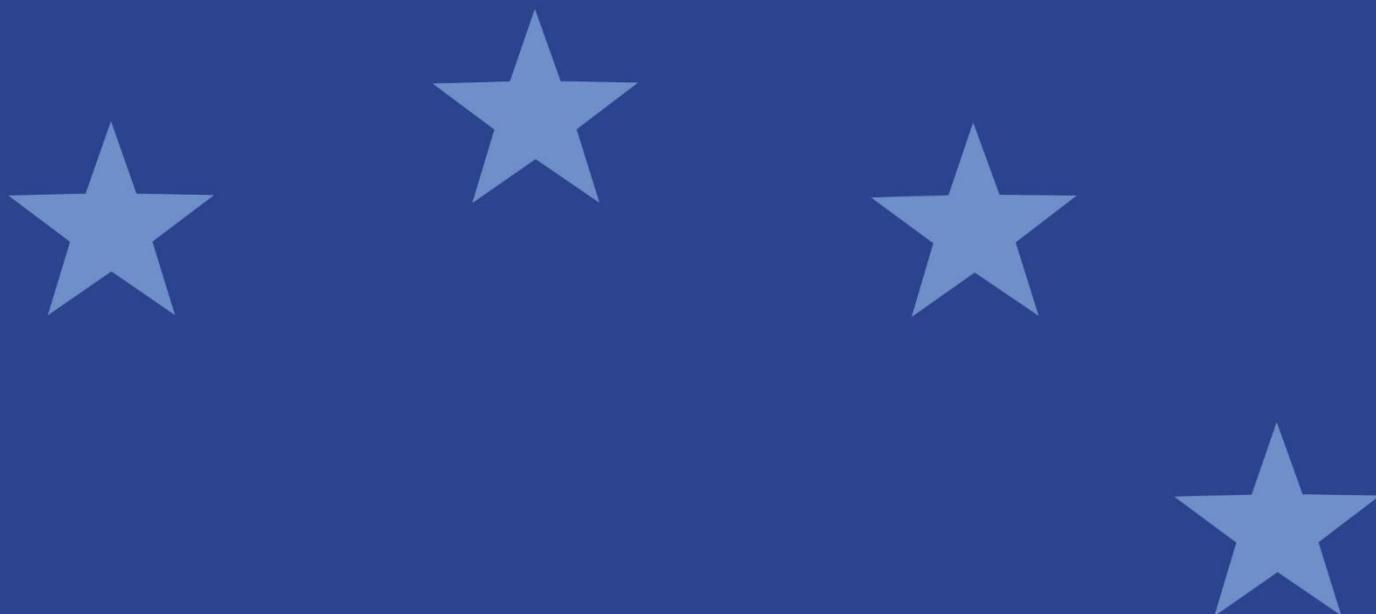


# Consultation Paper

**Draft technical advice on minimum information content for prospectus exemption**



## Responding to this paper

ESMA invites responses to the questions set out throughout its Consultation Paper on the draft technical advice on minimum information content for prospectus exemption. Responses are most helpful if they:

- respond to the question stated;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all responses received by **05 October 2018**.

### Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

- Insert your responses to the questions in the Consultation Paper in the present response form.
- Please do not remove tags of the type <ESMA\_QUESTION\_PE\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
- If you do not wish to respond to a given question, please do not delete it but simply leave the text "TYPE YOUR TEXT HERE" between the tags.
- When you have drafted your response, name your response form according to the following convention: ESMA\_PE\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_PE\_ABCD\_RESPONSEFORM.
- Upload the form containing your responses, **in Word format**, to ESMA's website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Your input – Open consultations' → "Consultation on the draft technical advice on minimum information content for prospectus exemption").

### Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. **Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed.** 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 'Data protection'.

## **Who should read this Consultation Paper**

This Consultation Paper may be of particular interest to investors, issuers, including issuers already admitted to trading on a regulated market or on a multilateral trading facility, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who is affected by the new Prospectus Regulation.

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## Acronyms and definitions

Commission	European Commission
ESMA	European Securities and Markets Authority
MAR	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
NCA	National Competent Authority
IPO	Initial Public Offer
Spun-off	Company being divided following a division as prescribed in Article 136 of Directive (EU) 2017/1132
Recipient Company	Company receiving contributions as a result of the division as provided by Articles 136 and 155 of Directive (EU) 2017/1132
Exempted Document	Documents referred to in points (f) and (g) of paragraph 4 and points (e) and (f) of the first subparagraph of paragraph 5 of Article 1 of the Prospectus Regulation
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)
Prospectus Directive (PD)	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

Prospectus Regulation (PR)	Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC
RTS	Regulatory Technical Standards
Second Commission Delegated Regulation	Commission Delegated Regulation (EU) 2016/301 of 30 November 2015 supplementing Directive 2003/71 of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No 809/2004
TD	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)
Takeover Directive or TOD	Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.
Merger and Division Directive	Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law
Commission 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

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# 1. Executive Summary

## Reasons for publication

The Prospectus Regulation was published in the Official Journal of the European Union on 30 June 2017 and entered into force 20 days after its publication. The Prospectus Regulation requires the European Commission ('the Commission') to adopt delegated acts in a number of areas.

On 28 February 2017, ESMA received a request from the Commission for technical advice, including in relation to the minimum information content of documents describing a merger, division or takeover which is necessary to apply an exemption from the obligation to publish a prospectus. The latest version of the Commission's Request is dated 26 January 2018.

## Content

This Consultation Paper presents a draft version of ESMA's technical advice on the minimum information content of documents provided for the purpose of describing a takeover, merger or division. In accordance with the Prospectus Regulation, issuers may offer/admit securities connected with a takeover, merger or division without publishing a prospectus, provided that an alternative document is made available to investors which describes the transaction and its impact on the issuer.

Sections 2 and 3 of this Consultation Paper set out a number of introductory points for consideration related to ESMA's work, including points regarding to the scope of the mandate, ESMA's understanding of the scope and some of the risks that the exemption may entail from the perspective of the principle of investor protection. In this regard, ESMA highlights that, under the current mandate emanating from Level 1, ESMA cannot limit the scope of the exemption and therefore the proposed technical advice reflects this limitation, in terms of disclosure requirements necessary for an investor to make an informed decision concerning the risks underlying to an investment in securities offered, allotted or to be allotted in connection with a takeover, merger or division.

Section 4 contains ESMA's proposals in relation to the operative provisions for the technical advice, together with the rationale underpinning these proposals. Furthermore, in Section 5, ESMA describes the methodology followed in preparation of the technical advice, and provides the background for any proposals. Additionally, ESMA identifies the minimum information content concerning the offer of securities to the public or the admission to trading of securities on a regulated market, the description and impact that a takeover, merger or division may have on the issuer's operational and financial activities.

Lastly, Annex V presents the full text of the Commission's request for ESMA to provide it with technical advice and Annex I outlines the consultation questions for stakeholders.



## **Next steps**

When finalising its technical advice to the Commission, ESMA will consider all feedback received in relation to this Consultation Paper by Q3 2018. A Final Report containing a summary of all consultation responses and a final version of ESMA's technical advice will be published on ESMA's website in Q1 of 2019.

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## 2. Introduction

### 2.1. Background

1. Regulation (EU) 2017/1129 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 on a regulated market, and repealing Directive 2003/71/EC ('the Prospectus Regulation' or 'PR') was published in the Official Journal of the European Union on 30 June 2017.
2. As set out in the Prospectus Regulation, the European Commission ('the Commission') is obliged to adopt delegated acts in a number of areas 21 months after entry into force of the Prospectus Regulation. The Commission has requested ESMA to deliver its technical advice by 31 March 2018 (Part I), 31 March 2019 (1<sup>st</sup> Part of Part II) and 31 August 2019 (2<sup>nd</sup> Part of Part II). In accordance with this timetable, ESMA has delivered its technical advice concerning Part I of the mandate.

### 2.2. ESMA's mandate to deliver technical advice

3. On 28 February 2017 ESMA received a formal request from the Commission to provide technical advice on delegated acts concerning the Prospectus Regulation (the 'mandate', full text presented in Annex10).
4. The mandate received was structured in two parts, with Part I focusing on the format and content of prospectuses, including the EU Growth prospectus, together with the criteria for scrutiny and review of prospectuses and the procedures for their approval.
5. Part II covers:
  - technical advice on the minimum information content of documents describing a merger, division or takeover which is necessary to apply an exemption from the obligation to publish an approved prospectus (Article 1 (7) of the PR);
  - technical advice regarding the general equivalence criteria that should be applied in respect of the information requirements imposed by third countries (Article 29 (3) of the PR).
6. This Consultation Paper solely addresses the 1<sup>st</sup> Part of Part II of the mandate concerning the technical advice requested in connection with Article 1 (7) of the PR. It does not cover the advice regarding the general equivalence criteria that should be applied in respect of the information requirements imposed by third countries (Article 29 (3) of the PR) which ESMA will address in a separate consultation paper.

7. ESMA is asked, in the Commission's mandate, to provide technical advice on the minimum information content of the documents referred to in points (f) and (g) of paragraph 4 and points (e) and (f) of the first subparagraph of paragraph 5 of Article 1 of the PR, taking into account recital 16 of the PR and in particular to define how the impact of the transaction on the issuer should be presented in such documents. Points (f) and (g) of paragraph 4 and points (e) and (f) of the first subparagraph of paragraph 5 of Article 1 of the PR require the document to describe the transaction and its impact on the issuer.
8. The mandate also sets out a number of principles which ESMA is invited to take account of when developing its advice. ESMA has been asked to provide advice that takes into account the Lamfalussy principles and the need to ensure the proper functioning of the internal market and improve the conditions of its functioning, particularly as regards the financial markets and a high level of investor protection. The Commission also asks that the advice be clear, coherent, comprehensive and proportional. The advice should also be justified by evidence, including a cost-benefit analysis where a range of technical options are available.

### **3. Scope of the Commission's empowerments**

9. In order for ESMA to respond to the Commission's mandate on minimum information content of merger and takeover documents for prospectus exemption, it is necessary to consider the scope of the empowerments given to the Commission in Article 1 (7) of the PR.

#### **3.1. General considerations**

10. Under points (f) and (g) of Article 1(4) and points (e) and (f) of the first subparagraph of Article 1(5) of the Prospectus Regulation (PR), an exemption from the requirement to publish an approved prospectus obligations can be applied to securities that are offered to the public or admitted to trading on a regulated market (or both), either in connection with a takeover, by means of an exchange offer, or in connection with a merger or a division only if a document containing information describing the transaction and its impact on the issuer is made available to the public.
11. Information provided to the public in the context of takeovers, mergers or divisions is currently regulated at national level and the relevant rules are incorporated in different pieces of legislation ranging from company to financial markets law. In the case of takeovers, these include acts that implement Directive 2004/25/EC (the Takeover Directive). In addition, national regulations or guidance from national competent authorities (NCAs), in some situations also prescribe the criteria for the equivalence assessment to a prospectus.

12. In contrast to the current regime under Directive 2003/71/EC (the Prospectus Directive), whereby equivalence criteria were set at national level, under the Prospectus Regulation the Commission is empowered to harmonise the minimum information content that is sufficient for the exemption from the obligation to publish a prospectus. This exemption is described by the Commission, in its mandate, as an alleviation compared to the corresponding exemptions of Directive 2003/71/EC – set out in points (b) and (c) of Article 4(1) and points (c) and (d) of Article 4(2) of that Directive – where the precondition to be fulfilled was that a document be available containing information "which is regarded by the competent authority as being equivalent to that of a prospectus". In this regard, ESMA considers the fact that the Exempted Document is not subjected to scrutiny and approval by the NCA in accordance with Article 20 of the PR (with its consequent costs) is already an alleviation when compared with the regular prospectus regime.
13. ESMA nevertheless notes that, while there is no obligation to publish a prospectus where the Exempted Document is made available to the public, an NCA may still be able to use its powers deriving from Article 32 of the PR that do not relate to the publication of a prospectus. For example, an NCA may be able to require an issuer to provide information and documents, prohibit an offer of securities to the public or admission to trading on a regulated market where the NCA becomes aware and has reasonable grounds for suspecting that the PR would be infringed, or suspend or require the suspension of securities from trading where it considers that the issuer's situation is such that trading would be detrimental to investor's interests. The exact scope of NCA powers will depend on the nature of the powers it has been granted by its Member State.
14. In this regard, ESMA notes that non-compliance with the minimum disclosure information requirements set out for the Exempted Document would result in an issuer not being exempted from the obligation to publish a prospectus. In such case, issuers are required to publish a prospectus and thus a submission of a draft prospectus for approval in accordance with the Prospectus Regulation should be made to the NCA.

### **3.2. Legal effects**

15. As mentioned, ESMA is required to set out *the minimum information content*, specifically describing the transaction and its impact on the issuer, which should be provided to investors in order to be exempted from the obligation to publish a prospectus. As the Prospectus Regulation provides for maximum harmonisation, the minimum information content requirements in delegated acts adopted by the Commission will constitute an upper limit to the information to be required for the exemption(s) to apply.
16. Although the PR does not define the concept of "the transaction", the objective of the Commission's mandate is to set out the minimum disclosure requirements for the Exempted Document in order to exempt issuers from publishing a prospectus. ESMA considers that the concept of transaction should be interpreted as the offer of securities to the public /admission to trading on a regulated market (the object of application of the PR) and the takeover, merger or division.

17. When a prospectus is drawn up, issuers must include information about the issuer, the securities being issued/admitted to trading and, in some cases, information about takeovers, merger or division transactions that may impact the issuer's financial situation<sup>1</sup>. For an exemption to apply, ESMA considers that the content of the Exempted Document should include information in relation to the offer/admission to trading of securities (which includes information about the issuer, the securities issued or admitted) and information related to the merger/takeover/division and its consequent impact.
18. In order to set out the minimum information content, ESMA will need to strike a balance between a sufficient level of disclosure to the public, thereby guaranteeing investor protection, and the need to ensure that the conditions for the exemptions envisaged by the Prospectus Regulation are alleviated when compared to the corresponding exemptions under the Prospectus Directive, as envisaged by the Commission in its mandate to ESMA.
19. At the same time, it is clear that the minimum information content necessary to avail of an exemption under the Prospectus Regulation does not interfere with national requirements on the disclosure as prescribed by domestic laws including laws implementing the Takeover Directive or the Merger and Division Directive. ESMA, therefore, understands the technical advice is without prejudice to the ability of national laws to impose information requirements under takeover or company law to entities involved in takeover or merger transactions, e.g. an independent evaluation of the takeover or merger transaction. The minimum content set out in the delegated acts that will be adopted by the Commission would add to the requirements already defined by the national laws or provisions implementing the TOD or the Merger and Division Directive.
20. When setting out the minimum content of the Exempted Document, ESMA considered the requirements already included in the TOD<sup>2</sup> and the Merger and Division Directive<sup>3</sup> when a takeover, merger or division takes place. Although ESMA encountered little overlap between the requirements set out in the prospectus regime which applies to public offers/admissions to trading on a regulated market, the TOD and the Merger and Division Directive, ESMA has identified these items in the different appendixes throughout this Consultation Paper.
21. Because ESMA acknowledges that the national laws transposing the TOD and the Merger and Division Directive differ amongst European countries (for instance some Member States have required more information to be included in such documents) and because very few overlaps exist between the three Directives/Regulations, instead of removing the overlapping disclosure items from the Exempted Documents appendixes, ESMA decided to keep and identify them in the relevant Appendixes as it expects that

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<sup>1</sup> For example, in cases of complex financial history where pro-forma information is required.

<sup>2</sup> Article 6 (3) of TOD.

<sup>3</sup> Articles 91 (2), 97 (1), 137 (2) and 143 (1) of the Merger and Division Directive.

the burden for issuers to include this information in the Exempted Document will not be significant. This is based on the assumption that, when issuers draw up an Exempted Document, they can take advantage of the information required by the national laws implementing the TOD or the Merger and Division Directive to comply with its minimum disclosure requirements. Consistently with this approach, ESMA proposes that the incorporation by reference provisions<sup>4</sup> in the PR are carried over into the Exempted Document operative provisions.

22. ESMA observes that the PR also provides issuers with exemptions from the publication of a prospectus in other cases<sup>5</sup>, for instance where the offer of securities is addressed solely to qualified investors or to fewer than 150 natural or legal persons or when there is an admission to trading of fungible securities representing less than 20% of the number of securities already admitted to trading on the same regulated market. Whenever these other exemptions apply, issuers do not need to provide an Exempted Document even if these offers or admissions to trading on regulated market are connected with a takeover, merger or division. Hence, most likely only transactions affecting more than 20% of the number of securities already admitted to trading on the same regulated market will be within the scope of the exemption.
23. Finally, the Commission's mandate does not explicitly request ESMA's advice on the format that this minimum content should follow. Therefore, while this Consultation Paper defines this minimum information content by sections depending on the nature of the information items, the order of these sections or how the information items are presented inside each section is not prescribed in the ESMA Technical Advice. For instance, issuers preparing Exempted Documents are able to change the order of the items in a particular section/appendix or change the order of the sections within the Exempted Document. Furthermore, ESMA notes that in addition to the minimum content set out in Level 2 regulation, issuers may decide to include more information that they consider relevant to portray a fair representation of the takeover, merger or division.

### 3.3. Scope of the exemption

24. Coming to the actual definition of the scope of the mandate, ESMA notes that the mandate refers to both points (f) and (g) of Article 1(4) and points (e) and (f) of the first subparagraph of Article 1(5) of the PR, which make reference to offers/admissions to trading in two different cases:
  - A) Securities offered in connection with a **takeover** by means of an exchange offer,
  - B) Securities offered, allotted or to be allotted in connection with a **merger or division**.

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<sup>4</sup> Article 19 of the PR.

<sup>5</sup> Article 1 (4) and (5) of the PR.

25. **Case A)** The first case refers to situations where a takeover is launched in accordance with laws and regulations on takeover bids that transpose Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004. Recital 16 of the PR addresses both Case A and Case B as it states: “*This Regulation should be interpreted in a manner consistent with Directive 2004/25/EC of the European Parliament and of the Council, where applicable, in the context of takeover bids, merger transactions and other transactions affecting the ownership or control of companies.*”
26. Therefore, ESMA considers that unless national laws provide for further situations where a takeover document is drawn up, the following takeover transactions are excluded from the scope of the mandate:
- i. takeover bids for companies which have no securities admitted to trading on a regulated market<sup>6</sup> (following Article 1 (1) of the TOD);
  - ii. takeover bids for securities issued by companies, the object of which is the collective investment of capital provided by the public, which operate on the principle of risk-spreading and the units of which are, at the holders' request, repurchased or redeemed, directly or indirectly, out of the assets of those companies (Article 1 (2) of the TOD);
  - iii. takeover bids made through public offers to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which does not follow or does not have the objective of the acquisition of control of the offeree company in accordance with national law (following the definition in Article 2 (1) (a) of the TOD).<sup>7</sup>
27. Where the Takeover Directive applies, bidders should submit to the competent authority under Article 4(1) of the Takeover Directive and publish before the offer starts, a takeover document containing the information necessary to enable the holders of the target company’s securities to reach a properly informed decision on the bid.
28. The information items to be included in the takeover document should be based on the minimum content requirements established by Article 6 (3) of the Takeover Directive (see Annex II). This list requires information on the terms of the bid and the main elements of the takeover, including on the securities for which the bid is made, as well as information on the impact that the takeover will have on the target company. However, the list does not include information on other characteristics of the bidder, e.g. the bidder’s financial structure, its balance sheet or corporate structure. When implementing Article 6(3) at national level, some Member States have enriched the list of minimum

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<sup>6</sup> As defined in Directive 93/22/EC.

<sup>7</sup> Offers launched with the objective of acquiring securities with no voting rights attached are out of scope of the mandate (i.e. takeover over bonds, exchange offers of bonds). Therefore, in the cases where exemptions do not apply, the public offer of securities would fall within the scope of the prospectus obligation.

content under the Takeover Directive with other elements that they deemed necessary to enable the holders of the target company securities to make a fully informed decision on whether to accept the bid. Therefore, the content of the takeover document varies across Member States based on the features of national legislation.

29. Although there is no definition of “exchange offer” in the PR, ESMA considers that the term “exchange offer” refers to offers where there is an exchange of securities between the bidder and the shareholders of the (to be) acquired company. Therefore, it is assumed that the mandate conferred to ESMA does not include within its scope capital increases to fund cash offers (e.g. the shareholders of the (to be) acquired company/ (to be) merged company receive only cash in return for their shares).
30. **Case B)** The second case refers to securities offered, allotted or to be allotted, in connection with a merger or division. While mergers transactions may take different forms depending on national requirements following the national laws and provisions implementing Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017, ESMA considers that the obligation to publish an Exempted Document in accordance with point (g) of Article 1(4) and point (f) of the first subparagraph of Article 1(5) of the PR only applies if, as a result of a merger or a division, the securities offered, allotted or to be allotted would be within scope of application of the PR (i.e. would constitute an offer of securities to the public or admission of securities to trading on a regulated market).
31. ESMA considers that in relation to divisions, the exemption covers both the company which is being divided as a result of a division and the company acquiring the assets which result from a division i.e. when the recipient company (the company acquiring the assets) issues, offers, allots or admits securities given in exchange (as consideration) for the assets (resulting from a division) received.

### **General considerations about the scope**

32. The exemptions provided for in points (f) and (g) of Article 1(4) and points (e) and (f) of the first subparagraph of Article 1(5) of the PR, refer to securities offered, allotted or to be allotted. Recital 16 of the PR provides further guidance on how to understand the scope of the exemptions by adding that such offers should be connected with takeovers, mergers or other transactions affecting the ownership or control of companies. While it is clear that in the case of takeovers, the scope of the exemption should be consistent with the scope of the Takeover Directive as implemented at national level (hence the term “where applicable”), in the case of mergers and on other transactions affecting control, these terms are not defined and no reference to other European Directives/regulations is either included in the exemption itself or in the recitals.
33. While ESMA believes that it is not under the scope of its mandate to define the concepts and the types of “mergers”, “takeover” or “divisions” which should benefit from the exemption prescribed in points (f) and (g) of Article 1(4) and points (e) and (f) of the first subparagraph of Article 1(5) of the PR, ESMA considers it would be helpful, where

possible, that these concepts are developed in Level 2 or as a change to Level 1. For instance, ESMA believes that a narrower scope of the exemption could result in a simpler and a more alleviated regime for the Exempted Document if the exemption would only apply if an issuer has already securities admitted to trading on regulated market or SME Growth Market (e.g. avoiding backdoor IPOs) or if reverse acquisitions would be scoped out.<sup>8</sup>At the same time, including a definition of the terms “takeover”, “merger” and “division” in Level 2 would bring more legal certainty about which takeover, merger or division transactions are scoped in and scoped out and prevent regulatory arbitrage where each Member State, following their national laws, could apply the exemption scope differently.

34. Taking into consideration that, in accordance with the provisions set out in the Merger and Division Directive, some types of mergers and divisions (such as for example, “merger by formation of a new company”<sup>9</sup> or “division by the formation of new companies”)<sup>10</sup> may lead to issuers being admitted to trading on regulated market without providing the relevant information to the market through a prospectus, ESMA believes that the minimum content of the Exempted Document should take this into account. Therefore, ESMA is of the view that, in these cases, the information requirements should be more comprehensive compared to cases of mergers and divisions where the issuer has securities admitted to trading on a regulated market or to an SME Growth Market.
35. In order to avoid loopholes in the Prospectus Regulation in terms of the information provided to investors through the Exempted Document when compared to the information included in a prospectus, ESMA developed different appendixes depending on whether the issuer issuing/admitting securities is known and information is already available to the market. However, ESMA points out that in accordance with the PR, NCAs will not have the responsibility to scrutinise and approve the Exempted Document. In addition, Article 23 of the PR which requires the publication of supplements due to the detection of a significant new factor, material mistake or material inaccuracy after publication of a prospectus does not apply in the case of an Exempted Document. Consequently, ESMA is seriously concerned that taking into account the complexity and magnitude of takeovers, mergers and divisions within the scope of exemption, the lack of scrutiny and approval of the Exempted Document pursuant Article 20 of the PR

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<sup>8</sup> As defined in paragraph B19 of IFRS 3 Business Combination, “reverse acquisitions occur when the entity that issues securities (the legal acquirer) is identified as the acquiree [target] for accounting purposes [...] For example, reverse acquisitions sometimes occur when a private operating entity wants to become a public entity [admitted to trading on regulated market] but does not want to register its equity shares [to draw up a prospectus]. To accomplish that, the private entity will arrange for a public entity to acquire its equity interests [its shares] in exchange for the equity interest of the public entity”. In this case, while from a legal perspective there is no backdoor listing (as the entity issuing shares has already securities admitted to trading on regulated market), from an economic perspective these transactions may also constitute backdoor listing.

<sup>9</sup> Please refer to Article 90 of Directive (EU) 2017/1132.

<sup>10</sup> Please refer to Article 155 of Directive (EU) 2017/1132.

together with the fact that NCAs cannot require, pursuant Article 23 of the PR, for supplements to the Exempted Document, could be detrimental to investor protection.

36. Finally, ESMA notes there is no delimitation on the securities which may be offered or allotted in connection with takeovers, mergers or divisions. For instance in the context of takeovers, the securities offered as consideration for the bid may include shares, debt securities or depository receipts. Therefore, despite the fact that normally takeovers as well as mergers or divisions involve offers and/ or admission to trading of shares, ESMA considered that other securities such as depository receipts or debt or a mix of securities and cash may be offered in the context of takeovers, mergers or divisions for the development of the content of the section related to securities.

## 4. Operative provisions and definitions

### 4.1. Operative provisions

37. While not specifically requested in the mandate received from the Commission, ESMA is of the view that in conjunction with the appendixes setting out the minimum content of an Exempted Document it will be necessary for the Commission to also develop operative provisions for any delegated act making it clear which appendixes are applicable in relation to which type of issuers and type of transactions (e.g. takeover, merger, divisions, reverse acquisition).
38. In addition and taking into account that the Articles 6, 14, 19, 27 of the PR are only applicable in the context of a publication of prospectus, ESMA believes that similar operative provisions should be addressed in Level 2 in order to ensure that the use of the Exempted Document is operational, its content remain relevant for investors and is not overly burdensome for issuers to draw up such documents for the reasons set out in the following paragraphs.

#### *Materiality test*

39. Under the prospectus regime a materiality test should be undertaken by issuers when deciding which information should be disclosed in a prospectus. ESMA considers that a similar approach should be followed in relation to the information that should be included in the Exempted Document. Issuers drawing up a prospectus should ensure that the information presented therein is material to the decision making process of investors and that material information is not obscured by immaterial information. In this respect, ESMA notes that this provision is particularly important in the context of the Exempted Document considering that ESMA's mandate refers only "the minimum information content", in order to ensure that, overall, the content of the Exempted Document remains relevant. As such, ESMA is of the view that a provision similar to the one included in Article 6 of the PR should be considered by the Commission when preparing its delegated acts. This should ensure that before including information into the Exempted Document, issuers assess its materiality for an informed assessment of the investor and

to ensure that issuers include any other material information not explicitly required in the appendixes.

#### *Incorporation by reference*

40. In order to alleviate the need for issuers to compile the information required in the Exempted document into one single document and to avoid duplication between the information included in the Exempted Document and other documents published, ESMA believes that issuers should be able to use the incorporation by reference when complying with the disclosures requirements set out in the Exempted Document. Therefore, because Article 19 of the PR is not applicable to the Exempted Document, ESMA proposes to include operative provisions in its technical advice that would allow the use of such facility. In this respect, we note that issuers may incorporate by reference the information included in the documents required by the national laws implementing the TOD or the Merger and Division Directive.

#### *Language*

41. Given that the language regime set out in the PR does not apply to the Exempted Document, ESMA considers it beneficial that similar provisions are replicated in the ESMA technical advice. These provisions would ensure that a language regime for such documents is harmonised at European level and would allow issuers to include information in the Exempted Document in a language customary in the sphere of international finance (e.g. English). In ESMA's view this is particularly relevant in the case of takeover, mergers, or divisions that have a cross-border element and in the context of the Capital Market Union. Consequently, ESMA considers that it is relevant to include the provisions in Article 27 of the PR into the technical advice.
42. The inclusion of language provisions into the operative provisions of the ESMA Technical Advice would also ensure that the information contained in the Exempted Document, including the information incorporated by reference, would be presented using a language regime similar to the one set out in the PR for the purpose of the publication of a prospectus. In this respect ESMA notes that although information published in accordance with the TD and MAR requirements may be available in the market and may be incorporated by reference into the Exempted Document, it might be in a different language where the issuance/admission to trading of securities on regulated market is taking place. This occurs due to the fact that the TD or MAR only require that the information is disclosed in an accepted language of competent authorities where the securities are admitted to trading on regulated market which may differ from (i) the language accepted by the competent authority for the purpose of the Exempted Document (i.e. where the offer to the public or admission to trading following this exemption will take place in the cases when the takeover, merger or divisions are cross-countries) or (ii) from a language customary in the sphere of international finance.
43. Therefore, while issuers may incorporate information by reference which is disclosed under other European Legislation (such as TD or MAR ), there might be translation costs to be considered by issuers.
44. Moreover, ESMA notes that because the Exempted Document should constitute an alleviation when compared with the regular Prospectus regime and its mandate relates

to the minimum information content of the Exempted Document, ESMA Technical Advice does not propose the publication of a summary (as per Article 7 of the PR) together with the Exempted Document.

45. However, ESMA acknowledges the limitations that this approach/limitation in the mandate might entail in terms of investor protection because if the Exempted Document is, for instance, drawn up in English, investors may not benefit from the translated version of the summary to at least one of the official languages of the Member State where the offer/admission to trading on regulated market will take place. Consequently, while ESMA's approach when proposing operative provisions for the Exempted Document does not address the summary (also taking into account the mandate conferred to ESMA), two questions were included in this Consultation Paper addressing this particular aspect in order to understand the relevance and impact of such approach/limitation in the ESMA's mandate might entail in the context of European Single Market and the expected use of the Exempted Document in cross border transactions.

#### *Simplified Disclosure Regime*

46. While no distinction between issuers admitted to trading on a regulated market and unlisted issuers is made in the Prospectus Regulation when applying the exemption in points (f) and (g) of Article 1(4) and points (e) and (f) of the first subparagraph of Article 1(5) of the PR, ESMA nevertheless considers that the information requirements should be lighter for issuers admitted to trading on a regulated market as they are already known to investors and publish regulated information. For that reason, ESMA has developed two sets of requirements in relation to the Minimum Information Content Issuer Section depending on whether there is already available public information on the issuer under the TD or the PR. For consistency purposes, ESMA believes that the criteria included in Article 14 (1) of the PR should be replicated to the technical advice on the Exempted Document in order to allow issuers that fall within these criteria are able to use a more simplified regime. However, ESMA notes that when issuers do not fulfil the criteria, they should use the relevant appendix which is closely aligned with the information required in the IPO shares schedule.
47. Furthermore, ESMA considers that a similar approach is appropriate when the takeover, merger or division transaction falls within the concept of "reverse acquisition". In this case, the issuer should not use the simplified disclosure regime and the acquirer from an accounting perspective should be considered as the issuer when preparing the Exempted Document.

#### *Definitions*

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

48. ESMA understands that usually transactions involving a takeover, merger or a division may constitute a "complex financial history" and/or "significant financial commitment" as foreseen in the prospectus regime. In this regard, ESMA believes that it would be

beneficial to include similar provisions as the ones set out in its technical advice on format and content<sup>11</sup> in relation to complex financial history.

#### Reverse acquisitions

49. While not expressly mentioned in the mandate, ESMA is of the view that, in order to provide issuers with clarity and ensure that they have the same understanding of similar provisions, it is important that the relevant definitions contained in the Commission Regulation are carried over to the technical advice on the minimum content of the Exempted Document. In this respect, ESMA believes that the technical advice should include a definition of reverse acquisition as in some cases, takeovers, mergers and divisions may, in substance, be a reverse acquisition. This definition is deemed important in ESMA's view as the disclosure requirements when the takeover, merger or division is in fact a reverse acquisition should be more comprehensive as explained below.
50. ESMA acknowledges that reverse acquisitions is a concept already considered at national level in some jurisdictions when drawing up the equivalent document to a prospectus in a context of takeovers and mergers. In addition, it is a concept known in the European Legislation, notably in IFRSs which have been in application since 2005.
51. Taking into account that the concept of reverse acquisitions is defined in IFRS as endorsed by the Commission and in order to avoid different interpretations of the same concept, ESMA believes that the definition included in IFRS 3 *Business Combinations* is appropriate and should be carried over into the technical advice.
52. In this respect, ESMA observes that the application of the same concept in the Prospectus Regulation and in the IFRS will have the advantage that, for those issuers which with securities admitted to trading or with securities which will become admitted to trading on regulated market as a result of a takeover, a merger or division, there will be a closer alignment between the financial information included in the Exempted Document and the subsequent financial information published according to the TD.
53. ESMA considers that this approach is preferable than defining a bright line such as a 100% dilution of capital of the issuer, because this could create a mismatch between the concept of reverse acquisition used for the purpose of the Exempted Document and the one used for accounting purposes (i.e. for accounting purposes a reverse acquisition may occur when the economic acquirer obtains control over the issuer, although the dilution of capital may be less than 100%).
54. Defining bright lines when determining whether a takeover, merger or division falls within the concept of reverse acquisition could also bring disruptive outcomes. For instance a transaction leading to 100% dilution would be considered as a reverse acquisition, whereas a similar transaction with a 99% dilution would not. In practice, therefore, the disclosure requirements that would apply to these transactions would be different on the

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<sup>11</sup> Final Report: Technical advice under the Prospectus Regulation, ESMA (ESMA31-62-800 | March 2018).

basis of whether or not they cross a specific threshold without consideration to the actual economic effects.

55. Even in situations where IFRS is not the applicable accounting framework, the guidance in IFRS 3 as endorsed by the EU may still be applied for the purpose of the Exempted Document. In this respect, ESMA points out that it does not intend to require issuers to apply IFRS to their financial statements in all cases. Furthermore, ESMA notes that IFRS 3 is a converged standard with the US GAAP. In ESMA's view, therefore, an additional advantage to the use of IFRS 3 is that there are no fundamental differences regarding this concept in IFRS and the US GAAP.
56. ESMA appreciates that the suggestion to use IFRS 3 for the concept of reverse acquisition introduces an additional element which is not included in the prospectus regime. However, ESMA considers that this different approach is justified, as prospectuses are scrutinised and approved by competent authorities before publication pursuant Article 20 of the PR whereas Exempted Documents will not. Therefore, in cases of complex financial history/significant financial commitment, NCAs may require that a prospectus includes additional and possibly tailor made information to address specific situations. However, in the absence of an NCA's scrutiny and approval pursuant to Article 20 of the PR, ESMA understands that this assessment will be performed solely by issuers. In this regard, ESMA considers that it will be helpful for issuers of such documents to know in advance their disclosure obligations. To address this point, ESMA included a specific question in this Consultation Paper dealing with the incorporation of the reverse acquisition definition in its draft technical advice.
57. Finally, ESMA notes that a reverse acquisition may be achieved via different legal frameworks. For instance a reverse acquisition may occur, if in accordance with the national provisions implementing the Takeover Directive or the Merger and Division Directive,<sup>12</sup> a company with no securities admitted to regulated market is taken over by/merged with a smaller issuer with securities admitted to trading on regulated market or when the company issuing securities due to an acquisition of assets arising from a division dilutes its capital in more than 100%.<sup>13</sup>

## 4.2. Draft technical advice

58. On the basis of the considerations in Sections 4.1, ESMA proposes the following wording for its technical advice in relation to the minimum information content of documents describing a merger, division or takeover which is necessary for an exemption from the obligation to publish a prospectus:

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<sup>12</sup> For instance, where the Takeover Directive Scope was extended via national provisions implementing this directive to capture also transactions involving companies which do not have securities admitted to trading on regulated market.

<sup>13</sup> Although we expect that latter transactions occur rarely, they would still be within the scope of the exemption.

## Article A: Definitions

For the purposes of this Regulation, the following definitions shall apply in addition to those laid down in Regulation (EU) 2017/1129:

- (a) 'profit estimate' means a profit forecast for a financial period which has expired and for which results have not yet been published;
- (b) 'profit forecast' means a form of words which expressly states or by implication indicates a figure or a minimum or maximum figure for the likely level of profits or losses for the current financial period and/or financial periods subsequent to that period, or contains data from which a calculation of such a figure for future profits or losses may be made, even if no particular figure is mentioned and the word 'profit' is not used;
- (c) 'complex financial history' means a situation where:
  - (a) the issuer's entire business undertaking at the time of the Exempted Document is not accurately represented in the disclosure relating to the issuer required in the relevant appendixes under which the Exempted Document has been drawn up;
  - (b) that inaccuracy will affect the ability of an investor to make an informed assessment as mentioned in Article **B**; and,
  - (c) information relating to the business undertaking that is necessary for an investor to make such an assessment is included in information, including financial information, relating to another entity as well as information relating to the issuer;
- (d) 'appendix' means a list of minimum information requirements adapted to the particular nature of the different types of issuers and/or the different securities involved;
- (e) 'significant financial commitment' means a binding<sup>14</sup> agreement to undertake a transaction which, on completion, is likely to give rise to a significant gross change;

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<sup>14</sup> In this context, the fact that an agreement makes completion of the transaction subject to conditions, including approval by a regulatory authority, should not prevent that agreement from being treated as binding if it is reasonably certain that those conditions will be fulfilled. In particular, an agreement should be treated as binding where it makes the completion of the transaction conditional on the outcome of the offer of the securities that are the subject matter of the Exempted Document or, in the case of a

- (f) 'significant gross change' means a variation of more than 25%, relative to one or more indicators of the size of the issuer's business, in the situation of the issuer;
- (g) 'reverse acquisition' means takeover/merger/division where the entity that issues securities (the legal acquirer) is identified as the acquiree for accounting purposes as set out in paragraph B19 of IFRS 3 *Business Combinations* as endorsed by the EU;
- (h) 'Exempted Document' means Documents referred to in points (f) and (g) of paragraph 4 and points (e) and (f) of the first subparagraph of paragraph 5 of Article 1 of the Prospectus Regulation;
- (i) '(To be) acquired company' means a company, the securities of which are the subject of bid pursuant the national laws transposing Directive 2004/25/EC;
- (j) '(To be) merged company' means a company being acquired pursuant the national laws transposing Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law;
- (k) 'Company being divided' means company being divided pursuant national laws transposing Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law;
- (l) 'Recipient Company' means the company (ies) receiving contributions as a result of the division pursuant national laws transposing Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law.

59. The Commission should introduce operative provisions, similar to Articles 6 to 20 of the Commission Regulation, in order to facilitate use of the appendixes to be set out in delegated acts. The use of the appendixes is dependent on whether the issuer is already admitted to trading on a regulated market or to an SME Growth Market in the following form:

#### **Article B: The Exempted Document**

The Exempted Document

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proposed takeover, if the offer of securities that are the subject matter of the Exempted Document has the objective of funding that takeover.

1. The Exempted Document shall contain the necessary information which is material to an investor for making an informed assessment of:

- (a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer;
- (b) the rights attaching to the securities; and
- (c) the takeover/merger/division and its impact on the issuer.

That information may vary depending on any of the following:

- (a) the nature of the issuer;
- (b) the type of securities;
- (c) the takeover/merger/division which the issuer has entered into;

2. The information in an Exempted Document shall be written and presented in an easily analysable, concise and comprehensible form, taking into account the factors set out in the second subparagraph of paragraph 1.

3. The Exempted Document shall be composed of the Minimum Information Content Issuer Section, Minimum Information Content Securities Section and Minimum Information Content Description and Impact of the Takeover/Merger/Division Section. The Minimum Information Content Issuer Section shall contain the information relating to the issuer. The Minimum Information Content Securities Section shall contain the information concerning the securities offered to the public or to be admitted to trading on a regulated market. The Minimum Information Content Description and Impact of the Takeover/Merger/Division Section shall include information concerning the takeover, merger or division and its impact on the issuer.

4. Where the takeover, merger or division constitutes a reverse acquisition, the information required in the Minimum Information Content Issuer Section in Appendix II should refer to the acquirer from an accounting perspective. The information required in Appendix IV pertaining to the (be) acquired/ (to be) merged company or the company being divided should refer to the acquiree from the accounting perspective.

5. By the way of derogation from paragraph 1, where a disclosure item included in the appendixes is not material or pertinent, it may be omitted provided that an explanation is included in the Exempted Document.

### **Article C: Minimum Information Content for simplified disclosure regime for the Issuer Section**

1. In order to use the simplified disclosure regime for the Minimum Information Content Issuer Section set out in Appendix I, the issuer should fulfil the following criteria:

(a) issuers whose securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue securities fungible with existing securities which have been previously issued;

(b) issuers whose equity securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue non-equity securities;

(c) offerors of securities admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months.

2. Where the issuer does not fulfil the criteria set out in paragraph 1 or where the takeover, merger or division constitutes a reverse acquisition the issuer should use Appendix II in relation to the Minimum Information Content Issuer Section.

#### **Article D: Incorporation by reference**

1. Information may be incorporated by reference in an Exempted Document where it has been previously or simultaneously published electronically in accordance with Article 21 (2) of Regulation (EU) 2017/1129, drawn up in a language fulfilling the requirements of Article E and where it is contained in one of the following documents:

(a) documents which have been approved by a competent authority, or filed with it, in accordance with Regulation (EU) 2017/1129 or Directive 2003/71/EC;

(b) documents required by the national laws transposing Directive 2004/25/EC of the European Parliament and of the Council and Directive (EU) 2017/1132 of the European Parliament and of the Council;

(c) regulated information;

(d) annual and interim financial information;

(e) audit reports and financial statements;

(f) management reports as referred to in Chapter 5 of Directive 2013/34/EU of the European Parliament and of the Council (1);

(g) corporate governance statements as referred to in Article 20 of Directive 2013/34/EU;

(h) reports on the determination of the value of an asset or a company;

(i) remuneration reports as referred to in Article 9b of Directive 2007/36/EC of the European Parliament and of the Council (2);

(j) annual reports or any disclosure of information required under Articles 22 and 23 of Directive 2011/61/EU of the European Parliament and of the Council (3);

(k) memorandum and articles of association.

Such information shall be the most recent available to the issuer or the (to be) acquired/ (to be) merged company or company being divided.

2. Where only certain parts of a document are incorporated by reference, a statement shall be included in the Exempted Document that the non-incorporated parts are either not relevant for the investor or covered elsewhere in the Exempted Document.

3. When incorporating information by reference, issuers, offerors or persons asking for admission to trading on a regulated market shall ensure accessibility of the information. In particular, a cross-reference list shall be provided in the Exempted Document in order to enable investors to identify easily specific items of information, and the Exempted Document shall contain hyperlinks to all documents containing information which is incorporated by reference.

#### **Article E: Use of Language**

1. Where an offer of securities to the public is made or admission to trading on a regulated market is sought only in the home Member State, the Exempted Document shall be drawn up in a language accepted by the competent authority of the home Member State.

2. Where an offer of securities to the public is made or admission to trading on a regulated market is sought in one or more Member States excluding the home Member State, the Exempted Document shall be drawn up either in a language accepted by the competent authorities of those Member States or in a language customary in the sphere of international finance, at the choice of the issuer, the offeror or the person asking for admission to trading on a regulated market.

3. Where an offer of securities to the public is made or an admission to trading on a regulated market is sought in more than one Member State including the home Member State, the Exempted Document shall be drawn up in a language accepted by the competent authority of the home Member State, and shall also be made available either in a language accepted by the competent authorities of each host Member State or in a language customary in the sphere of international finance, at the choice of the issuer, the offeror, or the person asking for admission to trading on a regulated market.

#### **Article F: Complex financial history and significant financial commitment**

1. Where the issuer of equity securities covered by Appendix I or Appendix II has a complex financial history or has made a significant financial commitment, and in consequence the inclusion in the Minimum Information Content Issuer Section or Minimum Information Content Securities Section of information items, including financial information, relating to an entity other than the issuer is necessary in order to satisfy the obligation laid down in Article B (1), those information items shall be deemed to relate to the issuer. The issuer, the offeror or the person asking for admission to trading shall include those items of information in the Minimum Information Content Issuer Section drawn up under Appendix I

or II and, as applicable, a Minimum Information Content Securities Section drawn up under Appendix III and Minimum Information Content Description of the takeover, merger or division and its impact drawn up under Appendix IV.

Those information items should normally include pro forma information prepared in accordance with Appendix IV. In this context, where the issuer has made a significant financial commitment or has a complex financial history any such pro forma information shall illustrate the anticipated effects of the takeover/merger/division that the issuer has agreed to undertake, and references in Appendix IV to 'the takeover/merger/division' shall be read accordingly.

2. Where there is a complex financial history or significant financial commitment the issuer shall include information relating to an entity other than the issuer in order to satisfy the obligation laid down in Article B (1), based on the following factors:

(a) The nature of the securities;

(b) The nature and range of information already included in the Exempted Document, and the existence of financial information relating to an entity other than the issuer in a form that might be included in a Exempted Document without modification;

(c) The facts of the case, including the economic substance of the transactions by which the issuer has acquired or disposed of its business undertaking or any part of it, and the specific nature of that undertaking;

3. Where the issuer is unable to provide the information required in paragraph 1, it should include a statement in the Exempted Document of this fact including the reasons why this information is cannot be provided.

## QUESTIONS FOR CONSULTATION

- Question 1: Are the definitions proposed to be carried over to the new regime, and new definitions proposed adequate? Should any additional definitions be added? Please provide your reasoning.
- Question 2: Do you agree to include a definition of a reverse acquisition as defined in IFRS 3 Business Combinations as endorsed by the EU into the technical advice (including in the situations where IFRS are not applicable). If not, please provide your reasoning.
- Question 3: Do you agree that a more comprehensive disclosure regime should apply if the takeover, merger or division transaction falls within the concept of reverse acquisition? If not, please provide your reasoning.
- Question 4: Do you agree to include an overarching principle guiding the content of the Exempted Document as included in Article B in L2 provisions? If not, please provide your reasoning.
- Question 5: Do you agree to carry over the criteria included in Article 14 (1) of the PR into ESMA Technical Advice in order to prescribe the use of the Minimum Information Content Simplified disclosure regime for the Issuer Section? If not, please provide your reasoning.
- Question 6: Do you agree to carry over the provision included in Article 19 of the PR in relation to incorporation by reference into the ESMA Technical Advice? If not, please provide your reasoning.
- Question 7: Do you agree the issuers should be able to incorporate by reference the information required by Takeover Directive or Merger and Division Directive into the Exempted Document? If not, please provide your reasoning.
- Question 8: Do you agree to carry over the provisions included in Article 27 of the PR in relation to language into the Technical Advice without including a summary of the Exempted Document? If not, please provide your reasoning.
- Question 9: Do you agree that the Exempted Document should not require the publication of a summary translated into the language of the competent authority (including in cross-border transactions directed at retail investors)? If not, do you consider that the content of such summary should be similar to the summary required under the Prospectus Regime? Please provide your reasoning.
- Question 10: Do you agree with Article F of this technical advice concerning Complex financial history and significant financial commitment into the technical advice? If not, please provide your reasoning.
- Question 11: What is the overall impact of the above technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that the proposed technical advice will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

## 5. Identification of the minimum information content

### 5.1. Methodology

60. This section investigates the methodology used for the identification of the minimum information content of the Exempted Documents. ESMA considers it appropriate to use, as a starting point for the development of the minimum information content of the Exempted Document, the full information included in a prospectus. This approach is based on the assumption that, in principle, all information contained therein is relevant and necessary to ensure that investors are fully informed regarding the public offer or admission to trading. As such, specific disclosure alleviations could be based on the options that are already provided for by the PR, the Level 2 measures on content and format that have been proposed by ESMA<sup>15</sup> and the disclosure information requirements set out in the TOD<sup>16</sup> and the Merger and Division Directive<sup>17</sup> in the context of takeovers, mergers and divisions.
61. In this respect, ESMA notes that the new prospectus regime provides specific alleviations when compared with the minimum disclosure requirements in the current Level 2 Regulation. Therefore, when assessing the potential need for further alleviations in the Exempted Document, in comparison with the disclosure requirements under the new PR, ESMA was mindful that such alleviations would not affect the regular functioning of markets and that the information requirements of the Exempted Document would be fit and proper to ensure an adequate level of consumer and investor protection. In addition, when developing the minimum content of the Exempted Document, ESMA has paid particular attention to potential restructuring transactions that may arise with the sole objective to circumvent the disclosure requirements in the PR in order to avoid the obligation to publish a prospectus.
62. To be more specific, ESMA is mindful that, in order to avoid potential loopholes in the prospectus framework and abuse of the exemption set out in the PR, the disclosure requirements in the cases where as a result of a merger, takeover or division an issuer becomes admitted to trading on a regulated market should not be different from the disclosure obligations in case of an IPO. In ESMA's view, the reasons for more detailed disclosure requirements in case of IPOs when compared with secondary issuances, as set out in the Consultation Paper on the format and content of the prospectus<sup>18</sup>, continue

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<sup>15</sup> Final Report: Technical advice under the Prospectus Regulation, ESMA (ESMA31-62-800 | March 2018).

<sup>16</sup> Annex II of this Consultation paper.

<sup>17</sup> Annex III and IV of this Consultation paper.

<sup>18</sup> Consultation Paper on draft technical advice on format and content of the prospectus (Ref: ESMA31-62-532 | 6 July 2017).

to be valid in cases where the exemptions provided in points (f) and (g) of Article 1(4) and points (e) and (f) of the first subparagraph of Article 1(5) of the PR apply.<sup>19</sup>

63. ESMA proposes that the structure of the Exempted Document to be published in accordance with both points (f) and (g) of Article 1(4) and points (e) and (f) of the first subparagraph of Article 1(5) of the PR should remain similar to the structure set out in the PR in relation to a prospectus. However, its content could be adjusted and in some cases alleviated when this does not impair investor protection.
64. The Commission's mandate does not cover the format of the Exempted Document. Therefore, ESMA considers that issuers may change the order of the sections, including the order of items within each section. The Exempted Document should include a section providing information about the issuer offering/admitting securities to the market, a section related to the type of securities to be offered/admitted to trading and a section describing the takeover, merger and division and explaining its impact in the organisational structure and/or the financial information of the issuer.
65. The level of detail of the information required in the section related to the issuer shall depend on whether:
  - (i) the issuer is already admitted to trading on a regulated market or to an SME Growth Market, or
  - (ii) the issuer is not admitted to trading on a regulated market or to an SME Growth Market, or
  - (iii) the takeover, merger or division falls within the definition of a reverse acquisition.
66. Where the issuer is already admitted to trading on a regulated market or to an SME Growth Market and the takeover, the merger or division does not constitute a reverse acquisition, ESMA is of the view that the issuer may benefit from a simplified regime for the Issuer Section. This approach is consistent with the approach followed in the regular prospectus regime which provides an alleviated schedule with regards to secondary issuances based on the fact that investors have already access to information pertaining the issuer and provided that the takeover or merger does not affect simultaneously and substantially the economic reality and the controlling shareholding structure of the issuer offering securities to the public or being admitted to trading on a regulated market. Where the takeover or merger constitutes a reverse acquisition, ESMA notes that the issuer should provide additional disclosure requirements and use Appendix II for the

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<sup>19</sup> ESMA believes that if it was the co-legislators intention to further alleviate the disclosure requirements for IPOs, it would have provided for those alleviations directly in Annex 1 and 2 of the PR. Therefore, in order to avoid that securities are offered or issuers become admitted to trading on regulated markets without all relevant information being provided to the market, the minimum content of the documents as foreseen in the mandate should be similar.

Minimum Information Content Issuer Section set out in section 5.3 of this Consultation Paper.

67. In addition, ESMA considers that the disclosure items should be adapted in order to focus on the economic acquirer and not disproportionately on the entity issuing the securities.
68. In order to provide further flexibility for issuers that are already admitted to trading on a regulated market or to an SME Growth Market and are not exempted from complying with the requirements of the TD, existing tools such as incorporation by reference may be used. In addition, it should be possible to incorporate by reference the contents of the takeover or merger/division documents that are published under national law, where relevant.
69. Finally, the Exempted Document should also provide specific information about the takeover, merger, division and its impact on the issuer's financial information, the management board, the commitments assumed and the timetable. Therefore, where relevant the information included in the Minimum Information Content Issuer Section was also slightly adapted.
70. Based on the methodology identified above, ESMA proposes the following appendixes to be included in its technical advice for the Exempted Document.

## **5.2. Appendix I – Minimum Information Content Simplified Disclosure Regime Issuer Section - The issuer is admitted to trading on regulated market or SME Growth Market**

71. In the cases where the issuer is already admitted to trading on regulated market, ESMA considers that the starting point for the development of its technical advice should be the specific schedules addressing the case of secondary issuances in order to assess whether there is room for more alleviations. In ESMA's view, as information is already available in the market, issuers would be able to reuse information that they have already published in compliance with other European directives or regulations. Therefore, ESMA would expect that the burden and the cost of drawing up the Exempted Document would not be significant, as issuers may take advantage of information in other documents already in the public domain to fulfil the requirements set out in the Exempted Document. At the same time, investors have at their disposal information in the market which should allow them to make informed decisions. Examples of such information would be regulated information published under the TD or information published in a prospectus.
72. ESMA therefore considers that the relevant measures under consideration are the schedules applicable under the simplified disclosure regime for secondary issuances (Article 14(3) of the PR). In the ESMA Technical Advice on format and content of prospectus these are described in *Annex 18 Registration Document for Secondary*

*Issuances.* In accordance with the mandate received from the Commission, ESMA has drawn up a proposal for a registration document which could be used for issuance of both equity, depository receipts and non-equity securities.

73. If the issuer does not fulfil the criteria set out in Article C of the technical advice, it should use Appendix II as defined in section 5.3. of this Consultation Paper, which covers the situation where the issuer is not admitted to trading on a regulated market or an SME Growth Market or the takeover, merger or division constitute in fact a reverse acquisition.
74. Where the issuer fulfils the criteria set out set out in Article C of the technical advice (e.g. it has already equity securities admitted to a regulated market or to an SME Growth Market for at least 18 months), ESMA believes that similar alleviations as the ones provided for in the secondary issuance regime should be provided for the Exempted Document. Therefore, ESMA considers that most of the content of *Annex 18 - Registration Document for Secondary Issuances* is applicable when such issuer decides to offer/admit securities as a result of a takeover, merger and/or division.
75. To avoid confusion between the contents of prospectuses and Exempted Documents, ESMA believes that the labels and the schedules numbering of the Exempted Document should be different. The information related to the issuer should be identified in the Exempted Document as “Minimum Information Content Issuer Section” while the information related to the securities should be referred to as “Minimum Information Content Securities Section”.

### Takeover and Mergers

76. Taking into account the specificities and differences between mergers/takeovers and divisions, the disclosure items were adapted to cover investor information needs in the case of a combination of two or more companies either through a merger or a takeover. While in the case of takeovers and mergers, investor focus should be on the issuer offering/admitting securities and on the (to be) acquired/ (to be) merged company, in case of divisions the focus should be on the company whose shares are being offered. Consequently, the disclosure items in the context of a takeover or a merger may need to cover in more detail different aspects of the issuer compared to the disclosure items relating to a division.
77. Moreover, ESMA notes that usually public offers/admission to trading connected with mergers and/or takeovers carry extra complexity to the analysis of investors, who may need to take into account the information of both the issuer and the (to be) acquired company or of both the issuer and the (to be) merged company when taking their investment decisions. As such, similar to the prospectus regime which requires extra disclosures when the issuer has a complex financial history or enters into a significant financial commitment, financial information of the (to be) acquired/merged companies should be also required when setting the minimum content of the Exempted Document. In this regard, ESMA notes that some of the requirements set out in the appendixes are already required by the Takeover or the Merger and Division Directive; therefore, issuers may take advantage of this fact when fulfilling the requirements set out in the appendixes of the Exempted Document. These items are identified in the third column of the appendix.

78. In addition, the Exempted Document should contain information that is necessary for a complete understanding of the risks and the rationale for the transaction. For example, when an offer of securities takes place as a result of a takeover, investors of both companies should be informed of the adverse effects that a failure of the takeover may have on the price of the securities of both companies or the adverse effects that shareholders not accepting a tender offer may be subjected to in cases the takeover succeeds. Similarly, the risks inherent to the operations of each company involved in a takeover, merger or division should be disclosed such as for example, regulatory constraints or litigations that the issuer is knowledgeable of and may be subjected to if the transaction becomes effective.

### Divisions

79. If the issuer issuing securities to be exchanged as consideration for the assets and liabilities that result from a division has already securities admitted to trading on a regulated market or to an SME Growth Market (e.g. where the issuer namely the recipient company, issues securities in return for assets and liabilities received i.e. contribution in kind), a significant amount of information may be already available. Therefore, ESMA notes that the issuer can take advantage of such information when preparing the Exempted Document. Conversely, when the issuer resulting from a division does not already have securities admitted to trading on a regulated market or to an SME Growth Market or does not fulfil the conditions for the use of the simplified regime, then ESMA expects the issuer to provide all the information required as if an IPO would take place (see section 5.3.).

### *Key differences*

80. The key differences to the Issuer Section for secondary issuances schedules set out in the prospectus regime can be summarised as follows:
- Requirement for issuers to include information on risks factors pertaining to the issuer shall take into account, where applicable, the impact that the takeover, merger/ division may have to its operations. In this respect, information regarding the possibility of achievement of synergies should be considered. In addition, any risks that the issuer will encounter relating to the combination of two or more companies. The risk factors subsection should present the risks relating to the issuer (combined entity resulting from the takeover, merger or division transaction or as if the takeover, merger or division transaction would have taken place at the moment of the publication of the Exempted Document) and information relating to risks on the securities to be offered.
  - The item regarding the Competent Authority's approval of the Exempted Document was removed as a Competent Authority will not be approving the Exempted Document pursuant Article 20 of the PR.
  - Requirement to prepare a summary, because the Exempted Document does not constitute a prospectus and therefore issuers will not be required to prepare a summary as prescribed in Article 7 of the PR.

- The items addressing the administrative, management and Supervisory Bodies were simplified by focussing on the key management personnel of the issuer (Board and supervisory committees) and potential changes resulting from the takeover, merger or division.
- Inclusion of a warning to inform investors that the Exempted Document was not approved by the Competent Authority pursuant to Article 20 of the PR.

81. The table below sets out the content of Appendix I – Minimum Information Content Simplified Disclosure Regime on Issuer Section that ESMA proposes to include in its technical advice concerning the Issuer issuing/admitting securities on regulated market.
82. ESMA notes that Appendix I was adapted to encompass the possibility that the issuer issues depository receipts in connection with the transaction. In this case, the disclosure items for the Minimum Information Content Simplified Disclosure Regime Issuer Section should mainly relate to the issuer of the underlying shares connected with the depository receipts.

ITEM	APPENDIX I – MINIMUM INFORMATION CONTENT SIMPLIFIED DISCLOSURE REGIME FOR THE ISSUER SECTION TAKEOVER/MERGER/DIVISION	Reference in TOD/ Merger and Division Directive
	IN CASE OF DEPOSITORY RECEIPTS, THE ISSUER SHOULD BE THE ISSUER OF THE UNDERLYING SHARES	
<b>1</b>	<b>PERSONS RESPONSIBLE, THIRD PARTY INFORMATION AND EXPERTS' REPORTS</b>	
1.1	All persons responsible for the information given in the Exempted Document and, as the case may be, for certain parts of it, with, in the latter case, an indication of such parts. In the case of natural persons including members of the issuer's administrative, management or supervisory bodies indicate the name and function of the person; in case of legal persons indicate the name and registered office.	
1.2	A declaration by those responsible for the Exempted Document that, having taken all reasonable care to ensure that such is the case, the information contained in the Exempted Document is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import. The responsibility statement shall also specify the relevant provisions at national level which are applicable and the extent of responsibility or liability.  As the case may be, declaration by those responsible for certain parts of the Exempted Document that, having taken all reasonable care to ensure that such is the case the information	

	<p>contained in the part of the Exempted Document for which they are responsible is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import.</p> <p>No disclaimers or other text may be included in the Exempted Document that contradicts or otherwise places limitations on the declaration.</p>	
1.3	<p>Where a statement or report attributed to a person as an expert is included in the Exempted Document, provide:</p> <ul style="list-style-type: none"> <li>• such person's name,</li> <li>• business address,</li> <li>• qualifications</li> <li>• material interest if any in the issuer</li> </ul> <p>If the report has been produced at the issuer's request a statement to the effect that such statement or report is included, in the form and context in which it is included, with the consent of the person who has authorised the contents of that part of the Exempted Document for the purpose of the public offer and/or admission to trading.</p>	
1.4	<p>Where information has been sourced from a third party, provide a confirmation that this information has been accurately reproduced and that as far as the issuer is aware and is able to ascertain from information published by that third party, no facts have been omitted which would render the reproduced information inaccurate or misleading. In addition, identify the source(s) of the information.</p>	
1.5	<p>The Exempted Document does not constitute a prospectus within the meaning of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017, therefore it was not subject to scrutiny and approval by the relevant competent authority as set out in Article 20 of Regulation 2017/1129.</p>	
<b>2</b>	<b>STATUTORY AUDITORS</b>	
2.1	<p>Names of the issuer for the period covered by the <u>historic financial information</u> (together with their membership in a professional body).</p>	
<b>3</b>	<b>RISK FACTORS</b>	
3.1	<p>A description of the material risks that are specific to the issuer, in a limited number of categories, in a section headed 'Issuer Risk Factors'.</p>	

	<p>In each category the most material risk factors, in the assessment of the issuer, offeror or person asking for admission to trading on a regulated market, taking into account the negative impact on the issuer and the probability of their occurrence, shall be mentioned first.</p> <p>The information concerning the risk factors shall take into account the anticipated the impacts that a takeover, merger or division may have on the issuer’s activities, governance structure and/or financial information.</p> <p>The risk factors shall be corroborated by the content of the Exempted Document.</p>	
3.2	<p>A description of the material risks that are specific to the securities being offered and/or admitted to trading, in a limited number of categories, in a section headed ‘Securities Risk Factors’.</p> <p>Risks to be disclosed shall include:</p> <ul style="list-style-type: none"> <li>• those resulting from the level of subordination of a security and the impact on the expected size or timing of payments to holders of the securities under bankruptcy, or any other similar procedure, including, where relevant, the insolvency of a credit institution or its resolution or restructuring in accordance with Directive 2014/59/EU (BRRD); and</li> <li>• in cases where the securities are guaranteed, the specific and material risks related to the guarantor to the extent they are relevant to its ability to fulfil its commitment under the guarantee.</li> </ul> <p>The information concerning the risks factors shall take into account the anticipated impact that a takeover, a merger or a division may have on the securities offered or object of the admission to trading on regulated market.</p> <p>In each category the most material risks, in the assessment of the issuer, offeror or person asking for admission to trading on a regulated market, taking into account their impact on the issuer and the securities and the probability of their occurrence, shall be mentioned first.</p> <p>The risks shall be corroborated by the content of the Exempted Document.</p>	
3.3	<p>A description of the material risks that are specific to the takeover, merger or division transaction in a limited number of categories, in a section headed ‘Transaction’s Risk Factors’.</p>	

	<p>In each category the most material risk factors, in the assessment of the issuer taking into account the negative impact on the issuer and the probability of their occurrence, shall be mentioned first.</p> <p>The risk factors shall be corroborated by the content of the Exempted Document.</p>	
<b>4</b>	<b>INFORMATION ABOUT THE ISSUER</b>	
4.1	The legal and commercial name of the issuer	In case of takeover Article 6 (b) of the TOD
4.2	The domicile and legal form of the issuer, Legal Entity Identifier, the legislation under which the issuer operates, its country of incorporation, and the address, telephone number of its registered office (or principal place of business if different from its registered office) and website with a disclaimer that the information on the website does not form part of the Exempted Document.	In case of Merger Article 91(2) (a) and 137(2) (a) Merger and Division Directive
<b>5</b>	<b>BUSINESS OVERVIEW</b>	
5.1	<p>A brief description of:</p> <ul style="list-style-type: none"> <li>• the key principal activities of the issuer;</li> <li>• of any significant changes impacting the issuer' operations and principal activities since the end of the period covered by the latest published audited financial statements, including: <ol style="list-style-type: none"> <li>1) an indication of any significant new products and services that have been introduced; and</li> <li>2) to the extent the development of new products or services has been publicly disclosed, the status of development, and,</li> <li>3) any material changes in the issuer's regulatory environment since the period covered by the latest published audited financial statements.</li> </ol> </li> </ul>	
5.2	<b>Investments</b>	
5.2.1	A description of the issuer's material investments made since the date of the last published financial statements and which are in progress and / or for which firm commitments have already been made, together with the anticipated source of funds.	

<b>6</b>	<b>TREND INFORMATION</b>	
6.1	<p>A description of :</p> <ul style="list-style-type: none"> <li>• the most significant recent trends in production, sales and inventory, and costs and selling prices since the end of the last financial year to the date of the Minimum Information Content Issuer Section,</li> <li>• any significant change in the financial performance of the group since the end of the last financial period for which financial information has been published to the date of the Minimum Information Content on Issuer Section, or provide an appropriate negative statement.</li> <li>• Information on any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the issuer's prospects for at least the current financial year.</li> </ul>	
<b>7</b>	<b>PROFIT FORECASTS OR ESTIMATES</b>	
7.1 (equity or depository receipts)	<p>Where an issuer or the offeror has published a profit forecast or a profit estimate (which is still outstanding and valid) on the issuer or the combined entity resulting from a takeover, merger, that forecast or estimate shall be included in the Exempted Document. If a profit forecast or profit estimate has been published and is still outstanding, but no longer valid (for example as a result of the takeover, merger or division), then provide a statement to that effect and an explanation of why such forecast or estimate is no longer valid. Such an invalid forecast or estimate is not subject to the requirements in items 7.2 to 7.4.</p>	
7.2 (non-equity securities)	<p>Where an issuer chooses to include a profit forecast or a profit estimate (which is still outstanding and valid) that forecast or estimate included in the Exempted Document must contain the information set out in items 7.3 and 7.4. If a profit forecast or profit estimate has been published and is still outstanding, but no longer valid, then provide a statement to that effect and an explanation of why such profit forecast or estimate is no longer valid. Such an invalid forecast or estimate is not subject to the requirements in items 7.3 to 7.4.</p>	
7.3	<p>Where an issuer chooses to include a new profit forecast or a new profit estimate, or where the issuer includes a previously published profit forecast or a previously published profit estimate pursuant to point 7.1, the profit forecast or estimate shall be clear and unambiguous and contain a statement</p>	

	<p>setting out the principal assumptions upon which the issuer has based its forecast, or estimate.</p> <p>The forecast or estimate shall comply with the following principles:</p> <ul style="list-style-type: none"> <li>• there must be a clear distinction between assumptions about factors which the members of the administrative, management or supervisory bodies can influence and assumptions about factors which are exclusively outside the influence of the members of the administrative, management or supervisory bodies;</li> <li>• the assumptions must be reasonable, readily understandable by investors, specific and precise and not relate to the general accuracy of the estimates underlying the forecast; and</li> <li>• in the case of a forecast, the assumptions shall draw the investor's attention to those uncertain factors which could materially change the outcome of the forecast.</li> </ul>	
7.4	The Exempted Document shall include a statement that the profit forecast or estimate has been compiled on the basis stated and prepared on a basis i) comparable with the historic financial information and ii) consistent with the issuer's accounting policies.	
<b>8</b>	<b>ADMINISTRATIVE, MANAGEMENT AND SUPERVISORY BODIES</b>	
8.1	<p>Names, business addresses and functions in the issuer of the following persons and an indication of the principal activities performed by them outside that issuer where these are significant with respect to that issuer:</p> <p>a) members of the administrative, management or supervisory bodies and</p> <p>b) partners with unlimited liability, in the case of a limited partnership with a share capital.</p>	
8.2.	Potential conflicts of interest between any duties to the issuer, of the persons referred to in item 8.1 and their private interests or other duties must be clearly stated. In the event that there are no such conflicts a statement to that effect must be made.	
8.3.	In so far as is known to the issuer, potential material impacts of the takeover, merger and division on the corporate governance,	

	<p>including future changes in the persons referred to in item 8.1 and committee's composition.</p> <p>In the case of new members of the administrative, management or supervisory bodies of the issuer (since the date of the latest audited annual financial statements) and of each person mentioned in point (b) of disclosure item 8.1 and of the first paragraph of disclosure item 8.3 the following information:</p> <ul style="list-style-type: none"> <li>a) The names of all companies and partnerships of which such person has been a member of the administrative, management or supervisory bodies or partner at any time in the previous five years, indicating whether or not the individual is still a member of the administrative, management or supervisory bodies or partner. It is not necessary to list all the subsidiaries of an issuer of which the person is also a member of the administrative, management or supervisory bodies;</li> <li>b) any convictions in relation to fraudulent offences for at least the previous five years;</li> <li>c) details of any bankruptcies, receiverships, liquidations or companies put into administration with which a person described in (a) and (b) of disclosure item 8.1 and first paragraph of disclosure item 8.3 who was acting in the capacity of any of the positions set out in (a) of disclosure item 8.1 was associated for at least the previous five years;</li> <li>d) details of any official public incrimination and/or sanctions of such person by statutory or regulatory authorities (including designated professional bodies) and whether such person has ever been disqualified by a court from acting as a member of the administrative, management or supervisory bodies of an issuer or from acting in the management or conduct of the affairs of any issuer for at least the previous five years.</li> </ul> <p>If there is no such information to be disclosed, a statement to that effect is to be made.</p>	
<b>9</b>	<b>MAJOR SHAREHOLDERS</b>	
	<b>EQUITY SECURITIES OR DEPOSITORY RECEIPTS</b>	
9.1	<p>In so far as is known to the issuer, the name of any person other than a member of the administrative, management or supervisory bodies who, directly or indirectly, has an interest in the issuer's capital or voting rights which is notifiable under the issuer's national law, together with the amount of each such person's interest, as of the date of the Exempted Document or,</p>	

	if there are no such persons, an appropriate negative statement.	
9.2	Whether the issuer's major shareholders have different voting rights, or an appropriate negative statement.	
9.3	To the extent known to the issuer, state whether the issuer is directly or indirectly owned or controlled and by whom and describe the nature of such control and describe the measures in place to ensure that such control is not abused.	
9.4	A description of any arrangements, known to the issuer, the operation of which may at a subsequent date result in a change in control of the issuer.	
9.5	Where applicable, and to the extent known by the issuer, any potential changes in the issuer's shareholdings as a result of the takeover, merger or division.	
<b>10</b>	<b>RELATED PARTY TRANSACTIONS</b>	
	<b>EQUITY SECURITIES OR DEPOSITORY RECEIPTS</b>	
10.1	<p>To the extent not covered elsewhere in the Exempted Document, details of related party transactions (which for these purposes are those set out in the Standards adopted according to the Regulation (EC) No 1606/2002), that the issuer has entered into since the date of the last financial statements, must be disclosed in accordance with the respective standard adopted according to Regulation (EC) No 1606/2002 if applicable.</p> <p>If such standards do not apply to the issuer the following information must be disclosed:</p> <ul style="list-style-type: none"> <li>a) The nature and extent of any transactions which are — as a single transaction or in their entirety — material to the issuer. Where such related party transactions are not concluded at arm's length provide an explanation of why these transactions were not concluded at arm's length. In the case of outstanding loans including guarantees of any kind indicate the amount outstanding.</li> <li>b) The amount or the percentage to which related party transactions form part of the turnover of the issuer.</li> </ul>	

11	<b>FINANCIAL INFORMATION CONCERNING THE ISSUER'S ASSETS AND LIABILITIES, FINANCIAL POSITION AND PROFITS, AND LOSSES</b>	
11.1	<p><b>Financial statements</b></p> <p>Issuer's Financial statements (annual and half-yearly) required to be published over the 12 months prior to the publication of the Exempted Document.</p> <p>Where both annual and half-yearly financial statements have been published, only the annual statements shall be required where they postdate the half-yearly financial statements.</p>	In case of Merger Article 97(1) (b) and 143 (b) of Merger and Division Directive
11.2	<b>Auditing of annual financial information</b>	
11.2.1	<p><b><u>Audit report</u></b></p> <p>The issuer's historical annual financial information must be independently audited. The audit report shall be prepared in accordance with the Audit Directive and Audit Regulation.<sup>20</sup></p> <p>Where the Audit Directive and Audit Regulation do not apply:</p> <ul style="list-style-type: none"> <li>• the issuer's historical annual financial information must be audited or reported on as to whether or not, for the purposes of the Exempted Document, it gives a true and fair view in accordance with auditing standards applicable in a Member State or an equivalent standard. Otherwise, the following information must be included in the Exempted Document :             <ol style="list-style-type: none"> <li>1) a prominent statement disclosing which auditing standards have been applied;</li> <li>2) an explanation of any significant departures from International Standards on Auditing.</li> </ol> </li> <li>• If audit reports on the issuer's historical annual financial information contain qualifications, modifications of opinion, or disclaimers or an emphasis of matter, such qualifications, modifications, disclaimers or emphasis of matter must be reproduced in full and the reasons given.</li> </ul>	
11.2.2	Indication of other information in the Exempted Document which has been audited by the auditors.	

<sup>20</sup> Directive 2014/56/EU of the European Parliament and Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts.

11.2.3	Where financial information in the Exempted Document is not extracted from the issuer's audited financial statements state the source of the data and state that the data is unaudited.	
11.3.	<p><b>Legal and arbitration proceedings</b></p> <p>Information on any governmental, legal or arbitration proceedings (including any such proceedings which are pending or threatened of which the issuer is aware), during a period covering at least the previous 12 months which may have, or have had in the recent past significant effects on the issuer and/or group's financial position or profitability, or provide an appropriate negative statement.</p>	
11.4.	<p><b>Significant change in the issuer's financial position</b></p> <p>A description of any significant change in the financial position of the group which has occurred since the end of the last financial period for which either audited financial statements or interim financial information have been published, or provide an appropriate negative statement.</p>	
11.5.	<p><b>Dividend policy</b></p> <p>A description of the issuer's policy on dividend distributions and any restrictions thereon.</p>	
11.5.1.	The amount of the dividend per share for the last financial year adjusted, where the number of shares in the issuer has changed, to make it comparable.	
<b>12</b>	<b>ADDITIONAL INFORMATION</b>	
12.1	<p><b>Share capital</b></p> <p>The following information as of the date of the most recent balance sheet included in the issuer's historical financial information.</p>	
12.1.2	The amount of any convertible securities, exchangeable securities or securities with warrants, with an indication of the conditions governing and the procedures for conversion, exchange or subscription.	
12.1.3	Information about and terms of any acquisition rights and or obligations over authorised but unissued capital or an undertaking to increase the capital.	
<b>13</b>	<b>REGULATORY DISCLOSURES</b>	
13.1	A summary of the information disclosed under Regulation (EU) No 596/2014 over the last 12 months which remains relevant as at the date of the Exempted Document. The summary shall	

	<p>be presented in an easily analysable, concise and comprehensible form and shall not be a replication of information already published under Regulation (EU) No 596/2014.</p> <p>The summary shall be presented in a limited number of categories depending on their topics.</p>	
<b>14</b>	<b>MATERIAL CONTRACTS</b>	
14.1	Where not previously disclosed elsewhere, a brief summary of all material contracts that are not entered into in the ordinary course of the issuer's business.	
<b>15</b>	<b>DOCUMENTS AVAILABLE</b>	
15.1	<p>A statement that for the life of the Exempted Document the following documents, where applicable, may be inspected:</p> <ul style="list-style-type: none"> <li>(a) the up to date memorandum and articles of association of the issuer;</li> <li>(b) all reports, letters, and other documents, historical financial information, valuations and statements prepared by any expert at the issuer's request any part of which is included or referred to in the Exempted Document;</li> <li>(c) all reports, letters, and other documents, valuations and statements not covered in a and b in other specific item in Appendix IV of the Exempted Document, prepared in accordance with the Directive (EU) 2017/1132 of the European Parliament and of the Council or with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.</li> </ul> <p>An indication of the website on which the documents may be inspected.</p>	

## **QUESTIONS FOR CONSULTATION**

Question 12: Do you agree with the proposal relating to the Minimum Information Content Simplified Disclosure Regime on Issuer Section set out in Appendix I for the Exempted Document (when the issuer has already securities admitted to regulated market or SME Growth Market? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

Question 13: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

### **5.3. Appendix II – Minimum Information Content Issuer Section - The issuer is not admitted to trading on regulated market or SME Growth Market**

83. Appendix II contains the Minimum Information Content on Issuer Section in case the issuer is not admitted to trading on regulated market or SME Growth Market. ESMA followed a similar approach in this case and took as a starting point Annex 1 of the ESMA Technical Advice on format and content of prospectus which sets out the information requirements of the Share registration document in order to assess whether alleviations could be provided. In ESMA's view there is not much room to provide alleviations as offers of securities connected with takeovers, mergers or divisions are usually risky and complex financial transactions which often fall within the concept of complex financial history or significant financial commitment and investors should receive all the necessary information pertaining an issuer which is not yet admitted to trading on regulated market or SME Growth Market. ESMA notes that in this case usually there is no information regarding the issuer disclosed under a European Regulation/Directive.
84. If as a result of a takeover, merger, or division, an issuer with no securities admitted to trading on a regulated market or to an SME Growth Market, wishes to make a public offer or applies for the admission of securities to a regulated market,<sup>21</sup> ESMA believes that the information requirements for the Issuer Section should be similar to the requirements foreseen in case of an IPO. Investors to whom the securities will be offered or investors trading securities in the secondary market should have all necessary information about the issuer to take an informed decision about their investments. Appendix II should be used also in the situations where there is an offer of securities to the public by an issuer that is not admitted to regulated market or SME Growth Market without a subsequent admission of securities to trading on regulated markets.
85. Having in mind the possibility for potential misuse of the exemption in the PR in order to circumvent the obligation to provide relevant and material information on the transaction and in order to ensure investor protection, ESMA considers that most of the disclosure items in Annex 1 of the Share registration document should be complied with.
86. ESMA also notes that where a takeover, merger or division constitutes in fact a reverse acquisition, issuers should use Appendix II for the Minimum Information Content Issuer Section. Reverse acquisitions occur when the entity issuing securities (the legal acquirer) is not the acquirer for accounting and economic purposes. In those cases, the disclosure items should be focused on the economic acquirer and where necessary complemented with the information related to the economic acquiree (the issuer issuing securities).

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<sup>21</sup> For instance, the cases where there is a merger by a formation of a new company or a division by formation of new companies as prescribed in Articles 109 and 155 of the Merger and Division Directive.

### *Merger or Takeover*

87. While in many jurisdictions, investors to whom the securities may be offered or allotted (in case of mergers) may choose to receive the securities or to partially receive cash in return for their investment in the merged companies, this option does not justify an alleviated regime in terms of required disclosure. Investors should, before deciding whether to accept the terms of a takeover or merger, obtain the relevant information about the (i) issuer offering or admitting securities to a regulated market, (ii) the (to be) merged or (to be) acquired company, (iii) rationale for the takeover/merger and their underlying risks.
88. ESMA notes that the information to be provided may not be important only to the addressees of a particular offer/allotment, notably, the shareholders of the company acquired or merged. If the securities offered become admitted to trading on a regulated market, other investors, not involved in and/or informed of the takeover/merger, would be in a position to trade those securities in the secondary market. The Exempted Document, therefore, would enable those investors to gain a comprehensive understanding of the issuer and its business after the takeover or merger becomes effective.
89. ESMA believes that historical information solely related to the issuer offering/admitting securities does not suffice to provide a complete picture of the issuer going to the market, considering the effects that the takeover or merger may have on its operating activities. For example the governance structure and financial information of the issuer may need to be updated with information on the operational activities of the (to be) acquired/ (to be) merged company which subsequently will form part of the issuer as a whole. Therefore, ESMA proposes some changes to *Annex 1 (Share Registration Document)* to present the impact of the transaction on the structure and activities of the issuer. In addition to the information required in Appendix I, issuers should consider the disclosure items set out in Appendix IV.

### *Division*

90. If, as a result of a division, the shares of a new issuer are offered<sup>22</sup>/admitted to trading on a regulated market, the information requirements should focus on the information of the issuer whose shares are being offered/allotted/admitted to trading. Therefore, the content of the Exempted Document should be similar to the information provided in case of an IPO. Even when the spun-off company is a subsidiary or a joint venture of an issuer already admitted to trading, investors may not have at their disposal the relevant information on the new entity whose shares are being offered.
91. Although some information may be already available to the market about the business of the spun-off company, for example in the management report of the parent company already admitted to trading, this information is aggregated and presented from the perspective of the parent company with securities already admitted to trading on a regulated market and directed to its shareholders. As such, the information contained in

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<sup>22</sup> Please refer to paragraph 31 of this Consultation Paper.

the management report provides a consolidated picture of all businesses of the issuer (parent company) and presents the issuer itself (with securities admitted) as the reporting entity.

92. The issuer being spun-off constitutes a different reporting entity representing its own group of subsidiaries, joint ventures and associated companies whose financial reporting as group may not be available to the market and thus not known to investors. The spun-off company may be organized differently, have a different management and be subject to different regulatory frameworks.
93. Moreover, the offer of securities to the public related to the division may be addressed to investors other than the shareholders of the parent company and even when this is case, if the shares of the issuer become admitted to trading on regulated market, all investors (not only the shareholders of the offeror) will be in position to trade those shares. As a consequence, considering the PR overarching principle of guaranteeing a high level of consumer and investor protection, ESMA does not see room for alleviations with regard to divisions.
94. ESMA notes, however, that a few requirements set out in the Issuer Section are already required by the Takeover or the Merger and Division Directive; therefore, issuers may take advantage of this fact (e.g. by means of the mechanism of incorporation by reference) when fulfilling the requirements set out in the appendix of the Exempted Document. These are identified in the third column of the appendix.

#### *Key differences*

95. Similarly to the changes proposed to the Issuer Section for Simplified Disclosure Regime in the case of Appendix 1, the key differences to Annex 1 of the full prospectus can be summarised as follows:
  - Requirement for issuers to include information on risks factors pertaining to the issuer shall take into account, where applicable, the impact that the takeover, merger/ division may have to its operations. In this respect, information regarding the possibility of potential synergies should be considered. In addition, any risks that the issuer will need to undertake considering the combination of two or more companies. The risk factors subsection should present the risks relating to the issuer (combined entity resulting from the takeover, merger or division transaction or as if the takeover, merger or division transaction would have taken place at the moment of the publication of the Exempted Document) and information on the risk concerning the securities to be offered.
  - The item regarding the Competent Authority's approval of the Exempted Document was removed, as a Competent Authority will not be approving the Exempted Document pursuant to Article 20 of the PR.
  - Requirement to prepare a summary, because the Exempted Document does not constitute a prospectus, issuers will not be required to prepare a summary as prescribed in Article 7 of the PR.

96. The table below sets out the content of Appendix II – Minimum Information Content on Issuer Section that ESMA proposes to include in its technical advice concerning the Issuer offering securities to the public or admitting securities on a regulated market or to an SME Growth Market.
97. ESMA notes that Appendix II covers situations where the issuer may issue depository receipts in connection with a takeover, merger or division. Where this is case, the disclosure items for the Minimum Information Content Issuer Section should mainly relate to the issuer of the underlying shares connected with the depository receipts.

ITEM	APPENDIX II - MINIMUM INFORMATION CONTENT ISSUER SECTION TAKEOVER/MERGER/DIVISION	Reference in TOD/ Merger and Division Directive
	<b>IN CASE OF DEPOSITORY RECEIPTS, THE ISSUER SHOULD BE THE ISSUER OF THE UNDERLYING SHARES</b>	
<b>1</b>	<b>PERSONS RESPONSIBLE, THIRD PARTY INFORMATION, EXPERTS' REPORTS</b>	
1.1	All persons responsible for the information given in the Exempted Document and, as the case may be, for certain parts of it, with, in the latter case, an indication of such parts. In the case of natural persons including members of the issuer's administrative, management or supervisory bodies indicate the name and function of the person; in case of legal persons indicate the name and registered office.	
1.2	<p>A declaration by those responsible for the Exempted Document or as the case may be for certain parts of the Exempted Document that, having taken all reasonable care to ensure that such is the case, the information contained in the Exempted Document is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import. The responsibility statement shall also specify the relevant provisions at national level which are applicable and the extent of responsibility or liability.</p> <p>As the case may be, a declaration by those responsible for certain parts of the Exempted Document that having taken all reasonable care to ensure that such is the case, the information contained in that part of the Exempted Document for which they are responsible is, to the best of their knowledge, in accordance with the facts and contains no omission likely to affect its import.</p>	

	No disclaimers or other text may be included in the Exempted Document that contradicts or otherwise places limitations on the declaration.	
1.3	<p>Where a statement or report attributed to a person as an expert is included in the Exempted Document, provide such person's:</p> <ul style="list-style-type: none"> <li>• Name;</li> <li>• Business address;</li> <li>• Qualifications;</li> <li>• Material interest if any in the issuer.</li> </ul> <p>If the report has been produced at the issuer's request a statement to the effect that such statement or report is included, in the form and context in which it is included, with the consent of the person who has authorised the contents of that part of the Exempted Document.</p>	
1.4	Where information has been sourced from a third party, provide a confirmation that this information has been accurately reproduced and that as far as the issuer is aware and is able to ascertain from information published by that third party, no facts have been omitted which would render the reproduced information inaccurate or misleading. In addition, identify the source(s) of the information.	
1.5	The Exempted Document does not constitute a prospectus within the meaning of Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017, therefore it was not subject to scrutiny and approval by the relevant competent authority as set out in Article 20 of Regulation 2017/1129.	
<b>2</b>	<b>STATUTORY AUDITORS</b>	
2.1	Names and addresses of the issuer's auditors for the period covered by the historical financial information (together with their membership in a professional body).	
2.2	If auditors have resigned, been removed or not been re-appointed during the period covered by the historical financial information, indicate details if material.	

3	RISK FACTORS	
3.1	<p>A description of the material risks that are specific to the issuer, in a limited number of categories, in a section headed 'Risk Factors'.</p> <p>In each category the most material risks, in the assessment of the issuer, offeror or person asking for admission to trading on a regulated market, taking into account their impact on the issuer and the probability of their occurrence, shall be mentioned first. The risks shall be corroborated by the content of the Exempted Document.</p> <p>The information concerning the risks factors should take into account the impacts that a takeover, merger or division may have on the issuer's activities, governance structure and/or financial information.</p> <p>The risk factors shall be corroborated by the content of the Exempted Document.</p>	
3.2	<p>A description of the material risks that are specific to the securities being offered and/or admitted to trading, in a limited number of categories, in a section headed 'Risk Factors'.</p> <p>Risks to be disclosed shall include:</p> <ul style="list-style-type: none"> <li>• those resulting from the level of subordination of a security and the impact on the expected size or timing of payments to holders of the securities under bankruptcy, or any other similar procedure, including, where relevant, the insolvency of a credit institution or its resolution or restructuring in accordance with Directive 2014/59/EU (BRRD); and</li> <li>• in cases where the securities are guaranteed, the specific and material risks related to the guarantor to the extent they are relevant to its ability to fulfil its commitment under the guarantee.</li> </ul> <p>In each category the most material risks, in the assessment of the issuer, offeror or person asking for admission to trading on a regulated market, taking into account their impact on the issuer and the securities and the probability of their occurrence, shall be mentioned first. The risks shall be corroborated by the content of the Exempted Document.</p>	

3.3	<p>A description of the material risks that are specific to the takeover, merger or division transaction in a limited number of categories, in a section headed 'Takeover, Merger or Division Risk Factors'.</p> <p>In each category the most material risk factors, in the assessment of the issuer taking into account the negative impact on the issuer and the probability of their occurrence, shall be mentioned first.</p> <p>The risk factors shall be corroborated by the content of the Exempted Document.</p>	
<b>4</b>	<b>INFORMATION ABOUT THE ISSUER</b>	
4.1	The legal and commercial name of the issuer.	In case of takeover Article 6 (b) of the TOD
4.2	The place of registration of the issuer, its registration number and Legal Entity Identifier.	In case of merger or division Article 91(2) (a) and 137(2) (a) Merger and Division Directive
4.3	The date of incorporation and the length of life of the issuer, except where indefinite.	
4.4	The domicile and legal form of the issuer, the legislation under which the issuer operates, its country of incorporation, and the address, telephone number of its registered office (or principal place of business if different from its registered office) and website of the issuer, if any, with a disclaimer that the information on the website does not form part of the Exempted Document.	
<b>5</b>	<b>BUSINESS OVERVIEW</b>	
5.1	<b>Principal activities</b>	
5.1.1	A description of, and key factors relating to, the nature of the issuer's operations and its principal activities, stating the main categories of products sold and/or services performed for each financial year for the period covered by the historical financial information; and	

5.1.2	An indication of any significant new products and/or services that have been introduced and, to the extent the development of new products or services has been publicly disclosed, give the status of development.	
5.2	<b>Principal markets</b> A description of the principal markets in which the issuer competes, including a breakdown of total revenues by operating segment and geographic market for each financial year for the period covered by the historical financial information.	
5.3	The important events in the development of the issuer's business.	
5.4	<b>Strategy and objectives</b> A description of the issuer's business strategy and objectives (both financial and non-financial (if any)). This description shall take into account the issuer's future challenges and prospects.	
5.5	If material to the issuer's business or profitability, summary information regarding the extent to which the issuer is dependent, on patents or licences, industrial, commercial or financial contracts or new manufacturing processes.	
5.6	The basis for any statements made by the issuer regarding its, the (to be) acquired, merged competitive position.	
5.7	<b>Investments</b>	
5.7.1	A description, (including the amount) of the issuer's material investments for each financial year for the period covered by the historical financial information up to the date of the Exempted Document.	
5.7.2	A description of any material investments of the issuer that are in progress or for which firm commitments have already been made, including the geographic distribution of these investments (home and abroad) and the method of financing (internal or external).	
5.7.3	To the extent not covered elsewhere in the Minimum Information Content Issuer Section information relating to the joint ventures and undertakings in which the issuer holds a proportion of the capital likely to have a significant	

	effect on the assessment of its own assets and liabilities, financial position or profits and losses.	
5.7.4	A description of any environmental issues that may affect the issuer's utilisation of the tangible fixed assets.	
<b>6</b>	<b>ORGANISATIONAL STRUCTURE</b>	
6.1	If the issuer is part of a group, a brief description of the group and the issuer's position within the group. This may be in the form of, or accompanied by, a diagram of the organisational structure if this helps to clarify the structure.	
6.2	To the extent not covered elsewhere in the Minimum Information Content Issuer Section a list of the issuer's significant subsidiaries, including name, country of incorporation or residence, proportion of ownership interest and, if different, proportion of voting power held.	
<b>7</b>	<b>OPERATING AND FINANCIAL REVIEW</b>	
7.1	<b>Financial condition</b>	
7.1.1	<p>To the extent not covered elsewhere in the Exempted Document and to the extent necessary for an understanding of the issuer's business as a whole, a fair review of the development and performance of the issuer's business and of its position for each year and interim period for which historical financial information is required, including the causes of material changes.</p> <p>The review shall be a balanced and comprehensive analysis of the development and performance of the issuer's business and of its position, consistent with the size and complexity of the business.</p> <p>To the extent necessary for an understanding of the issuer's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial Key Performance Indicators relevant to the particular business. The analysis shall, where appropriate, include references to, and additional explanations of, amounts reported in the annual financial statements.</p>	
7.1.2	To the extent not covered elsewhere in the Exempted Document and to the extent necessary for an	

	<p>understanding of the issuer's business as a whole, the review shall also give an indication of :</p> <ul style="list-style-type: none"> <li>a) the issuer's likely future development;</li> <li>b) activities in the field of research and development.</li> </ul> <p>Item 7.1 concerning the issuer may be satisfied through the inclusion of the management report referred to in Articles 19 and 29 of Directive 2013/34/EU.</p>	
7.2	<b>Operating results</b>	
7.2.1	Information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the issuer's income from operations, indicating the extent to which income was so affected.	
7.2.2	Where the historic financial information disclose material changes in net sales or revenues, provide a narrative discussion of the reasons for such changes.	
<b>8</b>	<b>CAPITAL RESOURCES</b>	
8.1	Information concerning the issuer's capital resources (both short and long term).	
8.2	An explanation of the sources and amounts of and a narrative description of the issuer's cash flows.	
8.3	Information on the borrowing requirements and funding structure of the issuer.	
8.4	Information regarding any restrictions on the use of capital resources that have materially affected, or could materially affect, directly or indirectly, the issuer's operations.	
8.5	Information regarding the anticipated sources of funds needed to fulfil commitments referred to in items 5.7.2.	

<b>9</b>	<b>REGULATORY ENVIRONMENT</b>	
	A description of the regulatory environment that the issuer operates in and that may materially affect its business, together with information regarding any governmental, economic, fiscal, monetary or political policies or factors that have materially affected, or could materially affect, directly or indirectly, the issuer's operations.	
<b>10</b>	<b>TREND INFORMATION</b>	
10.1	<p>A description of:</p> <ul style="list-style-type: none"> <li>• The most significant recent trends in production, sales and inventory, and costs and selling prices since the end of the last financial year to the date of the Exempted Document;</li> <li>• Any significant change in the financial performance of the group since the end of the last financial period for which financial information has been published to the date of the Exempted Document, or provide an appropriate negative statement.</li> </ul>	
10.2	Information on any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the issuer's prospects for at least the current financial year.	
<b>11</b>	<b>PROFIT FORECASTS OR ESTIMATES</b>	
11.1	Where an issuer has published a profit forecast or a profit estimate (which is still outstanding and valid) on the issuer and/or the combined entity resulting from a takeover, merger or division, that forecast or estimate shall be included in the Exempted Document. If a profit forecast or profit estimate has been published and is still outstanding, but no longer valid (for example as a result of the acquisition), then provide a statement to that effect and an explanation of why such forecast or estimate is no longer valid. Such an invalid forecast or estimate is not subject to the requirements in items 11.2 to 11.3.	
11.2	Where an issuer chooses to include a new profit forecast or a new profit estimate, or where the issuer includes a previously published profit forecast or a previously published profit estimate pursuant to point 11.1, the profit	

	<p>forecast or estimate shall be clear and unambiguous and contain a statement setting out the principal assumptions upon which the issuer has based its forecast, or estimate.</p> <p>The forecast or estimate shall comply with the following principles:</p> <ul style="list-style-type: none"> <li>• there must be a clear distinction between assumptions about factors which the members of the administrative, management or supervisory bodies can influence and assumptions about factors which are exclusively outside the influence of the members of the administrative, management or supervisory bodies;</li> <li>• the assumptions must be reasonable, readily understandable by investors, specific and precise and not relate to the general accuracy of the estimates underlying the forecast; and</li> <li>• in the case of a forecast, the assumptions shall draw the investor's attention to those uncertain factors which could materially change the outcome of the forecast.</li> </ul>	
11.3	<p>The Exempted Document shall include a statement that the profit forecast or estimate has been compiled on the basis stated and prepared on a basis i) comparable with the historic financial information and ii) consistent with the issuer's accounting policies.</p>	
<b>12</b>	<b>ADMINISTRATIVE, MANAGEMENT AND SUPERVISORY BODIES AND SENIOR MANAGEMENT</b>	
12.1	<p>Names, business addresses and functions in the issuer of the following persons and an indication of the principal activities performed by them outside that issuer where these are significant with respect to that issuer:</p> <ol style="list-style-type: none"> <li>a) Members of the administrative, management or supervisory bodies;</li> <li>b) Partners with unlimited liability, in the case of a limited partnership with a share capital;</li> <li>c) Founders, if the issuer has been established for fewer than five years; and</li> <li>d) Any senior manager who is relevant to establishing that the issuer has the appropriate expertise and experience for the management of the issuer's business.</li> </ol>	

	<p>The nature of any family relationship between any of those persons.</p> <p>In the case of each member of the administrative, management or supervisory bodies of the issuer and of each person mentioned in points (b) and (d) of the first subparagraph, details of that person's relevant management expertise and experience and the following information:</p> <ul style="list-style-type: none"> <li>a) The names of all companies and partnerships of which such person has been a member of the administrative, management or supervisory bodies or partner at any time in the previous five years, indicating whether or not the individual is still a member of the administrative, management or supervisory bodies or partner. It is not necessary to list all the subsidiaries of an issuer of which the person is also a member of the administrative, management or supervisory bodies;</li> <li>b) Any convictions in relation to fraudulent offences for at least the previous five years;</li> <li>c) Details of any bankruptcies, receiverships, liquidations or companies put into administration with which a person described in (a) and (d) of the first subparagraph who was acting in the capacity of any of the positions set out in (a) and (d) of the first subparagraph was associated for at least the previous five years;</li> <li>d) Details of any official public incrimination and/or sanctions of such person by statutory or regulatory authorities (including designated professional bodies) and whether such person has ever been disqualified by a court from acting as a member of the administrative, management or supervisory bodies of an issuer or from acting in the management or conduct of the affairs of any issuer for at least the previous five years.</li> </ul> <p>If there is no such information to be disclosed, a statement to that effect is to be made.</p>	
12.2	<p><b>Administrative, management and supervisory bodies and senior management conflicts of interests</b></p> <p>Potential conflicts of interests between any duties to the issuer, of the persons referred to in item 12.1., and their private interests and or other duties must be clearly stated. In the event that there are no such conflicts, a statement to that effect must be made.</p>	

	<p>Any arrangement or understanding with major shareholders, customers, suppliers or others, pursuant to which any person referred to in item 12.1 was selected as a member of the administrative, management or supervisory bodies or member of senior management.</p> <p>Details of any restrictions agreed by the persons referred to in item 12.1 on the disposal within a certain period of time of their holdings in the issuer's securities.</p>	
<b>13</b>	<b>REMUNERATION AND BENEFITS</b>	
	In relation to the last full financial year for those persons referred to in points (a) and (d) of the first subparagraph of item 12.1:	
13.1	<p>The amount of remuneration paid (including any contingent or deferred compensation), and benefits in kind granted to such persons by the issuer and its subsidiaries for services in all capacities to the issuer and its subsidiaries by any person.</p> <p>That information must be provided on an individual basis unless individual disclosure is not required in the issuer's home country and is not otherwise publicly disclosed by the issuer.</p>	
13.2	The total amounts set aside or accrued by the issuer or its subsidiaries to provide pension, retirement or similar benefits.	
<b>14</b>	<b>BOARD PRACTICES</b>	
	In relation to the issuer's last completed financial year, and unless otherwise specified, with respect to those persons referred to in point (a) of the first subparagraph of 12.1:	
14.1	Date of expiration of the current term of office, if applicable, and the period during which the person has served in that office.	
14.2	Information about members of the administrative, management or supervisory bodies' service contracts with the issuer or any of its subsidiaries providing for benefits upon termination of employment, or an appropriate negative statement	
14.3	Information about the issuer's audit committee and remuneration committee, including the names of	

	committee members and a summary of the terms of reference under which the committee operates.	
14.4	A statement as to whether or not the issuer complies with the corporate governance regime(s) applicable to the issuer. In the event that the issuer does not comply with such a regime, a statement to that effect must be included together with an explanation regarding why the issuer does not comply with such regime.	
14.5	In so far as is known to the issuer, potential material impacts of the takeover, merger or division on the corporate governance, including future changes in the board and committees composition referred to in 12.1 and 12.2 (in so far as this has been already decided by the board and/or shareholders meeting)	
<b>15</b>	<b>EMPLOYEES</b>	
15.1	Either the number of employees at the end of the period or the average for each financial year for the period covered by the historical financial information up to the date of the Exempted Document (and changes in such numbers, if material) and, if possible and material, a breakdown of persons employed by main category of activity and geographic location. If the issuer employs a significant number of temporary employees, include disclosure of the number of temporary employees on average during the most recent financial year.	
15.2	<b>Shareholdings and stock options</b> With respect to each person referred to in points (a) and (d) of the first subparagraph of item 12.1. provide information as to their share ownership and any options over such shares in the issuer as of the most recent practicable date.	
15.3	Description of any arrangements for involving the employees in the capital of the issuer.	
<b>16</b>	<b>MAJOR SHAREHOLDERS</b>	
16.1	In so far as is known to the issuer, the name of any person other than a member of the administrative, management or supervisory bodies who, directly or indirectly, has an interest in the issuer's capital or voting rights which is	

	notifiable under the issuer's national law, together with the amount of each such person's interest, as at the date of the Exempted Document, or, if there are no such persons, an appropriate negative statement.	
16.2	Whether the issuer's major shareholders have different voting rights, or an appropriate negative statement.	
16.3	To the extent known to the issuer, state whether the issuer is directly or indirectly owned or controlled and by whom and describe the nature of such control and describe the measures in place to ensure that such control is not abused.	
16.4	A description of any arrangements, known to the issuer, the operation of which may at a subsequent date result in a change in control of the issuer.	
16.5	Where applicable, and to the extent known by the issuer, any potential changes in the issuer's shareholdings as a result of the takeover, merger or division.	
<b>17</b>	<b>RELATED PARTY TRANSACTIONS</b>	
17.1	<p>To the extent not covered elsewhere in the Exempted Document, details of related party transactions (which for these purposes are those set out in the Standards adopted according to the Regulation (EC) No 1606/2002), that the issuer has entered into during the period covered by the historical financial statements information and up to the date of the Exempted Document, must be disclosed in accordance with the respective standard adopted according to Regulation (EC) No 1606/2002 if applicable.</p> <p>If such standards do not apply to the issuer the following information must be disclosed:</p> <p>a) The nature and extent of any transactions which are — as a single transaction or in their entirety — material to the issuer. Where such related party transactions are not concluded at arm's length provide an explanation of why these transactions were not concluded at arm's length. In the case of outstanding loans including guarantees of any kind indicate the amount outstanding;</p>	

	b) The amount or the percentage to which related party transactions form part of the turnover of the issuer.	
<b>18</b>	<b>FINANCIAL INFORMATION CONCERNING THE ISSUER'S ASSETS AND LIABILITIES, FINANCIAL POSITION AND PROFITS AND LOSSES</b>	
18.1	<b>Historic financial information</b>	
18.1.1	Audited historic financial information covering the latest three financial years (or such shorter period as the issuer has been in operation) and the audit report in respect of each year.	Article 97 and 143 (1) (b) of the Merger and Division Directive  Three Years Financial statements of the companies involved in a merger/division
18.1.2	Change of accounting reference date  If the issuer has changed its accounting reference date during the period for which historic financial information are required, the audited historical financial information shall cover at least 36 months, or the entire period for which the issuer has been in operation, whichever is shorter.	
18.1.3	Accounting standards  The financial information must be prepared according to International Financial Reporting Standards (IFRS) as endorsed in the EU based on Regulation (EC) No 1606/2002.  If IFRS are not applicable the financial information must be prepared according to:  (a) a Member State's national accounting standards for issuers from the EEA, as required by the Accounting Directive; or  (b) a third country's national accounting standards equivalent to IFRS for third country issuers. If such third country's national accounting standards are not equivalent to IFRS, the financial information shall be restated in IFRS.	
18.1.4	Change of accounting framework  The last audited historic financial information, containing comparative information for the previous year, must be	

	<p>presented and prepared in a form consistent with the accounting standards framework that will be adopted in the issuer's next published annual financial statements having regard to accounting standards and policies and legislation applicable to such annual financial statements.</p> <p>Changes within the accounting framework applicable to an issuer do not require the audited financial statements to be restated. However, if the issuer intends to adopt a new accounting standards framework in its next published financial statements, at least one complete set of financial statements, (as defined by IAS 1 <i>Presentation of Financial Statements</i>), including comparatives, must be presented in a form consistent with that which will be adopted in the issuer's next published annual financial statements, having regard to accounting standards and policies and legislation applicable to such annual financial statements.</p>	
18.1.5	<p>Where the—audited financial information is prepared according to national accounting standards, they must include at least the following:</p> <ol style="list-style-type: none"> <li>a) The balance sheet;</li> <li>b) The income statement;</li> <li>c) a statement showing either all changes in equity or changes in equity other than those arising from capital transaction with owners and distributions to owners;</li> <li>d) The cash flow statement;</li> <li>e) The accounting policies and explanatory notes.</li> </ol>	
18.1.6	<p><u>Consolidated financial statements</u></p> <p>If the issuer prepares both stand-alone and consolidated financial statements, include at least the consolidated financial statements in the Exempted document.</p>	
18.1.7	<p>Age of Financial Information</p> <p>The balance sheet date of the last year of audited financial information may not be older than one of the following:</p> <ol style="list-style-type: none"> <li>a) 18 months from the date of the Exempted Document if the issuer includes audited interim financial statements in the Exempted Document;</li> <li>b) 16 months from the date of the Exempted Document if the issuer includes unaudited interim financial statements in the Exempted Document.</li> </ol>	

18.2	<b>Interim and other financial information</b>	
18.2.1	<p>If the issuer has published quarterly or half yearly financial information since the date of its last audited financial statements, these must be included in the Exempted Document. If the quarterly or half yearly financial information has been audited or reviewed, the audit or review report must also be included. If the quarterly or half yearly financial information is unaudited or has not been reviewed state that fact.</p> <p>If the Exempted Document is dated more than nine months after the date of the last audited financial statement, it must contain interim financial information, which may be unaudited (in which case that fact must be stated) covering at least the first six months of the financial year.</p> <p>Interim financial information should be prepared in accordance with the requirements of the Accounting Directive or IFRS as the case may be.</p> <p>For issuers not subject to either the Accounting Directive or IFRS, the interim financial information must include comparative statements for the same period in the prior financial year, except that the requirement for comparative balance sheet information may be satisfied by presenting the year's end balance sheet in accordance with the applicable financial reporting framework.</p>	
18.3	<b>Auditing of historical annual financial statements</b>	
18.3.1	<p>The historical annual financial statements must be independently audited. The audit report shall be prepared in accordance with the Audit Directive and Audit Regulation.</p> <p>Where the Audit Directive and Audit Regulation do not apply;</p> <ul style="list-style-type: none"> <li>• the historical annual financial information must be audited or reported on as to whether or not, for the purposes of the Exempted Document, it gives a true and fair view in accordance with auditing standards applicable in a Member State or an equivalent standard.</li> <li>• if audit reports on the historical financial information contain qualifications, modifications of opinion, or disclaimers or an emphasis of matter,</li> </ul>	

	such qualifications, modifications, disclaimers or emphasis of matter must be reproduced in full and the reasons given.	
18.3.2	Indication of other information in the Exempted Document which has been audited by the auditors.	
18.3.3	Where financial information in the Exempted Document is not extracted from the issuer's audited financial statements state the source of the information and state that the information is unaudited.	
18.4	<b>Dividend policy</b>	
18.4.1	A description of the issuer's policy on dividend distributions and any restrictions thereon.	
18.4.2	The amount of the dividend per share for each financial year for the period covered by the historical financial information adjusted, where the number of shares in the issuer has changed, to make it comparable.	
18.5	<b>Legal and arbitration proceedings</b>	
18.5.1	Information on any governmental, legal or arbitration proceedings (including any such proceedings which are pending or threatened of which the issuer is aware), during a period covering at least the previous 12 months which may have, or have had in the recent past significant effects on the issuer and/or group's financial position or profitability, or provide an appropriate negative statement.	
18.6	<b>Significant change in the issuer's financial position</b>	
18.6.1	A description of any significant change in the financial position of the group which has occurred since the end of the last financial period for which either audited financial statements or interim financial information have been published, or provide an appropriate negative statement.	
<b>19</b>	<b>ADDITIONAL INFORMATION</b>	
19.1	<b>Share capital</b>  The following information as of the date of the most recent balance sheet included in the historical financial information:	

19.1.1	<p>The amount of issued capital, and for each class of share capital:</p> <ul style="list-style-type: none"> <li>a) The total of the issuer's authorised share capital;</li> <li>b) The number of shares issued and fully paid and issued but not fully paid;</li> <li>c) The par value per share, or that the shares have no par value; and</li> <li>d) A reconciliation of the number of shares outstanding at the beginning and end of the year.</li> </ul> <p>If more than 10% of capital has been paid for with assets other than cash within the period covered by the historical financial information, state that fact.</p>	
19.1.2	If there are shares not representing capital, state the number and main characteristics of such shares.	
19.1.3	The number, book value and face value of shares in the issuer held by or on behalf of the issuer itself or by subsidiaries of the issuer.	
19.1.4	The amount of any convertible securities, exchangeable securities or securities with warrants, with an indication of the conditions governing and the procedures for conversion, exchange or subscription.	
19.1.5	Information about and terms of any acquisition rights and or obligations over authorised but unissued capital or an undertaking to increase the capital.	
19.1.6	Information about any capital of any member of the group which is under option or agreed conditionally or unconditionally to be put under option and details of such options including those persons to whom such options relate.	
19.1.7	A history of share capital, highlighting information about any changes, for the period covered by the historical financial information.	
19.2	<b>Memorandum and Articles of Association</b>	
19.2.1	The register and the entry number therein, if applicable, and a brief description of the issuer's objects and purposes and where they can be found in the up to date memorandum and articles of association.	

19.2.2	Where there is more than one class of existing shares, a description of the rights, preferences and restrictions attaching to each class.	
19.2.3	A brief description of any provision of the issuer's articles of association, statutes, charter or bylaws that would have an effect of delaying, deferring or preventing a change in control of the issuer.	
<b>20</b>	<b>MATERIAL CONTRACTS</b>	
	<p>A summary of each material contract, other than contracts entered into in the ordinary course of business, to which the issuer or any member of the group is a party, for the two years immediately preceding publication of the Exempted Document.</p> <p>A summary of any other contract (not being a contract entered into in the ordinary course of business) entered into by any member of the group which contains any provision under which any member of the group has any obligation or entitlement which is material to the group as at the date of the Exempted Document.</p>	
<b>21</b>	<b>DOCUMENTS AVAILABLE</b>	
	<p>A statement that for the life of the Exempted Document the following documents, where applicable, can be inspected:</p> <ul style="list-style-type: none"> <li>a) The <u>up to date</u> memorandum and articles of association of the issuer;</li> <li>b) All reports, letters, and other documents, valuations and statements prepared by any expert at the issuer's request any part of which is included or referred to in the Exempted Document.</li> <li>c) All reports, letters, and other documents, valuations and statements not covered in a and b in other specific item in Appendix IV of the Exempted Document, prepared in accordance with the Directive (EU) 2017/1132 of the European Parliament and of the Council or with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.</li> </ul> <p>An indication <u>of the website on which</u> the documents may be inspected.</p>	

#### QUESTIONS FOR CONSULTATION

Question 14: Do you agree with the proposal relating to the Minimum Information Content Issuer Section as set out in Appendix II for the Exempted Document (when the issuer is not admitted to trading on a regulated market or an SME Growth Market)? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

Question 15: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

### 5.4. Appendix III – Minimum Information Content Securities Section

98. The following table sets out the information requirements relating to the securities to be offered or admitted to trading. ESMA saw fit to use as a starting point Annex 19 on the Securities Note for a Secondary Issuance of its technical advice. Although, ESMA considers that most of the elements included in Annex 19 on the Securities Note for a Secondary Issuance are fit for purpose when the issuers offers or admits its securities, some disclosure requirements have been amended to account for the specific features of a takeover, merger or division.
99. As mentioned above in the case of the Minimum Information Content Issuer Section, ESMA considers that in order to avoid confusion the labels and schedules numbering should be different from those applicable when the obligation to publish a prospectus applies. The information related to the securities offered or admitted to trading should be identified as “Minimum Information Content Securities Section” of the Exempted Document.
100. Taking into account that different types of securities may be issued or admitted to trading on regulated market in connection with a takeover, merger or division, the securities note in annex 19 was adapted to allow for the possibility that Depository Receipts (DRs) could be issued/offered or allotted in connection with a takeover, merger or division.
101. Finally ESMA observes that while some disclosure items included in Appendix III have been amended considering the particular features of takeovers, mergers and divisions, issuers and the persons responsible for the Exempted Document should take into account ESMA’s Q&A on Prospectus<sup>23</sup> and ESMA’s update of the CESR Recommendations<sup>24</sup> which provide further guidance on how to implement some of the requirements included in the appendixes. In this respect, ESMA highlights the guidance

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<sup>23</sup> Questions and Answers Prospectuses 28th updated version, ESMA, March 2018 (ESMA-31-62-780).

<sup>24</sup> ESMA update of the CESR recommendations, ESMA, March 2013 (ESMA/2013/319).

included in the ESMA update on the CESR Recommendations concerning the Working Capital Statement which is particularly relevant in the context of takeovers, mergers and divisions. In CESR recommendations (paragraphs 107 to 126) it is understood that the working capital statement should provide forward looking comfort from the issuer that, in its opinion, it has sufficient cash flow for a period of at least 12 months. Therefore, when issuers comply with this disclosure item in Appendix III, they should consider whether a clean working capital statement can be provided at a consolidated level also taking into account the (to be) acquired/ (to be) merged company as if the takeover, merger or division had taken place. Therefore, for this purpose the issuer when complying with such a requirement may need to consider whether the working capital statement is valid before and after the takeover, merger or division becomes effective.

#### *Key differences*

102. The key differences to the Minimum Information Content Securities Section for secondary issuances can be summarised as follows:

- The items regarding the Competent Authority's approval was removed as the Competent Authority will not be approving the Exempted Document pursuant to Article 20 of the PR.
- The section describing the reason for the offer has been simplified to reflect the different conditions applicable in the context of takeover, merger or division transactions.
- Information items concerning the price of equity securities have been moved to Appendix IV where information concerning merger/takeover/division is aggregated and it is more appropriate to make reference to a conversion ratio.
- Information items concerning risk factors of the securities were moved to the Issuer Section, as the Exempted Document should not be comprised of separate documents (e.g. registration document, securities note), ESMA believes that the two sections concerning risks should be best placed together.
- The items addressing the placing and underwriting were removed as they do not seem to be applicable in the context of the transactions under consideration.
- Information items concerning wholesale disclosures were removed in order to simplify the requirements. ESMA believes that offers of securities to the public/admission to trading in connection with takeovers, mergers or divisions are usually addressed to retail investors as well as wholesale.
- Where applicable, disclosure items were adapted to reflect the fact that depository receipts may be offered/admitted as part of the consideration paid for a takeover, merger or division.
- Information items regarding the availability of experts' reports were deleted, considering the duplication of similar requirements between the Issuer Section and the Securities Section.

103. The table below sets out the content of Appendix III – Minimum Information Content on Securities Section that ESMA proposes to include in its technical advice concerning the securities to be issued offered/admitted on regulated market.

ITEM	APPENDIX III - MINIMUM INFORMATION CONTENT SECURITIES SECTION TAKEOVER/MERGER/DIVISION	Reference in TOD/ Merger and Division Directive
<b>1</b>	<b>ESSENTIAL INFORMATION</b>	
1.1	<p><b>Interest of natural and legal persons involved in the issue/offer</b></p> <p>A description of any interest, including conflicting ones that is material to the issue/offer, detailing the persons involved and the nature of the interest.</p>	
<b>2</b>	<b>EQUITY SECURITIES OR DEPOSITORY RECEIPTS</b>	
2.1. (equity securities or depository receipts)	<p>Reasons for the offer to the public or for the admission to trading in connection with a takeover, merger or division.</p> <p>Where applicable, and if the issuer is aware that the anticipated proceeds will not be sufficient to fund all the proposed uses, state the amount and sources of other funds needed. Details must be given with regard to the use of the proceeds, in particular when they are being used to acquire assets, other than in the ordinary course of business, to finance announced acquisitions of other business, or to discharge, reduce or retire indebtedness.</p>	
2.2. (equity securities or depository receipts)	<p><b>Working capital statement</b></p> <p>Statement by the issuer (or in case in Depository Receipts, issuer of the underlying securities) that, in its opinion, the working capital is sufficient for the issuer's present requirements (or in case in Depository Receipts, issuer of the underlying securities) or, if not, how it proposes to provide the additional working capital needed.</p>	
2.3. (equity securities or depository receipts)	<p><b>Capitalisation and indebtedness</b></p> <p>A statement of capitalisation and indebtedness of the issuer (or in case in Depository Receipts, issuer of the underlying securities) (distinguishing between guaranteed and unguaranteed, secured and unsecured indebtedness) as of a date no earlier than 90 days prior to the date of the Exempted Document. Indebtedness also includes indirect and contingent indebtedness.</p> <p>A statement of capitalisation and indebtedness of the (to be) acquired/ (to be) merged company (distinguishing between</p>	

	<p>guaranteed and unguaranteed, secured and unsecured indebtedness) as of a date no earlier than 90 days prior to the date of the Exempted Document. Indebtedness also includes indirect and contingent indebtedness.</p> <p>In the case of material changes in the capitalisation and indebtedness position of the issuer (or in case in Depository Receipts, issuer of the underlying securities) within the 90 day period <u>additional</u> information shall be given through the presentation of a narrative description of such changes_or through the updating of those figures. In the case of material changes in the capitalisation and indebtedness position of the (to be) acquired/ (to be) merged company within the 90 day period <u>additional</u> information shall be given through the presentation of a narrative description of such changes_or through the updating of those figures.</p>	
	<b>NON- EQUITY SECURITIES</b>	
2.4. (non-equity securities)	<p>Reasons for the offer to the public or for the admission to trading.</p> <p>Where applicable and if the issuer is aware that the anticipated proceeds will not be sufficient to fund all the proposed uses, state the amount and sources of other funds needed.</p>	
<b>3</b>	<b>INFORMATION CONCERNING THE SECURITIES TO BE OFFERED/ADMITTED TO TRADING</b>	
3.1	<p>A description of the type, class and amount of the securities being offered and/or admitted to trading (in the case of Depository Receipts, the underlying shares),</p> <p>including the ISIN (International Security Identification Number).</p>	
3.2	Currency of the securities issue (in the case of Depository Receipts, the underlying shares).	
3.3	In the case of new issues (in the case of Depository Receipts, if new underlying shares are being created for the issue of the depository receipts), a statement of the resolutions, authorisations and approvals by virtue of which the securities have been or will be created and/or issued.	
3.4	An indication whether the securities (in the case of Depository Receipts, the underlying shares) are in registered form or bearer form and whether the securities are in certificated form or book-entry form. In the latter case, name and address of the entity in charge of keeping the records.	

3.5	A description of any restrictions on the free transferability of the securities (in the case of Depository Receipts, the underlying shares).	
3.6	<p>A warning that the tax legislation of the investor's Member State and of the issuer's Member State of incorporation may have an impact on the income received from the securities.</p> <p>Information on the taxation treatment of the securities where the proposed investment attracts a tax regime specific to that type of investment.</p>	
3.7	If different from the issuer, the identity and contact details of the offeror, of the securities and/or the person asking for admission to trading, including LEI where the offeror has legal personality.	
<b>EQUITY SECURITIES OR DEPOSITORY RECEIPTS</b>		
3.8 (equity securities and depository receipts)	<p>A description of the rights attached to the securities (in the case of Depository Receipts, the underlying shares), including any limitations of those rights, and procedure for the exercise of those rights.</p> <p>Dividend rights:</p> <ul style="list-style-type: none"> <li>○ Fixed date(s) on which the entitlement arises,</li> <li>○ Time limit after which entitlement to dividend lapses and an indication of the person in whose favour the lapse operates,</li> <li>○ Dividend restrictions and procedures for non-resident holders,</li> <li>○ Rate of dividend or method of its calculation, periodicity and cumulative or non-cumulative nature of payments.</li> </ul> <ul style="list-style-type: none"> <li>● Voting rights.</li> <li>● Pre-emption rights in offers for subscription of securities of the same class.</li> <li>● Right to share in the issuer's profits.</li> <li>● Rights to share in any surplus in the event of liquidation.</li> <li>● Redemption provisions.</li> <li>● Conversion provisions.</li> </ul>	
3.9 (equity securities and depository receipts)	Statement on the existence of national legislation on takeovers applicable to the issuer and the possibility for frustrating measures if any.	

	Brief description of the shareholders' rights and obligations in case of mandatory takeover bid, squeeze-out or sell-out rules in relation to the securities).	
3.10 (equity securities and depository receipts)	An indication of public takeover bids by third parties in respect of the issuer's equity, which have occurred during the last financial year and the current financial year. The price or exchange terms attaching to such offers and the outcome thereof must be stated.	
	<b>NON EQUITY SECURITIES</b>	
3.11 (non-equity securities)	The relative seniority of the securities in the issuer's capital structure in the event of insolvency, including, where applicable, information on the level of subordination of the securities and the potential impact on the investment in the event of a resolution under Directive 2014/59/EU.	
3.12 (non-equity securities)	A description of the rights attached to the securities, including any limitations of those rights.	
3.13 (non-equity securities)	<p>The nominal interest rate, and</p> <p>Provisions relating to interest payable:</p> <ul style="list-style-type: none"> <li>• the date from which interest becomes payable and the due dates for interest.</li> <li>• the time limit on the validity of claims to interest and repayment of principal</li> </ul> <p>Where the rate is not fixed:</p> <ul style="list-style-type: none"> <li>• A statement setting out the type of underlying;</li> <li>• Description of the underlying on which it is based and of the method used to relate the two;</li> <li>• An indication where information about the past and the further performance of the underlying and its volatility can be obtained;</li> <li>• A description of any market disruption or settlement disruption events that affect the underlying;</li> <li>• Adjustment rules with relation to events concerning the underlying;</li> </ul>	

	<ul style="list-style-type: none"> <li>Name of the calculation agent;</li> <li>If the security has a derivative component in the interest payment, provide a clear and comprehensive explanation to help investors understand how the value of the underlying instrument(s), especially under the circumstances when the risks are most evident.</li> </ul>	
3.14 (non-equity securities)	<p>Maturity date</p> <p>Arrangements for the amortisation of the loan, including the repayment procedures.</p> <p>Where advance amortisation is contemplated, on the initiative of the issuer or of the holder, it shall be described, stipulating amortisation terms and conditions.</p>	
3.15 (non-equity securities)	<p>An indication of yield.</p> <p>Describe the method whereby that yield is calculated in summary form.</p>	
3.16 (non-equity securities)	<p>Representation of debt securities holders including an identification of the organisation representing the investors and provisions applying to such representation. Indication of the website where the public may have free access to the contracts relating to these forms of representation.</p>	
3.17 (non-equity securities)	<p>Where there is no offer, the issue date of the securities.</p>	
	<b>DEPOSITORY RECEIPTS</b>	
3.18 (depository receipts)	<p>If different from the issuer of the underlying shares, Name, registered office, Legal Entity Identifier and principal administrative establishment if different from the registered office of the issuer of the depository receipts.</p>	
3.19 (depository receipts)	<p>If different from the issuer of the underlying shares, date of incorporation and length of life of the issuer of the issuer of the depository receipts, except where indefinite.</p>	
3.20 (depository receipts)	<p>If different from the issuer, Legislation under which the issuer of the issuer of the depository receipts operates and legal form which it has adopted under that legislation.</p>	

3.21 (depository receipts)	Indicate the number of shares represented by each depository receipts	
3.22 (depository receipts)	The issue date of the underlying shares if new underlying shares are being created for the issue of depository receipts and they are not in existence at the time of issue of the depository receipts.	
3.23 (depository receipts or )	Where applicable, the potential impact on the investment in the event of resolution under the Directive 2014/59/EU (BRRD).	
3.24 (depository receipts)	A description of the type and class of depository receipts being offered and / or admitted to trading	
3.25 (equity securities and depository receipts)	Legislation under which the depository receipts have been created.	
3.26 (depository receipts)	An indication whether the depository receipts are in registered or bearer form and whether the depository receipts are in certificated or book-entry form. In the latter case, include the name and address of the entity in charge of keeping the records.	
3.27 (depository receipts)	Currency of the depository receipts;	
3.28 (depository receipts)	Describe the rights attaching to the depository receipts, including any limitations of these attached to the depository receipts and the procedure if any for the exercise of these rights.	
3.29 (depository receipts)	<p>If the dividend rights attaching to depository receipts are different from the dividend rights disclosed in relation to the underlying shares, disclose the following about dividend rights:</p> <ul style="list-style-type: none"> <li>• fixed date(s) on which the entitlement arises;</li> <li>• time limit after which entitlement to dividend lapses and an indication of the person in whose favour the lapse operates;</li> </ul>	

	<ul style="list-style-type: none"> <li>• dividend restrictions and procedures for non-resident holders;</li> <li>• rate of dividend or method of its calculation, periodicity and cumulative or non-cumulative nature of payments.</li> </ul>	
3.30 (depository receipts)	<p>If the voting rights attaching to the depository receipts are different from the voting rights disclosed in relation to the underlying shares disclose the following about those rights:</p> <ul style="list-style-type: none"> <li>• voting rights;</li> <li>• pre-emption rights in offers for subscription of securities of the same class;</li> <li>• right to share in the issuer's profits;</li> <li>• rights to share in any surplus in the event of liquidation;</li> <li>• redemption provisions;</li> <li>• conversion provisions.</li> </ul>	
3.31 (depository receipts)	<p>Describe the exercise of and benefit from rights attaching to the underlying shares, in particular voting rights, the conditions on which the issuer of the depository receipts may exercise such rights, and measures envisaged to obtain the instructions of the depository receipt holders – and the right to share in profits and any liquidation surplus which are not passed on to the holder of the depository receipt.</p>	
3.32 (depository receipts)	<p>The expected issue date of the depository receipts.</p>	
3.33 (depository receipts)	<p>A description of any restrictions on the free transferability of the depository receipts.</p>	
3.34 (depository receipts)	<p>A warning that the tax legislation of the investor's Member State and of the issuer's Member State of incorporation may have an impact on the income received from the depository receipts.</p> <p>Information on the taxation treatment of the depository receipts where the proposed investment attracts a tax regime specific to that type of investment.</p>	
3.35 (depository receipts)	<p>Bank or other guarantees attached to the depository receipts and intended to underwrite the issuer's obligations.</p>	

3.36 (depository receipts)	Possibility of obtaining the delivery of the depository receipts into original shares and procedure for such delivery.	
<b>4</b>	<b>TERMS AND CONDITIONS OF THE OFFER</b>	
4.1	<b>Conditions, offer statistics, expected timetable and action required to apply for the offer/allotment</b>	
4.1.1	Conditions to which the offer is subject.	
4.1.2	The time period, including where applicable any possible amendments, during which the offer or allotment will be open and a description of the application process together with the issue date of new securities.	
4.1.3.	Details of the minimum and/or maximum amount of application	
4.1.4.	Method and time limits for paying up the securities and for delivery of the securities.	
4.1.5.	A full description of the manner and date in which results of the offer are to be made public.	
4.1.6.	An indication of as to whether or not, when and under which circumstances shareholders have a withdrawal right as well as the procedure for its exercise and how the value of the shares is to be determined for the exercise of such right.	
	<b>EQUITY SECURITIES OR DEPOSITORY RECEIPTS</b>	
4.1.7 (equity securities or depository receipts)	Total amount of the issue/offer Where in the case of the takeover, the amount of the issue/offer is not fixed, an indication of the amount of securities to be offered (if available) and a description of the arrangements and time for announcing to the public the definitive amount of the offer.	
4.1.8. (equity securities or depository receipts)	An indication of when, and under which circumstances, the offer may be revoked or suspended and whether revocation can occur after dealing has begun.	
4.1.9 (equity securities or depository receipts)	An indication of the period during which an application may be withdrawn, provided that investors are allowed to withdraw their subscription.	

	<b>NON-EQUITY SECURITIES</b>	
4.1.10. (non-equity securities)	<p>Total amount of the issue/offer;</p> <p>Where in the case of the takeover, the amount of the issue/offer is not fixed, an indication of the amount of securities to be offered (if available) and a description of the arrangements and time for announcing to the public the definitive amount of the offer.</p> <p>Where the maximum amount of securities to be offered cannot be provided in the Exempted Document, the latter shall specify that acceptances of the purchase or subscription of securities may be withdrawn for not less than two working days after the amount of securities to be offered to the public has been filed.</p>	
4.2	<b>Acceptance of offer</b>	
	<b>EQUITY SECURITIES OR DEPOSITARY RECEIPTS</b>	
4.2.1. (equity securities or depository receipts)	To the extent known to the issuer, an indication of whether major shareholders or members of the issuer's management, supervisory or administrative bodies intended to accept the offer, or whether any person with more than five per cent of the issuer's share capital intends to accept the offer.	
<b>5</b>	<b>ADMISSION TO TRADING AND DEALING ARRANGEMENTS</b>	
5.1	<p>An indication as to whether the securities offered/issued are or will be the object of an application for admission to trading, with a view to their distribution in a regulated market, other equivalent third country markets or an SME Growth Market with indication of the markets in question.</p> <p>If known, the earliest dates on which the securities will be admitted to trading.</p>	
	<b>EQUITY SECURITIES OR DEPOSITARY RECEIPTS</b>	
5.2 (equity securities or depository receipts)	All the regulated markets equivalent third country markets or SME Growth Markets on which, to the knowledge of the issuer, securities of the same class of the securities to be offered or admitted to trading are already admitted to trading.	

5.3 (equity securities or depository receipts)	If simultaneously or almost simultaneously with the application for admission of the securities to a regulated market, securities of the same class are subscribed for or placed privately or if securities of other classes are created for public or private placing, give details of the nature of such operations and of the number, characteristics and price of the securities to which they relate.	
5.4 (equity securities or depository receipts)	Details of the entities which have a firm commitment to act as intermediaries in secondary trading, providing liquidity through bid and offer rates and description of the main terms of their commitment.	
5.5	Stabilisation: in case of an admission to trading on a regulated market, third country market, SME Growth Market or MTF where an issuer or a selling shareholder has granted an over-allotment option or it is otherwise proposed that price stabilising activities may be entered into in connection with an offer:	
5.5.1	The fact that stabilisation may be undertaken, that there is no assurance that it will be undertaken and that it may be stopped at any time.	
5.5.1.1	The fact that stabilisation transactions aim at supporting the market price of the securities during the stabilisation period.	
5.5.2	The beginning and the end of the period during which stabilisation may occur,	
5.5.3	The identity of the stabilisation manager for each relevant jurisdiction unless this is not known at the time of publication,	
5.5.4	The fact that stabilisation transactions may result in a market price that is higher than would otherwise prevail.	
5.5.5	The place where the stabilisation may be undertaken including, where relevant, the name of the trading venue(s).	
5.6	Over-allotment and 'green shoe': In case of an admission to trading on a regulated market or an MTF: <ul style="list-style-type: none"> <li>a) The existence and size of any over-allotment facility and/or 'green shoe';</li> <li>b) The existence period of the over-allotment facility and/or 'green shoe';</li> <li>c) Any conditions for the use of the over-allotment facility or exercise of the 'green shoe'.</li> </ul>	

	<b>RETAIL NON-EQUITY SECURITIES</b>	
5.7 (non-equity securities)	All the regulated markets, equivalent third country markets or SME Growth Markets on which, to the knowledge of the issuer, securities of the same class of the securities to be offered or admitted to trading are already admitted to trading.	
5.8 (non-equity securities)	The issue price of the securities.	
5.9 (non-equity securities)	An estimate of the total expenses related to the admission to trading.	
<b>6</b>	<b>SELLING SECURITIES HOLDERS</b>	
	<b>EQUITY SECURITIES OR DEPOSITORY RECEIPTS</b>	
6.1 (equity securities and depository receipts)	Name and business address of the person or entity offering to sell the securities (in the case of Depository Receipts, the underlying shares), the nature of any position office or other material relationship that the selling persons has had within the past three years with the issuer or any of its predecessors or affiliates.	
6.2 (equity securities and depository receipts)	The number and class of securities being offered by each of the selling security holders.	
6.3 (equity securities and depository receipts)	Where a major shareholder is selling the securities, the size of its shareholding both before and immediately after the issuance.	
6.4 (equity securities and depository receipts)	<p><b>Lock-up agreements</b></p> <p>The parties involved.</p> <p>Content and exceptions of the agreement.</p> <p>Indication of the period of the lock up.</p>	

<b>7</b>	<b>EXPENSE OF THE ISSUE/OFFER</b>	
	<b>EQUITY SECURITIES OR DEPOSITORY RECEIPTS</b>	
7.1 (equity securities and depository receipts)	The total net proceeds and an estimate of the total expenses of the issue/offer.	
<b>8</b>	<b>DILUTION</b>	
	<b>EQUITY SECURITIES OR DEPOSITORY RECEIPTS</b>	
8.1 (equity securities and depository receipts)	A comparison of the net asset value per share as of the date of the latest balance sheet before the takeover, merger or division (selling offer and / or capital increase) and the issue price per share within that takeover, merger or division	
8.2 (equity securities and depository receipts)	An indication of the dilution (including the dilution in voting rights) that existing shareholders of the issuer will experience as a result of the offer should be presented.	
8.3 (depository receipts)	Additional information where there is a simultaneous or almost simultaneous offer or admission to trading of the same class of underlying shares as those underlying shares over which the depository receipts are being issued.	
8.4 (depository receipts)	If simultaneously or almost simultaneously with the creation of the depository receipts for which admission to a regulated market is being sought underlying shares of the same class as those over which the depository receipts are being issued are subscribed for or placed privately, details are to be given of the nature of such operations and of the number and characteristics of the underlying shares to which they relate.	
8.5 (depository receipts)	Disclose all regulated markets or equivalent markets on which, to the knowledge of the issuer of the depository receipts, underlying shares of the same class as those over which the depository receipts are being issued are offered or admitted to trading.	
8.6 (depository receipts)	To the extent known to the issuer of the depository receipts, indicate whether major shareholders, members of the administrative, management or supervisory bodies intended to subscribe in the offer, or whether any person intends to subscribe for more than five per cent of the offer.	

<b>9</b>	<b>ADDITIONAL INFORMATION</b>	
9.1.	If advisors connected with an issue are mentioned in the Exempted Document, a statement of the capacity in which the advisors have acted.	
	<b>RETAIL NON-EQUITY SECURITIES</b>	
9.2 (non-equity securities)	Credit ratings assigned to the securities at the request or with the co-operation of the issuer in the rating process. A brief explanation of the meaning of the ratings if this has previously been published by the rating provider.	

#### **QUESTIONS FOR CONSULTATION**

Question 16: Do you agree with the proposal relating to the Minimum Information Content Securities Section for the Exempted Document? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

Question 17: Do you believe that information concerning placing and underwriting is necessary in the context of offers to public connected with takeovers, mergers or divisions? If yes, please provide your reasoning.

Question 18: Do you agree that Minimum Information Content Securities Section should include information items concerning non-equity securities issuances connected with takeovers, mergers and divisions? If not, please provide your reasoning.

Question 19: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs on any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, IT costs, etc.) and nature (one-off vs. ongoing costs).

## 5.5. Appendix IV – Minimum Information Content Description and Impact of the Takeover, Merger or Division Section

104. Appendix IV sets out the minimum information disclosure items concerning the description and impact that a takeover, merger or division may have on the issuer organisation structure and financial information.
105. ESMA considered that the impact of a takeover, merger or division may have on the issuer may be illustrated by including information concerning the new entity or the assets and liabilities which will be combined with or transferred to the issuer once the transaction becomes effective. ESMA took this approach because, in most cases, the Exempted Document may need to be published before the transaction effectively occurs, and thus, at that moment, there is not yet information concerning the combined entity and it could be burdensome and costly to produce such information only for the purpose of the Exempted Document. Therefore, in order to assess the rationale of the transaction, its merits and underlying risks, investors should consider both information concerning the issuer and information pertaining to the (to be) acquired/ (to be) merged company or assets and liabilities transferred. The sum of both should provide a fair depiction of the company resulting from a takeover, merger or division between the issuer issuing or admitting securities and another entity or the assets and liabilities transferred.
106. In order to illustrate the impact that a takeover, merger or division may have on the issuer, ESMA followed the approach considered in the previous sections of this Consultation Paper and took as a starting point Annex 12 of the ESMA Technical Advice on format and content of prospectus which sets out the information requirements of the *Pro-forma Information Building Block* in order to assess what other information would be deemed necessary in order to allow an informed decision of investors about the merits and the risks attached to a takeover, merger or division.

### Description of the Takeover, Merger, Division

107. As mentioned above, offers of securities to the public or admissions to trading as result of mergers, takeovers or divisions are often complex business deals with potential high impact on both the organisation structures of the issuer and the financial information to be provided in the context of an offer of securities to the public/admission to trading. As such, ESMA believes that information concerning the merits/objectives of the transaction is key together with information on any expected synergies.
108. Therefore, the Exempted Document should contain comprehensive and sufficient information describing the transaction, its main terms and conditions and legal basis. Information about the exchange ratio employed to determine the share exchange ratio in case of a division or the exchange ratio in the situation of an exchange offer should also include the valuation methods and main assumptions used.

### Impact of the Takeover, Merger or Division

109. With regards to the potential impact of the transaction on the issuer, the Exempted Document should require information items concerning the (to be) acquired/ (to be)

merged company or in case of a division information regarding the assets and liabilities transferred. Moreover, ESMA believes that the Exempted Document should present information concerning the main activities, products sold or principal markets where the (to be) acquired/merged has operations.

110. In addition, the Exempted Document should contain financial information concerning the (to be) acquired/ (to be) merged company, such as a brief description of the financial performance of the (to be) acquired/ (to be) merged company, including information on operating results, cash-flows and information concerning its financing structure. This information should be consistent with the accounting principles applied by the issuer in its last or next financial statements. This would allow investors to better assess the financial impact of the transaction on the financial information of the issuer. In this respect, ESMA notes that where the (to be) acquired/ (to be) merged company (or its assets and liabilities) will become part of the issuer's next consolidated financial statements, intragroup transactions between the issuer and acquired/merged company should be eliminated.
111. Information about the maturity, conditions of the financing structure of the (to be) acquired/ (to be) merged company is normally important for investors in order to understand, for instance, the liquidity risks to which the issuer may be exposed in the future. Where these risks are relevant, these should be included in the risk factors subsection.
112. Where in the case of divisions, the assets and liabilities transferred to the recipient company constitute a segment or a business unit, similar information as required on the (to) be acquired/ (to be) merged company in the cases of takeovers or mergers should be included in Appendix IV. Where, as result of a division, the assets and liabilities transferred do not constitute a segment or a business unit, the issuer should provide details about the nature of the assets as well as its quantitative impact on the issuer's financial information. If in case of divisions, the issuer which issues/admits securities on regulated market is the spun-off company, section 2 - *Impact of the Takeover/Merger/Division* of Appendix IV is not applicable, as more comprehensive disclosure information appendix is applicable, notably *Appendix II - Issuer Information Section*.
113. Information concerning related party transactions which are relevant in the context of the takeover, merger or division should also be disclosed as well as any information concerning any a legal and arbitration proceedings.
114. Information concerning the (to) be acquired company, (to be) merged company or the assets and liabilities transferred in a context of a division may be presented together with the issuer's information items in the Minimum Information Content on Issuer Section provided that this information is clearly identified as such (for instance, when the issuer presents its information as a combined company – after the takeover, merger, or division is effective). Where this is case, it is considered that the information items required in Appendix IV regarding the impact of the takeover, merger or division (subsection 2 of Appendix IV) are complied with.

115. Where the transaction constitutes a reverse acquisition the financial information concerning (to be) the acquired/ (to be) merged company should refer to the economic/accounting acquired and not the legal acquirer (the company issuing securities). In this respect, we note that this should be consistent with pro-forma information to be provided and the information required in Appendix II which should focus on the economic/accounting acquirer.

#### Pro-forma information

116. In addition to the above requirements concerning the impact of the transaction, the issuer should provide financial information concerning the main changes arising from the takeover, merger and division.
117. Where pro-forma information is not required, narrative information on the main impact of the transaction on the financial information of an issuer should be included.
118. In addition, ESMA is of the view that pro-forma information should be provided within the Exempted Document where the expected impact of the takeover, merger or division represents more than 25% relative to one or more indicators of the size of the issuer's business, for example an increase or decrease of 25% in the total assets, liabilities or profits of the issuer offering or admitting securities. Pro-forma is particularly relevant in the cases of takeovers or mergers where the combined entity resulting from the takeover or merger may differ significantly from the issuer whose securities are being offered. However, its application is not limited to takeovers or mergers. Where the conditions for the pro-forma apply, the Exempted Document should contain pro-forma information as set out in subsection 3 and followings of Appendix IV.
119. In addition and without prejudice to the pro-forma information, where available, the financial statements of the (to be) acquired/ (to be) merged company should also form part of the Exempted Document. While pro-forma information provides useful insight on the effect of the transaction on the issuer's performance or financial position, the financial statements of the (to be) acquired/ (to be) merged company may include relevant narrative information regarding the assets, liabilities, financial position and performance of the company to be controlled/incorporated by the issuer and this may not be captured by the pro-forma information.
120. Therefore, where available and in particular in the case of a takeover or merger, the financial statements of the (to be) acquired or (to be) merged company should also form part of the Exempted Document. In the case of divisions, where the assets and liabilities are transferred to a recipient company which issues or admits securities to a regulated market, there might not exist financial statements; therefore in those cases, the Exempted Document may only contain, where applicable, the carve-out financial statements or information about the assets and liabilities in addition to the pro-forma information.
121. Furthermore, ESMA notes that most of the items included in Appendix IV do not impose additional obligations, as issuers may use the information required under the TOD or the Merger and Division Directive when complying with the requirements set out in the Exempted Document. These items are identified in the third column of Appendix IV.

122. ESMA points out that information included in Appendix IV may be incorporated by reference, for instance, when both the issuer and the acquired/merged company have securities admitted to trading on a regulated market, financial information required in appendix IV may be cross-referred to the published documents.

*Key differences*

123. The key differences in relation to Annex 12 – Pro forma information of ESMA's technical advice on the format and content of the prospectus are the following:

- Requirement to describe the takeover, merger or division, its terms and legal basis including information concerning the purpose/merits of the takeover, merger or division and potential synergies.
- Requirement to include information on consideration exchanged, in particular information concerning the exchange ratio used for the exchange offer or allotment of shares, and the methods used to determine such exchange ratio. Information concerning any contingent consideration agreed that the issuer may need to pay to the owners of the acquiree.
- Requirement to include narrative description of the main impact that a takeover, merger or division may have on the issuer operational activities, such as information concerning the issuer main activities, main products sold, markets as well as financial information concerning the cash-flows, operating results, financing structure of the (to be) acquired/ (to be) merged company or the assets and liabilities that are being transferred to the recipient company in the context of a division.
- Requirement to include information about material firm commitments undertaken/cancelled by the issuer, the (to be) acquired company or (to be) merged company on investments; information regarding the potential material disinvestments as a result of a merger/takeover/division.
- Where the pro-forma information is not required, obligation concerning a narrative and quantitative explanation of expected impact on the financial statements of the issuer, notably the statement of financial position or profit and loss account;
- Requirement to include information, where applicable, concerning related party transactions and legal and arbitration proceedings concerning the (to be acquired)/(to be) merged company or affecting the assets and liabilities transferred in a context of a division;

124. The table below sets out the content of Appendix IV – Minimum Information Content on the Description and Impact of the Takeover/Merger/Division Section that ESMA proposes to include in its technical advice.

ITEM	APPENDIX IV – MINIMUM INFORMATION CONTENT DESCRIPTION AND IMPACT TAKEOVER/ MERGER/DIVISION SECTION	Reference in TOD/ Merger and Division Directive
<b>1</b>	<b>DESCRIPTION OF THE TAKEOVER/MERGER/DIVISION</b>	
<b>1.1</b>	<b>Purpose and objectives of the Takeover, Merger or Division</b>	
1.1.1	Purpose of the takeover, merger or division for the offeror/issuer and its shareholders	
1.1.2	Purpose of the takeover, merger or division for the (to be) acquired/ (to be) merged company or company being divided and its shareholders.	
1.1.3	Description of any anticipated synergies	
<b>1.2</b>	<b>Conditions of the Takeover, Merger or Division</b>	
1.2.1	<p>A description of the takeover, merger or division shall include information on the procedures, terms, and legal basis of the takeover, merger or division, the national law applicable.</p> <p>In cases of mergers and divisions, the Exempted Document shall contain the information required by Articles 91 (2) and 137 (2) of the Merger and Division Directive or indication where this information may be inspected.</p>	Article 6 (a) (c) (f) (h) (n) of TOD
1.2.2	Where applicable, any conditions to which the effectiveness of the takeover/merger/division is subjected to.	
1.2.3	Where applicable, any information on break-up fees which may be payable if the takeover/merger/division does not proceed.	
1.2.4	Indications of any notifications and/or requests for authorisations required by the applicable regulations that the takeover, merger or division is subject to.	
1.2.5	The addressees of the offer or allotment of the securities connected with takeover, merger or division.	
1.2.6	Where applicable, the securities, the class or classes of securities for which the bid is made.	
1.2.7	Timetable of the takeover, merger, division.	Article 6 (j) of TOD

<b>1.3</b>	<b>Consideration</b>	
1.3.1	The consideration offered for each security or class of securities in particular the share exchange ratio and the amount of any cash payment.	Article 6 (d) of TOD
1.3.2	Information concerning any contingent consideration agreed in the context of the takeover, merger or division (e.g. any obligation of the acquirer to transfer additional securities or cash to the former owners of the acquiree if future events occur or conditions are met).	Article 91 (2) (b) and 137 (2) (b) of the Merger and Division Directive
1.3.3	The valuation methods and the assumptions employed to determine the consideration offered for each security or class of securities in particular regarding the exchange ratio.	
1.3.4	Indication of any appraisals/reports prepared by independent experts and information where these reports may be inspected  In case of mergers and divisions, the Exempted Document shall contain the information required by Articles 96 and 142 of the Merger and Division Directive or indication where this information may be inspected.	
<b>2</b>	<b>IMPACT OF THE TAKEOVER/MERGER/DIVISION ON THE ISSUER</b>	
<b>2.1</b>	<b>Information about the (to be) acquired, (to be) merged company or company being divided</b>	
2.1.1	Where applicable, the legal and commercial name of (to be) acquired company, or the (to be) merged company, or the company being divided.	Article 91 (2) (a) and Article 137 (2) (a) of the Merger and Division Directive
2.1.2	The domicile and legal form of the (to be) acquired company, or the (to be) merged company or the company being divided, Legal Entity Identifier, the applicable legislation under which the (to be) acquired company, or the (to be) merged company, or the company being divided operates, its country of incorporation, and the address, telephone number of its registered office (or principal place of business if different from its registered office) and website with a disclaimer that the information on the website does not form part of the Exempted Document.	

<p><b>2.2</b></p>	<p><b>Business Overview of the Acquired/Merged Company or the Assets and Liabilities Transferred to a Recipient Company in a context of a Division</b></p>	
<p>2.2.1</p>	<p>To the extent not covered elsewhere in the Exempted Document, where applicable, brief description of:</p> <ul style="list-style-type: none"> <li>(a) the nature of the (to be) acquired/ (to be) merged company's operations and its principal activities, stating the main categories of products sold and/or services performed in last financial year; and</li> <li>(b) an indication of any significant changes in the products and/or services as a result of the takeover/merger/division.</li> </ul> <p>In case of divisions and where applicable, the description shall refer to assets, liabilities and any underlying activities and operations connected with the division.</p>	
<p>2.2.2</p>	<p>To the extent not covered elsewhere in the Exempted Document, where applicable, a brief description of the principal markets in which the (to be) acquired/(to be) merged company compete including a breakdown of total revenues by operating segment and geographic market for the last financial year.</p> <p>In case of divisions, the description shall refer to the principal markets where the main assets and liabilities are located.</p>	
<p><b>2.3</b></p>	<p><b>Investments/ disinvestments</b></p>	
<p>2.3.1</p>	<p>A description of the (to be) acquired/ (to be) merged company's material investments made since the date of the last published financial statements and which are in progress and / or for which firm commitments have already been made, together with the anticipated source of funds.</p> <p>Information on any material cancelation of future investments previously communicated by the issuer or by the (to be) acquired/ (to be) merged company or company being divided.</p> <p>In so far as is known by the issuer, information on material disinvestments of the issuer and/or to be) acquired/ (to be) merged company such as material sales of subsidiaries or major line of business (after the takeover/merger or division becomes effective).</p>	

2.4	<b>Operating and Financial Review of the Acquired/Merged Company or the Assets and Liabilities Transferred to a Recipient Company in a context of a Division</b>	
2.4.1	<b>Financial condition</b>	
2.4.1.1	<p>To the extent not covered elsewhere in the Exempted Document and to the extent necessary for an understanding of the (to be) acquired / (to be) merged company's business as a whole, a fair review of the development and performance of the (to be) acquired / (to be) merged company business and of its position for the last financial year and, where applicable, interim period, including the causes of material changes.</p> <p>The review shall be a balanced and comprehensive analysis of the development and performance of the (to be) acquired / (to be) merged company business and of its position, consistent with the size and complexity of the business.</p> <p>To the extent necessary for an understanding of the (to be) acquired / (to be) merged company's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial Key Performance Indicators relevant to the particular business. The analysis shall, where appropriate, include references to, and additional explanations of, amounts reported in the annual financial statements.</p> <p>In case of divisions, the information required in the subparagraphs above shall refer to the assets and liabilities transferred as a result of a division if these constitute a segment or a separate business unit.</p> <p>The financial information included in this disclosure item must be prepared in a manner consistent with the applicable financial reporting framework and accounting policies adopted by the issuer in its last or next financial statements.</p>	
2.4.1.2	<p>To the extent not covered elsewhere in the Exempted Document and to the extent necessary for an understanding of the issuer's business as a whole, the review shall also give an indication of :</p> <ul style="list-style-type: none"> <li>c) the (to be) acquired/ (to be) merged company's likely future development;</li> <li>d) activities in the field of research and development.</li> </ul> <p>Where applicable, item 2.3.1 and 2.3.2 concerning the (to be) acquired/ (to be) merged company may be satisfied through the</p>	Annual reports Article 91 (2) (b) and Article 137 (2) (b) and (h) of the Merger and Division Directive

	inclusion of the management report referred to in Articles 19 and 29 of Directive 2013/34/EU.	
2.4.2.	<b>Operating results</b>	
2.4.2.1	<p>To the extent not covered elsewhere in the Exempted Document, information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the (to be) acquired/ (to be) merged company's income from operations, indicating the extent to which income was so affected.</p> <p>In case of divisions, the information required in the first subparagraph shall refer to the assets and liabilities transferred as a result of the division if these constitute a segment or separate business unit.</p> <p>The financial information included in this disclosure item must be prepared in a manner consistent with the applicable financial reporting framework and accounting policies adopted by the issuer in its last or next financial statements.</p>	
<b>2.5</b>	<b>Capital resources</b>	
2.5.1	<p>Where applicable, an explanation of the sources and amounts of and a narrative description of the (to be) acquired/ (to be) merged company's cash flows.</p> <p>In case of divisions, the information required in the first subparagraph shall refer to cash flows originated from the assets and liabilities transferred as a result of the division if these constitute a segment or separate business unit.</p>	
2.5.2	<p>Where applicable, information on the borrowing requirements and funding structure of the (to be) acquired/ (to be) merged company.</p> <p>In case of divisions, the information required in the first paragraph shall refer to the assets and liabilities transferred as a result of the division if these constitute a segment or a business unit.</p>	
<b>2.6</b>	<b>Auditing of historical annual financial statements</b>	
2.6.1	Where applicable, if audit reports on the historical financial information of the (to be) acquired company/ (to be) merged company or the company being divided included in the Exempted Document contain qualifications, modifications of opinion, disclaimers or an emphasis of matter, such qualifications, modifications, disclaimers or emphasis of matter must be reproduced in full and the reasons given.	

<b>2.7</b>	<b>Trend information</b>	
2.7.1	<p>A description of:</p> <ul style="list-style-type: none"> <li>• The most significant recent trends in production, sales and inventory, and costs and selling prices since the end of the last financial year to the date of the Exempted Document;</li> <li>• Any significant change in the financial performance of the group of (to be) acquired/ (to be) merged company since the end of the last financial period for which financial information has been published to the date of the Exempted Document, or provide an appropriate negative statement.</li> </ul> <p>In case of divisions, the information required above shall refer to trends concerning the assets and liabilities transferred as a result of a division if these constitute a business segment or a separate business unit.</p>	
<b>2.8</b>	<b>Related party transactions and conflict of interests</b>	
2.8.1	<p>Details of related party transactions (which for these purposes are those set out in the Standards adopted according to the Regulation (EC) No 1606/2002), that the (to be) acquired/ (to be) merged company has entered into during the period covered by its last historical financial statements information and up to the date of the Exempted Document, must be disclosed in accordance with the respective standard adopted according to Regulation (EC) No 1606/2002 if applicable.</p> <p>If such standards do not apply to the issuer the following information must be disclosed:</p> <ol style="list-style-type: none"> <li>a) The nature and extent of any transactions which are — as a single transaction or in their entirety — material to the issuer. Where such related party transactions are not concluded at arm’s length provide an explanation of why these transactions were not concluded at arm’s length. In the case of outstanding loans including guarantees of any kind indicate the amount outstanding;</li> <li>b) The amount or the percentage to which related party transactions form part of the turnover of the issuer.</li> </ol> <p>Where applicable, information concerning details of related party transactions that the (to be) acquired/ (to be) merged company has entered into shall include details on technical and commercial agreements signed between the (to be) acquired/ (to be) merged company and the issuer.</p>	

	In case of divisions, details (if any) of related party transactions shall include information about the nature of the future relationship between the spun-off company and the issuer.	
2.8.2	To the extent not covered elsewhere in the Exempted Document, details on any material conflict of interests that the issuer, the (to be) acquired/merged company or the company being divided and any of its shareholders may have in connection with the takeover, merger or division.	
<b>2.9</b>	<b>Legal and arbitration proceedings</b>	
2.9.1	<p>To the extent known, information on any governmental, legal or arbitration proceedings (including any such proceedings which are pending or threatened of which the issuer is aware), during a period covering at least the previous 12 months which may have, or have had in the recent past significant effects on the (to be) acquired/ (to be) merged company/group and/or group's (including the) financial position or profitability, or provide an appropriate negative statement.</p> <p>In case of divisions, the information on legal and arbitration proceedings should refer to the assets and liabilities object of the division.</p>	
<b>2.10</b>	<b>Strategy and objectives</b>	
2.10.1	<p>The issuer's shall provide a brief description of its intentions with regards to the future business following the takeover, merger, or division in so far as how the issuer operating activities are/will be affected.</p> <p>Where applicable, this information shall include a description of the business prospects, any restructuring and/or reorganization; details of the plans drawn up by the companies participating in the takeover merger or division, with particular reference to which part of these plans is due to be implemented in whole or in part in the next 12 months.</p>	Article 6 (i) of the TOD.
<b>3.</b>	<b>PRO FORMA FINANCIAL INFORMATION</b>	
3.1	<p><b>Pro forma financial information</b></p> <p>In the case of a significant gross change, a description of how the takeover, merger or division might have affected the assets and</p>	

	<p>liabilities and earnings of the issuer, had the takeover, merger or division been undertaken at the commencement of the period being reported on or at the date reported. This pro forma financial information is to be presented as set out in items 4 to 6 and must include the information indicated therein.</p> <p>This requirement will normally be satisfied by the inclusion of pro forma financial information.</p> <p>Pro forma financial information must be accompanied by a report prepared by independent accountants or auditors.</p>	
3.2	<p>Where pro forma financial information is not applicable, the issuer shall provide narrative and financial information about the material impacts that the merger, takeover, division will have in the issuer's financial statements. This narrative and financial information does not require auditing.</p> <p>The narrative and financial information must be prepared in a manner consistent with the applicable financial reporting framework and accounting policies adopted by the issuer in its last or next financial statements. Where this information is audited, this indication shall be given as well as information about the auditor.</p>	
<b>4.</b>	<b>CONTENTS OF PRO FORMA FINANCIAL INFORMATION</b>	
	<p>Pro-forma financial information shall consist of</p> <p>(a) an introduction setting out:</p> <ol style="list-style-type: none"> <li>1. the purpose to which the pro forma financial information has been prepared, including a description of the takeover, merger and division or significant commitment and businesses or entities involved,</li> <li>2. the period and/or date covered by the pro forma financial information and</li> <li>3. an explanation that it illustrates the impact of the takeover, merger or division as if the takeover, merger or division had been undertaken at an earlier date selected for purposes of the illustration, and that this hypothetical compilation may differ from the entity's actual financial position or results</li> </ol> <p>(b) profit and loss account, a balance sheet or both, depending on the circumstances presented in a columnar format composed of:</p>	<p>With respect to subparagraph (d), Article 97(1) (b) and 143 (1) (b) of the Merger and Division Directive requires</p> <p>Three Years Financial statements of the companies involved in a merger/division</p>

	<ol style="list-style-type: none"> <li>1. historical unadjusted information;</li> <li>2. accounting policies adjustments, if necessary;</li> <li>3. pro forma adjustments; and</li> <li>4. resulting pro forma financial information in the final column;</li> </ol> <p>(c) accompanying notes explaining</p> <ol style="list-style-type: none"> <li>1. the sources from which the unadjusted financial information has been extracted and whether or not an audit or review report on the source has been published;</li> <li>2. the basis upon which the pro forma financial information is prepared;</li> <li>3. source and explanation for each adjustment; and</li> <li>4. whether each adjustment in respect of a pro forma profit and loss statement is expected to have a continuing impact on the issuer or not.</li> </ol> <p>(d) If applicable, the financial information and/or interim financial information of the (to be) acquired businesses or entity (ies) used in the preparation of the pro-forma information must be included in the Exempted Document. Similarly, in the case of a division, the financial information of the company being divided should be included.</p>	
<b>5.</b>	<b>PRINCIPLES IN PREPARING AND PRESENTING PRO FORMA FINANCIAL INFORMATION</b>	
5.1	<p>Pro forma financial information shall be labelled as such to distinguish it from historical financial information.</p> <p>The pro forma financial information must be prepared in a manner consistent with the applicable financial reporting framework and accounting policies adopted by the issuer in its last or next financial statements:</p>	
5.2	<p>Pro forma information may only be published in respect of:</p> <ol style="list-style-type: none"> <li>(a) the last completed financial-year and/or</li> <li>(b) the most recent interim period for which relevant unadjusted information has been published or are included in the Exempted Document.</li> </ol>	
5.3	<p>Pro forma adjustments must:</p> <ol style="list-style-type: none"> <li>(a) be clearly shown and explained;</li> </ol>	

	<p>(b) present all significant effects directly attributable to the takeover, merger or division; and</p> <p>(c) be factually supportable.</p>	
<b>6.</b>	<b>REQUIREMENTS FOR ADDITIONAL INFORMATION</b>	
	<p>The Exempted Document shall include a report prepared by the independent accountants or auditors stating that in their opinion:</p> <ul style="list-style-type: none"> <li>- the pro forma financial information has been properly compiled on the basis stated and</li> <li>- that basis is consistent with the accounting policies of the issuer.</li> </ul>	

#### QUESTIONS FOR CONSULTATION

Question 20: Do you agree with the proposal relating to the Minimum Information Content on Description and Impact of the Takeover, Merger or Division Section? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

Question 21: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, IT costs, etc.) and nature (one-off vs. ongoing costs).

#### General Questions:

Question 22: Taking into consideration the scope of the exemption as described in this Consultation Paper, would you consider that the Technical Advice provides investors with useful and relevant information when an offer of securities to the public or admission to trading on regulated market is connected with a takeover, merger or division? Please provide your reasoning.

Question 23: Taking into consideration that the Exempted Document will not be subject to scrutiny and approval pursuant to Article 20 of the PR, in which cases would you consider that issuers may opt for a voluntary prospectus instead of publishing an Exempted Document? Please provide your reasoning.

## Annex I: List of questions for consultation

### *Operative Provisions and Definitions*

- Question 1: Are the definitions proposed to be carried over to the new regime, and new definitions proposed adequate? Should any additional definitions be added? Please provide your reasoning.
- Question 2: Do you agree to include a definition of a reverse acquisition as defined in IFRS 3 Business Combinations as endorsed by the EU into the technical advice (including in the situations where IFRS are not applicable). If not, please provide your reasoning.
- Question 3: Do you agree that a more comprehensive disclosure regime should apply if the takeover, merger or division transaction falls within the concept of reverse acquisition? If not, please provide your reasoning.
- Question 4: Do you agree to include an overarching principle guiding the content of the Exempted Document as included in Article B in L2 provisions? If not, please provide your reasoning.
- Question 5: Do you agree to carry over the criteria included in Article 14 (1) of the PR into ESMA Technical Advice in order to prescribe the use of the Minimum Information Content Simplified disclosure regime for the Issuer Section? If not, please provide your reasoning.
- Question 6: Do you agree to carry over the provision included in Article 19 of the PR in relation to incorporation by reference into the ESMA Technical Advice? If not, please provide your reasoning.
- Question 7: Do you agree the issuers should be able to incorporate by reference the information required by Takeover Directive or Merger and Division Directive into the Exempted Document? If not, please provide your reasoning.
- Question 8: Do you agree to carry over the provisions included in Article 27 of the PR in relation to language into the Technical Advice without including a summary of the Exempted Document? If not, please provide your reasoning.
- Question 9: Do you agree that the Exempted Document should not require the publication of a summary translated into the language of the competent authority (including in cross-border transactions directed at retail investors)? If not, please provide your reasoning.
- Question 10: Do you agree with Article F of this technical advice concerning Complex financial history and significant financial commitment into the technical advice? If not, please provide your reasoning.
- Question 11: What is the overall impact of the above technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that the proposed technical advice will pose additional costs for issuers, please

provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

*Appendix I – Minimum Information Content Simplified Disclosure Regime for the Issuer Section*

Question 12: Do you agree with the proposal relating to the Minimum Information Content Simplified Disclosure Regime on Issuer Information Section set out in Appendix I for the Exempted Document (when the issuer has already securities admitted to regulated market or SME Growth Market? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

Question 13: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

*Appendix II – Minimum Information Content Issuer Section*

Question 14: Do you agree with the proposal relating to the Minimum Information Content Issuer Section as set out in Appendix II for the Exempted Document (when the issuer is not admitted to trading on a regulated market or to an SME Growth Market)? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

Question 15: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).

*Appendix III – Minimum Information Content Securities Section*

Question 16: Do you agree with the proposal relating to the Minimum Information Content Securities Section for the Exempted Document? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

Question 17: Do you believe that information concerning placing and underwriting is necessary in the context of offers to public connected with takeovers, mergers or divisions? If yes, please provide your reasoning.

Question 18: Do you agree that Minimum Information Content Securities Section should include information items concerning non-equity securities issuances

connected with takeovers, mergers and divisions? If not, please provide your reasoning.

Question 19: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs on any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, IT costs, etc.) and nature (one-off vs. ongoing costs).

*Appendix IV – Minimum Information Content Description and Impact of Takeover, Merger and Division*

Question 20: Do you agree with the proposal relating to the Minimum Information Content on Description and Impact of the Takeover, Merger or Division Section? If not, which items of information do you believe may be deleted or included? Please provide your reasoning.

Question 21: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for any stakeholder, please provide an estimate and indicate their different type (e.g. extra staff costs, IT costs, etc.) and nature (one-off vs. ongoing costs).

*General Questions:*

Question 22: Taking into consideration the scope of the exemption as described in this Consultation Paper, would you consider that the Technical Advice provides investors with useful and relevant information when an offer of securities to the public or admission to trading on regulated market is connected with a takeover, merger or division? Please provide your reasoning.

Question 23: Taking into consideration that the Exempted Document will not be subject to scrutiny and approval pursuant to Article 20 of the PR, in which cases would you consider that issuers may opt for a voluntary prospectus instead of publishing an Exempted Document? Please provide your reasoning.

## Annex II: List of minimum content of the offer document of Takeover bid

<b>Offer document established by Article 6 (3) of the Takeover Directive</b>
(a) the terms of the bid;
(b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;
(c) the securities or, where appropriate, the class or classes of securities for which the bid is made;
(d) the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid;
(e) the compensation offered for the rights which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it;
(f) the maximum and minimum percentages or quantities of securities which the offeror undertakes to acquire;
(g) details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company;
(h) all the conditions to which the bid is subject;
(i) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;
(j) the time allowed for acceptance of the bid;
(k) where the consideration offered by the offeror includes securities of any kind, information concerning those securities;
(l) information concerning the financing for the bid;
(m) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company;
(n) the national law which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts.

## Annex III: List of minimum content of the draft terms of merger

<b>Draft terms of merger - Article 91 (2) of the Merger and Division Directive</b>
(a) the type, name and registered office of each of the merging companies;
(b) the share exchange ratio and the amount of any cash payment;
(c) the terms relating to the allotment of shares in the acquiring company;
(d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;
(e) the date from which the transactions of the company being acquired shall be treated for accounting purposes as being those of the acquiring company;
(f) the rights conferred by the acquiring company on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;
(g) any special advantage granted to the experts referred to in Article 96(1) and members of the merging companies' administrative, management, supervisory or controlling bodies.
<b>Availability of documents for inspection by shareholders - Article 97 (1) of the Merger and Division Directive</b>
(a) the draft terms of merger;
(b) the annual accounts and annual reports of the merging companies for the preceding three financial years;
(c) where applicable, an accounting statement drawn up on a date which shall not be earlier than the first day of the third month preceding the date of the draft terms of merger, if the latest annual accounts relate to a financial year which ended more than six months before that date;
(d) where applicable, the reports of the administrative or management bodies of the merging companies provided for in Article 95;
(e) where applicable, the report referred to in Article 96(1).

## Annex IV: List of minimum content of the draft terms of division

<b>Draft terms of division- Article 137 (2) of Merger and Division Directive</b>
(a) the type, name and registered office of each of the companies involved in a division;
(b) the share exchange ratio and the amount of any cash payment;
(c) the terms relating to the allotment of shares in the recipient companies;
(d) the date from which the holding of such shares entitles the holders to participate in profits and any special conditions affecting that entitlement;
(e) the date from which the transactions of the company being divided shall be treated for accounting purposes as being those of one or other of the recipient companies;
(f) the rights conferred by the recipient companies on the holders of shares to which special rights are attached and the holders of securities other than shares, or the measures proposed concerning them;
(g) any special advantage granted to the experts referred to in Article 142(1) and members of the merging companies' administrative, management, supervisory or controlling bodies.
(h) the precise description and allocation of the assets and liabilities to be transferred to each of the recipient companies;
(i) the allocation to the shareholders of the company being divided of shares in the recipient companies and the criterion upon which such allocation is based.
<b>Availability of documents for inspection by shareholders - Article 143 (1) of Merger and Division Directive</b>
(a) the draft terms of division;
(b) the annual accounts and annual reports of the companies involved in the division for the preceding three financial years;
(c) where applicable, an accounting statement drawn up on a date which shall not be earlier than the first day of the third month preceding the date of the draft terms of division, if the latest annual accounts relate to a financial year which ended more than six months before that date;
(d) where applicable, the reports of the administrative or management bodies of the companies involved in the division provided for in Article 141;
(e) where applicable, the report referred to in Article 142.

## Annex V: Mandate to deliver technical advice to the European Commission

REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE REGULATION 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 ON A REGULATED MARKET

(UPDATED 26.01.2018)

With this mandate to ESMA, the Commission seeks ESMA's technical advice on possible delegated acts to supplement certain elements of the Regulation 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 on a regulated market (the "**Regulation**")<sup>25</sup>. These delegated acts should be adopted in accordance with Article 290 of the Treaty of the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final policy decision.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**")<sup>26</sup>, the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**")<sup>27</sup>, and the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on better law-making (the "**Interinstitutional Agreement**")<sup>28</sup>.

This request for technical advice will be made available on DG FISMA's website once it has been sent to ESMA.

The formal mandate consists of two parts.

### Part I

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<sup>25</sup> Reference is made to the text approved by the European Parliament on 5 April 2017 and adopted by the Council on 16 May 2017 (<http://data.consilium.europa.eu/doc/document/PE-63-2016-INIT/en/pdf>).

<sup>26</sup> Communication of 9.12.2009. COM (2009) 673 final.

<sup>27</sup> 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. OJ L331/84, 15.12.2010, p.84.

<sup>28</sup> Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making, OJ L123/1, 12.05.2016, p.1.

The technical advice for the following delegated acts should be received by the Commission within 13 months following the receipt of this mandate:

a) The measures specifying the criteria for the scrutiny and review of the universal registration document and any amendments thereto, and the procedures for the approval and filing of those documents as well as the conditions under which the status of frequent issuer is lost (Article 9(14) of the Regulation);

b) The measures specifying the format of the prospectus, the base prospectus and the final terms, and the schedules defining the specific information which must be included in a prospectus, including LEIs and ISINs (Article 13(1) of the Regulation);

c) The measures setting out the schedule defining the minimum information contained in the universal registration document (Article 13(2) of the Regulation);

d) The measures specifying the reduced information to be included in the schedules applicable under the simplified disclosure regime for secondary issuances (Article 14(3) of the Regulation);

e) The measures specifying the reduced content and standardised format and sequence for the EU Growth prospectus, as well as the reduced content and standardised format of its specific summary (Article 15(2) of the Regulation);

f) The measures specifying the criteria for the scrutiny of prospectuses, in particular the completeness, comprehensibility and consistency of the information contained therein, and the procedures for the approval of the prospectus (Article 20(11) of the Regulation).

## **Part II**

The technical advice for the following delegated acts should be received by the Commission within 25 months for point g) and 30 months for point h) following the receipt of this mandate:

g) The measures setting out the minimum information content of the documents referred to in points (f) and (g) of paragraph 4 and points (e) and (f) of the first subparagraph of paragraph 5 of Article 1 (documents containing minimum information describing a takeover by way of exchange offer, a merger or a division) (Article 1(7) of the Regulation);

h) The measures establishing general equivalence criteria, based on the requirements laid down in Articles 6, 7, 8 and 13 (equivalence of information requirements imposed by third countries) (Article 29(3) of the Regulation).

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The European Parliament and the Council have been duly informed about this mandate.

The powers of the Commission to adopt delegated acts are subject to Article 44 of the PR.

## 1. CONTEXT

### 1.1 Scope

On 30 November 2015, the Commission published its proposal for a Regulation on the prospectus to be published when securities are offered to the public or admitted to trading. On 7 December 2016 the European Parliament and the Council reached political agreement on a compromise text of the Regulation. This compromise text was endorsed by the COREPER on 20 December 2016 and approved by the ECON Committee of the European Parliament on 25 January 2017.

The main objectives of the Regulation are to reduce the administrative burden for issuers when drawing up a prospectus, in particular for SMEs, frequent issuers of securities and secondary issuances; to make the prospectus a more relevant disclosure tool for potential investors, especially when investing in SMEs; and to avoid overlaps between the EU prospectus and other EU disclosure rules.

Certain elements of the Regulation need to be further specified in delegated acts to be adopted by the Commission no later than 18 months after the entry into force of the Regulation.

The Regulation emphasizes a number of high level principles and objectives the Commission should take into account when exercising its delegated powers, in particular as regards investor protection, transparency in financial markets, proportionality, innovation in financial markets, reduction of administrative burden and cost and easier access to capital markets for issuers, including SMEs<sup>29</sup>.

### 1.2 Principles that ESMA should take into account

In developing its technical advice, ESMA should take account of the following principles:

- **Lamfalussy:** The principles set out in the de Larosière Report and the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- **Internal Market:** The need to ensure the proper functioning of the internal market and to improve the conditions of its functioning, in particular with regards to the financial markets, and a high level of investor protection.
- **Proportionality:** The technical advice should not go beyond what is necessary to achieve the objectives of the Regulation. It should be simple and avoid creating divergent practices by national competent authorities in the application of the Regulation.
- **Comprehensive:** ESMA should provide comprehensive advice on all subject matters covered by the mandate regarding the delegated powers included in the Regulation.
- **Coherent:** While preparing its advice, ESMA should ensure coherence within the wider regulatory framework of the Union.
- **Autonomy in working methods:** ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different strands of work being carried out by ESMA.

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<sup>29</sup> See Recital 83.

- **Consultation:** ESMA is invited to consult market participants (practitioners, consumers and end-users) in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.
- **Evidenced and justified:** ESMA should justify its advice by identifying, where relevant, a range of technical options and undertaking an evidenced assessment of the costs and benefits of each. The results of this assessment should be submitted alongside the advice to assist the Commission in preparing its delegated acts. Where administrative burdens and compliance costs on the side of the industry could be significant, ESMA should where possible quantify these costs.

ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the presentation of the advice produced by ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.

ESMA should provide comprehensive technical analysis on the subject matters described below, covered by the delegated powers included in the relevant provisions of the Regulation, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.

- **Clarity:** The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.
- **Advice, not legislation:** ESMA should provide the Commission with a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology used in the field of securities markets in the Union.
- **Responsive:** ESMA should address to the Commission any question it might have concerning the clarification on the text of the Regulation, which it should consider of relevance to the preparation of its technical advice.

## 2. PROCEDURE

The Commission requests the technical advice of ESMA for the purpose of the preparation of the delegated acts to be adopted pursuant to the legislative act and described in section 3 of this mandate.

The Commission reserves the right to revise and/or supplement this mandate if needed. The technical advice received on the basis of this mandate should not prejudice the Commission's final decision.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"), the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA**

**Regulation")**, and the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on better law-making (the "**Interinstitutional Agreement**").

The European Parliament and the Council have been duly informed about this mandate.

After the delivery of the technical advice by ESMA, in accordance with the Annex to the Interinstitutional Agreement, signed on 13 April 2016, the Commission will continue to consult experts designated by the Member States in the preparation of draft delegated acts.

In accordance with the Annex to the Interinstitutional Agreement, the Commission services will state the conclusions they have drawn from the discussions of any meeting with Member States' experts on draft delegated acts, including how they will take the experts' views into consideration and how they intend to proceed. When they consider this necessary, the European Parliament and the Council may each send experts to these meetings.

The powers of the Commission to adopt delegated acts are subject to Article 44 of the PR.

When preparing and drawing up the delegated act, the Commission will ensure a timely and simultaneous transmission of all documents, including the draft acts, to the European Parliament and the Council at the same time as Member States' experts.

As soon as the Commission adopts delegated acts, it will simultaneously notify to the European Parliament and the Council.

### **3. ISSUES ON WHICH ESMA IS INVITED TO PROVIDE TECHNICAL ADVICE**

#### **3.1 The format of the prospectus, the base prospectus and the final terms, and the schedules defining the specific information which must be included in a prospectus (Article 13(1) of the Regulation)**

Since Directive 2003/71/EC (the Prospectus Directive) will be repealed when the PR comes into application, so will Regulation (EU) No 809/2004 and all the schedules and building blocks it contains. It is therefore necessary to establish a new and complete set of disclosure schedules for different types of securities and issuers.

ESMA is invited to reassess whether the information items currently required in the existing schedules and building blocks are still fit for purpose, provide benefits to investors that are commensurate with their associated cost, or whether they should be deleted. ESMA should also reassess the general order of presentation of the information items, based on the experience gained by competent authorities.

- ESMA is invited to provide technical advice on the format of the prospectus and the schedules defining the specific information which must be disclosed in a prospectus.
- ESMA should follow the "building block approach" established by Regulation (EU) No 809/2004, distinguishing between the schedules for registration documents and those for securities notes, as well as any other appropriate building blocks.
- Specific schedules should be established for different types of securities (shares, non-equity securities with a denomination per unit above or below 100 000 EUR, asset-backed securities, depositary receipts on shares, units or shares of closed-ended collective investment undertakings). In a spirit of simplification, ESMA could explore ways to streamline these schedules in order to reduce the overall number of annexes compared to those currently included in Regulation (EU) No 809/2004.
- ESMA should evaluate whether specific schedules should be established for certain types of issuers such as issuers with a complex financial history, issuers which have made a significant financial commitment, or so-called "specialist issuers". If ESMA concludes that specific schedules are needed for some or all of such types of issuer, it should provide technical advice accordingly.
- ESMA is invited to carry forward the disclosure items currently required by Regulation (EU) No 809/2004 into the new schedules only once it has verified that they represent an appropriate balance between investor protection and cost to the issuers. For example, when disclosed in a prospectus, profit forecasts or estimates (Items 13.2 of Annexes I and X, 9.2 of Annex IV, and 8.2 of Annex XI of Regulation (EU) No 809/2004) must currently be accompanied by a report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer. ESMA is invited to consider the effects of repealing such requirement by assessing the benefits of such report to investors against the cost this entails for issuers to have them produced.
- When drafting the required minimum information items of the prospectus schedules, ESMA should ensure consistency and adequate alignment with the disclosure requirements of other pieces of EU legislation, like Directive 2004/109/EC (TD) and Directive 2013/34/EU<sup>30</sup>, so that issuers may easily incorporate by reference in their prospectus all or parts of the content of documents required under those acts (e.g. management reports, corporate governance statements, remuneration reports). In this respect, ESMA is asked to revisit the drafting of the section on the operating and financial review to ensure that the corresponding contents of the issuer's management report

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<sup>30</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

drawn up under Directive 2004/109/EC can easily be incorporated by reference in that section of the prospectus.

- ESMA is also invited to provide technical advice on the format of the base prospectus and the final terms. In that context, ESMA should preserve the flexibility of the base prospectus regime and aim to considerably decrease compliance costs for issuers using base prospectuses.
- To ensure a consistent application of the Regulation across the Union, ESMA is asked to carry forward in its advice the principles currently laid out in Regulation (EU) No 809/2004 whereby issuers are entitled to include additional information going beyond the information items of the schedules and building blocks, while competent authorities may not require that a prospectus contain information items which are not included in such schedules and building blocks.

### **3.2 The schedule defining the minimum information contained in the universal registration document (Article 13(2) of the Regulation)**

The universal registration document (URD) is designed as an optional shelf registration for companies that expect to frequently issue securities ("frequent issuers"). It is based on the premise that an issuer that draws up, every year, a complete registration document in the form of a URD should benefit from a fast-track approval (5 working days, instead of 10) when the competent authority approves a prospectus consisting of separate documents.

The logic behind the URD is to grant procedural alleviations to those issuers that intend to have frequent recourse to capital markets and choose to commit to draw up a URD every year. In exchange, those issuers will be able to swiftly seize market opportunities.

A URD functions as a registration document that can be used by issuers to offer securities, irrespective of their type (shares, debt, derivatives) or of the nature of the issuer (large company or SME). It follows that the content of a URD must be aligned with the disclosure standard for a share registration document and should be similar, in terms of the range of information covered, to what would be required in the context of an initial public offering on a regulated market.

A URD should be a comprehensive source of reference for investors, consolidating in one single document all information investors may need to know about a particular issuer, and avoiding duplicative disclosures by issuers. The Regulation allows frequent issuers to use the URD as a medium to publish the periodic information required by Directive 2004/109/EC (Transparency Directive).

- ESMA is invited to provide technical advice on the schedule defining the minimum information to be contained in the URD, taking into account recitals 39 to 45 of the Regulation. ESMA should base its work on the disclosure standard appropriate for a share registration document.
- When establishing the schedule defining the content of the URD, ESMA is asked to ensure that the information items that correspond to the content of the annual financial report and half-yearly financial report required under the Transparency Directive (historical financial information, operating and financial review, corporate governance) are drafted in a way that is aligned as much as possible with the relevant parts of Directive 2004/109/EC and Directive 2013/34/EU, enabling frequent issuers to incorporate such information by reference or to disclose them directly in the URD according to the arrangements set out in Article 9(12) and (13) of the Regulation.

### **3.3 The reduced information to be included in the schedules applicable under the simplified disclosure regime for secondary issuances (Article 14(3) of the Regulation)**

A new alleviated prospectus regime will apply for issuers which have had securities admitted to trading on a regulated market or an SME growth market continuously for at least 18 months. When proceeding with a secondary issuance, such issuers will have the option to draw up a simplified prospectus taking into account the information they have already disclosed to the market on an ongoing basis under Regulation (EU) No 596/2014 (MAR)<sup>31</sup>, and where applicable, under Directive 2004/109/EC (TD) or the market rules of the SME growth market.

Issuers who opt to draw up this simplified prospectus are subject to a distinct "disclosure test", set out in Article 14(2) of the Regulation. This article defines the reduced information they are expected to disclose and clarifies that the simplified prospectus should be an autonomous document enabling investors to make an informed investment decision based on a more limited and focused set of relevant information. Recital 48 highlights that the rationale for simplifying the content of the prospectus: information already made available to investors by the issuer under its ongoing disclosure obligations (MAR and TD) need not be repeated in the prospectus.

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<sup>31</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC Text with EEA relevance

- ESMA is invited to provide technical advice on the schedules applicable under the simplified disclosure regime for secondary issuances, taking into account recitals 48 to 50 of the Regulation. ESMA should develop specific draft schedules for both registration documents and securities notes, at least for shares and debt securities. When defining the information items of these schedules, ESMA shall take into account ongoing disclosure requirements of TD and MAR that would enable investors to have access to such items elsewhere than in a prospectus.
- ESMA is invited to clarify what form the concise summary of the relevant information disclosed under Regulation (EU) No 596/2014 (MAR) over the past 12 months<sup>32</sup> should take in order for issuers to adequately inform their potential investors in a relevant and cost-efficient way, without merely repeating the contents of previous disclosures made under MAR.

### **3.4 The content, format and sequence of the EU Growth prospectus including its specific summary (Article 15(2) of the Regulation)**

The EU growth prospectus is designed for offers of securities by three types of issuers: SMEs, companies traded on SME growth markets as long as their market capitalization does not exceed 500M€ and unlisted companies with less than 499 employees that raise below 20M€<sup>33</sup> (jointly referred to as "SMEs and midcaps"). The EU growth prospectus is optional and cannot be used for an admission to trading on a regulated market.

The EU growth prospectus aims at facilitating access to financing on capital markets and reducing the administrative costs of raising capital for SMEs and midcaps. Its information content should be reduced compared to the prospectus used by issuers admitted to regulated markets, without compromising investor protection.

- ESMA is invited to identify the minimum disclosure requirements of the EU growth prospectus and to define the order of presentation of such disclosures (referred to as "sequence" in Article 15(2)).
- ESMA should adopt a "bottom-up approach" and avoid taking the existing Annexes of Regulation (EC) No 809/2004 as a starting point. This means that the exercise should not consist in identifying information which could be omitted from a full prospectus. Instead, ESMA should devise a new, substantially alleviated standard of disclosure from scratch without being guided by the content and format of the prospectus which applies to issuers on regulated markets. In particular, ESMA should take as a benchmark the content of admission documents required by markets where the prospectus obligation does not apply, e.g. the rules of MTFs that cater for SMEs and midcaps.

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<sup>32</sup> Referred to in letter (c) of the second subparagraph of Article 14(3) of the Regulation

<sup>33</sup> As defined in Regulation (EU) 2015/1017 on the European Fund for Strategic Investments.

- When calibrating the content of the EU growth prospectus, ESMA should aim to ensure that SMEs and midcaps are obliged to disclose sufficient information on their strategy and prospects to allow investors to take an investment decision. ESMA should not propose information items which would imply high costs for SMEs with only a low corresponding added value for investors (e.g. items involving statements by independent accountants or auditors).
- There should be a tangible difference between the reduced content of the EU growth prospectus and the content of the prospectus which applies to issuers on regulated markets.
- ESMA should develop specific draft schedules for both registration documents and securities notes, based on the high-level outlines featured in Annexes IV and V of the Regulation. Schedules should be developed at least for shares, debt and derivatives.
- ESMA should develop the minimum disclosure requirements for the EU Growth prospectus, following a standardized sequence.
- To make it easy for SMEs and midcaps to draw up an EU growth prospectus, ESMA should aim to create schedules and headings that allow SMEs to prepare their prospectus with no or little external advice, if they wish to do so.
- ESMA is also invited to advise the Commission on the content and standardized format applying to the specific summary of an EU growth prospectus. Such content should be a considerably shorter version of the summary set out in Article 7, and should not include the key information corresponding to disclosure items which are not required in the EU growth prospectus.

### **3.5 The criteria for the scrutiny of prospectuses and URDs and the procedures for their approval (Articles 9(14) and 20(11) of the Regulation)**

The decision of the competent authority to approve a prospectus involves analysis of, and changes to, the draft prospectus on the part of the issuer to ensure that the prospectus meets the requirement of completeness, consistency and comprehensibility.

The reform of the EU prospectus regime aims to create a single rulebook that ensures a coherent implementation throughout the EU. The practices of competent authorities concerning scrutiny and approval should be aligned so as to avoid supervisory forum shopping.

A swift and efficient scrutiny of prospectuses is conducive to facilitating fundraising on capital markets, allowing issuers to seize market windows speedily.

- ESMA is invited to provide technical advice on the criteria for the scrutiny of prospectuses, in particular the completeness, comprehensibility and consistency of the information contained therein, and the procedures for the approval of the prospectus.

- ESMA's technical advice is expected to accommodate a proportionate approach by competent authorities in the scrutiny of prospectuses based on the specific circumstances of the issuer and the issuance.
- Commission Delegated Regulation (EU) 2016/301 of 30 November 2015 specifies the requirements regarding the procedures for approval of prospectuses. Since that Regulation will cease to apply when the new PR comes into application, ESMA is invited to incorporate the content of that Regulation, bearing in mind that some of the requirements of that Regulation have already been introduced in the PR.
- With respect to scrutiny and approval, ESMA is invited to provide technical advice that is the same for both URDs and prospectuses. This is without prejudice to ESMA's technical advice on the procedures for the filing and (ex-post) review of URDs and on the conditions where the status of frequent issuer is lost.

### **3.6 The procedures for the filing of the URD, the criteria for the review of the URD and the conditions under which the status of frequent issuer is lost (Article 9(14) of the Regulation)**

After a frequent issuer has had a URD approved by a competent authority for two consecutive financial years, subsequent URDs may be filed with the competent authority without prior approval. Following such filing, the competent authority may, at any time, review the contents of a filed URD and of any amendments thereto. The Regulation acknowledges that it is up to competent authorities to decide if and when such ex-post review should be carried out. As indicated in Recital 40, each competent authority may decide the frequency of such review taking into account its assessment of the risks of the issuer, the quality of its past disclosures, or the length of time elapsed since a filed URD has been last reviewed.

In essence, the scrutiny and the review of a URD should involve the same kind of work from a competent authority (checking the completeness, the consistency and the comprehensibility of the information given in the universal registration document and amendments thereto), the only difference being that scrutiny occurs ex ante, before the approval of a URD, whilst a review occurs ex post, following the filing of a URD and subject to a decision of the competent authority to conduct such a review.

The status of frequent issuer is gained from the moment an issuer submits its first URD for approval to the competent authority. Yet, due to the conditions set out in Article 9(11) of the Regulation, such status may be challenged at various points in time thereafter. Indeed, upon each filing or submission for approval of a URD, and every time an application for approval of a prospectus consisting of separate documents (including a URD) is made, the provision of certain statements and, where applicable, amendments to the URD will be required for such a frequent issuer to keep its status and benefit from the fast-track approval.

- ESMA is invited to provide technical advice on the procedures for the filing and the criteria for the review of the URD and the conditions under which the status of frequent issuer is lost.
- In doing so, ESMA should take into account the fact that the objectives and criteria of the ex-post review of URD are aligned with those of an ex-ante scrutiny and relate to the completeness, the consistency and the comprehensibility of the information provided by the issuer.

### **3.7 The minimum information content of documents describing a merger or a takeover by way of exchange offer (Article 1(7) of the Regulation)**

Points (f) and (g) of Article 1(4) and points (e) and (f) of the first subparagraph of Article 1(5) of the Regulation grant a prospectus exemption where the following securities are either offered to the public or admitted to trading on a regulated market (or both):

- securities offered in connection with a **takeover** by means of an exchange offer,
- securities offered, allotted or to be allotted in connection with a **merger or division**.

Such an exemption is conditional on a document being made available to the public containing information "*describing the transaction and its impact on the issuer*".

This represents an alleviation compared to the corresponding exemptions of Directive 2003/71/EC – set out in points (b) and (c) of Article 4(1) and points (c) and (d) of Article 4(2) of that Directive – where the precondition to be fulfilled was that a document be available containing information "*which is regarded by the competent authority as being equivalent to that of a prospectus*".

The Commission notes that the information provided to the public in the context of takeovers and mergers, as well as the way such information is controlled by competent authorities, is prescribed in national corporate laws, including laws implementing Directive 2004/25/EC on takeover bids<sup>34</sup>. The implementing measures to be taken by the Commission in that field under the empowerment of Article 1(7) are therefore not intended to interfere with these laws, and their focus should be limited to ensuring a minimum harmonisation of these documents for the purpose of applying the exemption granted in points (f) & (g) of Article 1(4) and points (e) & (f) of the first subparagraph of Article 1(5) of the Regulation, without prejudice to the ability of national laws to require more information from issuers involved in takeovers and mergers for other purposes (including supplying adequate information to existing shareholders in the context of a vote in an annual general meeting).

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<sup>34</sup> Article 6(2) of that Directive requires the initiator of a bid to submit to its competent authority "*an offer document containing the information necessary to enable the holders of the offeree company's securities to reach a properly informed decision on the bid*", before making such offer document public. Such an offer document may be subject to the prior approval of the competent authority. Article 6(3) of that Directive prescribes a minimum content for such offer document.

- ESMA is invited to provide technical advice on the minimum information content of the documents referred to in points (f) and (g) of paragraph 4 and points (e) and (f) of the first subparagraph of paragraph 5 of Article 1, taking into account recital 16 of the Regulation. In particular, ESMA is invited to define how the impact of the transaction on the issuer should be presented in such documents.

### **3.8 General equivalence criteria for prospectuses drawn up under the laws of third countries (Article 29(3) of the Regulation)**

Issuers domiciled in a third country may only carry out an offer of securities to the public or an admission to trading on a regulated market in the EU using a prospectus drawn up under the laws of that third country provided that the Commission has taken a decision stating that the information requirements contained in the laws of such third country are equivalent to the information requirements of the PR (an "equivalence decision").

Such issuers can then elect a home Member State, among those allowed under Article 2 (m) (ii) and (iii) of the Regulation. Provided it has concluded cooperation arrangements with the relevant supervisory authorities of the third country, the competent authority of this home Member State can then approve the prospectus drawn up under the laws of that third country. Such a prospectus is subject to the language rules of the Regulation and can benefit from the EU passport.

An equivalence decision by the Commission must rely on general equivalence criteria based on the requirements of the Regulation applying to the general disclosure test (Article 6), the summary (Article 7), the base prospectus (Article 8) and the minimum information and format of registration documents and securities notes (Article 13).

- ESMA is invited to provide technical advice on general equivalence criteria to guide future assessments of national laws of third countries in relation to disclosures when securities are either offered to the public or when an admission to trading on a regulated market is sought. These criteria should reflect the requirements laid down in Articles 6, 7, 8 and 13 of the PR.
- As regards the general equivalence criteria reflecting Article 13 of the Regulation, the Commission does not expect ESMA to proceed schedule by schedule. Instead, ESMA should focus on the minimum content and format of prospectuses for equity securities and for non-equity securities (potentially distinguishing between debt and derivatives).

## **4. INDICATIVE TIMETABLE**

This mandate takes into consideration the expected date of application of the Regulation, that ESMA needs enough time to prepare its technical advice, and that the Commission needs to adopt the delegated acts in accordance with Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Article 44 of the Regulation.

The delegated acts provided for by the Regulation and addressed under **points 3.1 to 3.6** of this mandate should be adopted no later than 18 months following the entry into force of the Regulation. Therefore the deadline set to ESMA to deliver the technical advice is **thirteen (13) months** after the date of receipt of this mandate, i.e. 31 March 2018.

The Regulation does not envisage any deadline for the adoption of the delegated acts addressed under **points 3.7 and 3.8** of this mandate. Therefore, the Commission asks ESMA to deliver its technical advice on these two items:

- by **31 March 2019** for the delegated act referred to under **points 3.7** (i.e. twenty five (25) months after the date of receipt of this mandate);
- by **31 August 2019** for the delegated act referred to under **points 3.8** (i.e. thirty (30) months after the date of receipt of this mandate).

#### **Indicative timetable for the delegated acts referred to in points 3.1 to 3.6**

<b>Deadline</b>	<b>Action</b>
20 July 2017	Date of entry into force of the Regulation (twentieth day following that of its publication in the Official Journal of the European Union)
March 2018 (13 months after date of receipt of the request)	ESMA provides its technical advice on <b>points 3.1 to 3.6</b> .
Until June 2018	Preparation of the draft delegated acts by Commission services on the basis of the technical advice by ESMA. The Commission will consult with experts appointed by the Member States within the Expert Group of the European Securities Committee (EG ESC) on the draft delegated acts.
Until October 2018	Translation and adoption procedure of draft delegated acts.
Until April 2019	Objection period for the European Parliament and the Council (three months which can be extended by another three months)
June 2019 (24 months after entry into force)	Date of application of the PR and delegated acts.