



European Securities and
Markets Authority

Response form for the Consultation Paper on draft RTS under the new Prospectus Regulation



Responding to this paper

ESMA invites responses to the questions set out throughout its Consultation Paper on draft RTS under the new Prospectus Regulation (ESMA31-62-802). 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 9 March 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_PR_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_PR_nameofrespondent_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA_PR_ABCD_RESPONSEFORM.
- Upload the form containing your responses, **in Word format**, to ESMA’s website (www.esma.europa.eu under the heading “Your input – Open consultations” → “Consultation on draft RTS under the new Prospectus Regulation”).

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 under the heading “Data protection”.

Who should read the Consultation Paper

The Consultation Paper may be of particular interest to investors, issuers, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who is affected by the new Prospectus Regulation (Regulation (EU) 2017/1129).

General information about respondent

Name of the company / organisation	Afep
Activity	Non-financial counterparty
Are you representing an association?	<input checked="" type="checkbox"/>
Country/Region	France

Introduction

Please make your introductory comments below, if any:

<ESMA_COMMENT_PR_1>

Since 1982, **Afep (Association française des entreprises privées)** is the association which brings together French large companies and companies operating in France. Based in Paris and Brussels, Afep aims to foster a business-friendly environment and to present its members' vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation are Afep's core priorities. Afep has around 115 members and is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility.

Afep would like to make the following preliminary comments, focusing on the **Key Financial Information (KFI)**:

- The 7-page limit imposed on the summary by the prospectus Regulation is a very stringent requirement. Companies consider that this requirement suffice to ensure that summaries remain short, useful and user-friendly. There should be no limit on the number of KFI, including alternative performance measures (APMs). As illustration, a company using four APMs in its financial communication (annual and half-yearly announcements, roadshows) and mandatory filings (annual and half-yearly financial reports) will have to lose one APM in the summary of its prospectus, creating thus inconsistency between the prospectus summary and other financial material disclosed and made available to the public throughout the year.
- **The best way forward would be to give flexibility to companies to:**
 - determine the additional KFI they want to include in the summary and
 - to choose the format of presentation of the KFI.
- ESMA is required by level 1 to specify the content and format of presentation of the key financial information referred to in point (b) of article 7(6) of the Prospectus Regulation (a selection of historical key financial information regarding the issuer) and the relevant key financial information referred to in paragraph 7(c)(iii) of the same article (the relevant key financial information for the purpose of assessing the guarantor's ability to fulfil its commitments under the guarantees). We consider that **ESMA should define a small number of mandatory KFI extracted from the issuer's historical financial information** (eg.: for issuers of equity securities this could be total revenue, net profit or loss, total equity and total asset) and give to issuers the flexibility to include any additional KFI they deem necessary as long as these KFI - extracted from the historical financial information or APMs - are included in the prospectus. Flexibility would not lower investor protection because there would be no advantage for issuers to abuse this flexibility and display non-relevant KFI in numbers. Once again, the overall 7-page limit of the summary will prevent any abuse.

- **Limiting the number of KFI could also raise issues in terms of liability.** As stated by recital 33 of the Prospectus Regulation: “*No civil liability should be attached to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of the prospectus.*” This is reflected in the warning that must be included in each summary pursuant to article 7(5) of the Prospectus Regulation. In the example mentioned above, the four APMs used by the issuer will be included in the prospectus but not in the summary, creating inconsistency between the two documents.
- Bearing also in mind the 7-page limit, companies believe that the tables proposed by ESMA consume too much space. It would appear that one single table regrouping all KFI from the profit and loss statement, the balance sheet and the cash flow statement could be more appropriate and help save space. Therefore, **issuers should also be allowed to choose the format of presentation of the KFI.** The tables put forward by ESMA in the consultation paper could be used as guidance but should not be made mandatory. In this regard ESMA's specifications could be limited to principles (eg. : issuers should use tables, KFI should be presented from left to right starting with the most recent year...).

Key financial information in the summary

Q1 : Do you agree that the KFI extracted from the issuer's historical financial information should be sign-posted?

<ESMA_QUESTION_PR_1>

Afep does not consider that KFI extracted from the issuer's historical financial information should be sign-posted. Sign-posting these data will bring very limited added value to the information disclosed. KFI disclosed by issuers should be apprehended as a whole meaning that they are all relevant to assess the financial situation of these issuers. Considering also the fact that the summary should be read as an introduction to the prospectus, investors will be able, looking at the prospectus, to distinguish historical financial information from APMs and find all necessary details and explanations regarding the latter (*Please, refer also to our answer to question 5*).<ESMA_QUESTION_PR_1>

Q2 : Would you suggest the inclusion of specific templates for other types of issuer? Please specify and explain your reasoning.

<ESMA_QUESTION_PR_2>

Afep does not consider that specific templates for other types of issuer are necessary. The multiplication of templates will render the regime more complex. **Flexibility is the best solution** to take into account each specific business sector or type of activities. Companies should be allowed, building on a limited number of mandatory KFI determined by ESMA, to include in the summary any GAAP and non-GAAP KFI they consider relevant for investors (as long as these KFI are included in the main body of the prospectus).<ESMA_QUESTION_PR_2>

Q3 : Do you agree that cash flow from operations is the most useful measure of cash flow for non-financial entities issuing equity and that cash flow from financing activities and cash flow from investing activities are not so relevant for investors in equity securities?

<ESMA_QUESTION_PR_3>

No, Afep disagrees with ESMA's statement that cash flow from financing activities and cash flow from investing activities are not relevant for investors in equity securities. Both cash flows from investing and financing could be relevant to investors considering, for instance, the opportunity to invest in a company pursuing an active acquisition strategy or in Biotech companies. Again, we would like to insist on the need to **give flexibility to issuers to decide whether KFI extracted from the cash flow statement are or not relevant** for the summary of the prospectus (*Please refer also to our preliminary comments*).<ESMA_QUESTION_PR_3>

Q4 : Do you think that investment companies which are subject to capital requirements should be required to include regulated capital ratios in their summary?

<ESMA_QUESTION_PR_4>



[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_PR_4>

Q5 : Do you agree with the proposal to allow the use of footnotes to describe APMs or could this result in lengthy footnotes and complicated explanations?

<ESMA_QUESTION_PR_5>

Afep considers that **requiring the use of footnotes to describe APMs is not necessary and could result in lengthy developments and complicated explanations** that would not be consistent with the obligation to keep the summary short. The summary is an introduction to the prospectus and detailed explanations regarding APMs would be found in the prospectus. In this regard, the use of APMs is framed since 2015 by ESMA's guidelines applicable to APMs disclosed both in prospectuses and regulated information. ESMA's guidelines address issues related to the presentation and definition of APMs, reconciliation with the financial statements, explanations on the use of APMs, comparability and consistency and constitute a robust framework ensuring that APMs are comprehensible and not misleading. We don't consider that it is necessary to impose additional requirements to APMs particularly in the summary. <ESMA_QUESTION_PR_5>

Q6 : Do you agree that issuers should be given flexibility to present pro forma financial information as additional columns to the relevant tables or as a separate table? If not, should a format be mandated, bearing in mind the page limit for the summary as well as the requirement for the summary to be comprehensible?

<ESMA_QUESTION_PR_6>

Yes, issuers should be given flexibility to present pro forma financial information. Furthermore, we question the requirement to disclose *pro forma* adjustments (paragraph 48 of the consultation paper and paragraph 5 of article 2 of the draft RTS). **Including pro forma adjustments would result in lengthy and heavy tables** that would not be consistent with the requirement to ensure that the summary remains short: where an issuer decides to add columns, this obligation would result in 2 additional columns (a *pro forma* adjustments column and *pro forma* KFI column). Once again, we stress the fact that the summary is an introduction to the prospectus. Therefore, only key *pro forma* financial information should be included in the summary. Investors will find all details regarding *pro forma* adjustments in the prospectus. <ESMA_QUESTION_PR_6>

Q7 : Do you agree that complex financial information in the summary should be presented according to its presentation in the prospectus? If not, please specify and provide alternative ways of presentation.

<ESMA_QUESTION_PR_7>

Yes, we agree that complex financial information in the summary should be presented according to its presentation in the prospectus. <ESMA_QUESTION_PR_7>

Q8 : Which financial measures are most useful for retail investors to determine the health of a credit institution? Do you consider that the CET1 is comprehensible for retail investors? Please specify.

<ESMA_QUESTION_PR_8>

Except CET1, which is now well known, several ratios might be too technical and not easy to understand by retail investors. That is why we consider that the **CET 1 is a simple and factual measure suitable for retail investors, provided that issuers retain flexibility to determine whether such disclosure (or the disclosure of any other financial measures) is appropriate in the context of their business and the securities which are issued** (i.e. disclosure of financial measures in the summary should not be mandatory).

<ESMA_QUESTION_PR_8>

Q9 : Do you agree that it should be mandatory for credit institutions to disclose SREP information in relation to Common Tier One Equity, the minimum prudential capital requirements, the Total Capital Ratio and the Leverage Ratio in the summary?

<ESMA_QUESTION_PR_9>

These information should be optional. Credit institutions will include them when they consider it makes sense, taking into account the investors' profile. Furthermore these KFI are relevant only in the case of equity and subordinated debt.

<ESMA_QUESTION_PR_9>

Q10: Do you agree with the choice of measures for insurance companies?

<ESMA_QUESTION_PR_10>

[TYPE YOUR TEXT HERE]

<ESMA_QUESTION_PR_10>

Q11: Do you think it would be useful for retail investors to include a measure of historical performance for closed end funds in the summary?

<ESMA_QUESTION_PR_11>

[TYPE YOUR TEXT HERE]

<ESMA_QUESTION_PR_11>

Q12: Given the page limit for the summary please provide your views on which items of historical financial information would be most useful for retail investors.

<ESMA_QUESTION_PR_12>

The 7-page limit imposed on the summary by the prospectus Regulation is a very stringent requirement. Afep considers that this requirement suffice to ensure that summaries remain short, useful and user-friendly. **Therefore there should be no limit on the number of key financial information (KFI)**, including alternative performance measures (APMs). The best way forward would be to give to issuers **the flexibility to include any additional KFI** they deem necessary as long as these KFI are included in the main body of

the prospectus. Limiting the number of KFI could also raise **liability issues** by creating inconsistency between information disclosed in the summary, the prospectus and other reports and disclosures made public by the issuer (eg.: annual financial reports, registration documents, press releases...)<ESMA_QUESTION_PR_12>

Q13: Would the issuer, offeror or person asking for admission to trading incur costs if the proposed provisions are adopted? If so, please specify the nature of such costs, including quantifying them.

<ESMA_QUESTION_PR_13>

The European Commission in the Refit Scoreboard Summary published in October 2017 claims that the review of the prospectus directive could allow **savings of approximately 130 million euros per year stemming from the secondary issuance regime and of around 45 million per year from the new EU Growth prospectus**. Afep welcomes these objectives and consider that **one key element of success in meeting them is to allow for flexibility**. Imposing stringent rules and templates that would not fit in all situations and be relevant for all issuers could generate additional costs in drafting prospectuses. Considering in particular the new requirements imposed to summaries (limit in number of pages and risks) and potential liability issues (*please, refer to our preliminary comments*), we fear that the fees of legal counsels drafting and reviewing prospectuses may rise significantly.<ESMA_QUESTION_PR_13>

Data and machine readability

Q14: Do you believe that the data related to the amount raised should be made mandatory? Please explain your reasons.

<ESMA_QUESTION_PR_14>

No, Afep does not consider that the amount raised should be made mandatory. The amount raised is not required by the Prospectus Regulation contrary to the ISIN of the securities, the LEI of the issuer or the guarantor or other information mentioned in article 47 of the Prospectus Regulation. Furthermore, the data mentioned in article 21 and 47 of the Prospectus Regulation shall be provided to ESMA at the same time as the Competent Authorities notify approval of prospectuses. **The amount raised would not be known at the time of approval of a prospectus** but after the closing of the offer or admission to trading of the securities. Requiring this piece of information to be provided would impose additional burden on the Competent Authority and also on issuers.<ESMA_QUESTION_PR_14>

Q15: Do you agree with the data items that have been identified as necessary for the purpose of classification as well as to allow for the compilation of the annual report under Article 47 of the Prospectus Regulation? Would you like to propose any additional items or suggest items that should in your view be deleted? Please explain your reasons.

<ESMA_QUESTION_PR_15>

Afep could agree with the data identified by ESMA **as long as the collection of these data does not impose additional burden to issuers** (Please refer to our answer to question 17). <ESMA_QUESTION_PR_15>

Q16: Do you agree with the ESMA proposal to maintain the current system in place whereby NCAs submit data to ESMA in XML format as the practical arrangement to ensure that such data is machine readable? Do you agree that, by keeping the data submission system unchanged, adaptation costs are minimised for the market at large?

<ESMA_QUESTION_PR_16>

We agree with ESMA's proposal to keep XML format as the practical arrangement to ensure that data is machine readable. We insist again on the fact that **the responsibility of the NCAs to provide the data in XML format should not be transferred to issuers**. Such transfer would generate unjustified costs for issuers and would be contrary to the objective to facilitate access to financial markets. Any evolution of the current system should be carefully assessed in terms of costs and benefits and should not result in imposing undue burden on companies. <ESMA_QUESTION_PR_16>

Q17: Do you agree that the proposed amendment to the technical advice on prospectus approval could contribute to provide clarity on the way data referred to in Annex VII are collected by NCAs?

<ESMA_QUESTION_PR_17>

No, Afep doesn't consider that the proposed amendment is appropriate. Companies are concerned that such an amendment would transfer the burden to collect the data to them whereas the responsibility to provide data to ESMA lies with the Competent Authorities, according to the Prospectus Regulation. We could agree that when reviewing prospectuses, Competent Authorities are entitled to require some information that would not be public at the time of the approval but this should not result in a transfer of responsibilities to the issuers. Furthermore, these data should be provided by issuers to the Competent Authorities in the format available and not in XML format. It is the duty of the Authorities to deliver the data to ESMA in the appropriate format. <ESMA_QUESTION_PR_17>

Q18: Do you have suggestions in relation to how the efficiency, accuracy and timeliness of the data compilation and submission process can be further improved? In your experience, is there any specific reporting format or standard that you would deem most appropriate in this context?

<ESMA_QUESTION_PR_18>

We would like to raise the issue of additional costs the amendments mentioned in Question 17 could generate. **Requiring issuers to provide additional data will certainly add to the administrative burden and the costs without benefits for issuers.** Issuers already make their prospectuses available on their website and investors can also find these prospectuses on the websites of the Competent Authority, the stock exchange and eventually of the Officially Appointed Mechanism required by the Transparency directive. All these websites offer search functions. Therefore imposing additional costs to issuers would be



contrary to the CMU and the objectives to save approximately 175 million euros every year (*Please refer to our answer to question 13*).<ESMA_QUESTION_PR_18>

Advertisements

Q19: Do you consider that an advertisement should contain at least a hyperlink to the website where it is published and where available and technically feasible additional information that would facilitate tracing the prospectus? Please provide examples of the additional information that you think would be helpful to include in the advertisement.

<ESMA_QUESTION_PR_19>

Afep agrees that advertisements, other than oral advertisements, should contain a hyperlink to the specific page of the website where the prospectus was published or will be published. We would suggest clarifying the point by explicitly referring to “written format”.

Regarding the mention of the website where the prospectus may be found (paragraph 133 of the Consultation Paper) and the additional information that could be included in the advertisement (paragraph 134 of the Consultation Paper) we understand that it will be applicable for oral and written advertisements. As explained in the paragraphs 135 and 136, it may not be possible to add all this information in the advertisement and ESMA should take into consideration whether the additional information is adequate and proportionate to the format of the advertisement in question and grant additional flexibility to issuers. **An explicit reference to the wording “adequate and proportionate” should be added in the Article 12(1) of the RTS.**<ESMA_QUESTION_PR_19>

Q20: Do you consider that the definition for complex securities set out in para 140 provides clarity to issuers and would be helpful in deciding when the comprehension alert referred to in Article 8(3)(b) of the PRIIPs Regulation should be included in an advertisement?

<ESMA_QUESTION_PR_20>

The PRIIPs Regulation does not contain any reference to “complex securities”. Therefore, the definition of complex securities under MIFID 2 should not be used to determine what type of securities fall under the scope of PRIIPs or in other words, **complex securities under MIFID 2 should not automatically be considered PRIIPs and vice-versa**. We believe that this is the Commission's position and would agree with it. As a consequence, **we do not consider that the definition set out in paragraph 140 of the consultation paper would be helpful** as regards when the PRIIPs Regulation warning should be included in advertisements.<ESMA_QUESTION_PR_20>

Q21: Do you agree with the requirements suggested for Article 12 of the RTS? If not, please provide your reasoning.

<ESMA_QUESTION_PR_21>

Afep agrees with the requirements suggested for Article 12 of the draft RTS. However, we consider that **the word “advertisement” should not be required** in each advertisement. It would be more relevant and appropriate to include, as principles in ESMA’s draft RTS, that any advertisement relating to an offer of securities or an admission to trading should be easily and clearly recognisable and/or to allow the insertion of any equivalent term or wording in accordance with local regulation. We would also suggest clarifying Article 12.1(b) of the RTS by referring to “where disseminated by written electronic means”, as the requirements herein do not seem to apply to oral advertisements

Regarding article 13 of the RTS, there are potential issues regarding the dissemination of amended advertisements following the publication of a supplement to the prospectus. Given the wide scope of communication being viewed as “advertisements”, dissemination of amended versions could be problematic in practice. Article 13.1 does not include a materiality threshold, *i.e.* a requirement to disseminate an amended advertisement only if the significant new factor, material mistake or material inaccuracy detailed in the supplement has rendered the contents of the previously disseminated advertisement materially inaccurate or misleading. Therefore we suggest including the word “materially” before the words “inaccurate or misleading” at the end of Article 13.1. <ESMA_QUESTION_PR_21>

Q22: In particular, do you agree with the requirement to include warnings in advertisements? Do you consider that the suggested warnings are fit for purpose in terms of investor protection?

<ESMA_QUESTION_PR_22>

Afep agrees with the requirement to include warnings. <ESMA_QUESTION_PR_22>

Q23: Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including whether they are one-off or ongoing and, quantify them.

<ESMA_QUESTION_PR_23>

No, we do not foresee any significant new costs derived from the proposed provisions. ESMA’s proposed draft RTS mainly follows, and carries over, the current requirements under Delegated Regulation EU 301/2016. Therefore there shouldn’t be any additional burden or costs for issuers.]

<ESMA_QUESTION_PR_23>

Supplements

Q24: Do you agree that Article 2 of the First Commission Delegated Regulation should be carried over, in its entirety, to Level 2 under the new regime?

<ESMA_QUESTION_PR_24>

Afep agrees that article 2 of Commission Delegated Regulation (EU) N°382/2014 should be carried over. <ESMA_QUESTION_PR_24>

Q25: Do you agree that the additional requirements identified from ESMA's draft technical advice should also be included.

<ESMA_QUESTION_PR_25>

Afep agrees that the additional requirement identified by ESMA regarding changes in the working capital statement of the issuer of underlying securities of depositary receipts **should be included in the draft RTS**. Regarding profit forecasts and estimates, we would like to recall that, at the time being, **there is no obligation to include outstanding forecasts in prospectuses** but a presumption that profit forecasts would be material for equity prospectuses, laid down in ESMA's Q&A on prospectus. <ESMA_QUESTION_PR_25>

Q26: Do you agree that the publication of audited financial statements by an issuer of retail debt or retail derivative securities should not trigger the requirement to publish a supplementary prospectus?

<ESMA_QUESTION_PR_26>

Afep agrees that the publication of audited financial statements by an issuer of retail debt or retail derivative securities should not trigger the obligation to publish a supplement. When an issuer holds information regarding its financial situation and its capacity to pay the interests or redeem bonds, for instance, this would be price sensitive information. Pursuant to the provisions of MAR, the issuer would have to disclose without delay the information. Publication of financial statements should therefore not systematically require publication of a supplement. <ESMA_QUESTION_PR_26>

Q27: Would the issuer, offeror or person asking for admission to trading incur costs if the aforementioned provisions are adopted? If so, please specify the nature of such costs, including quantifying them.

<ESMA_QUESTION_PR_27>

Considering that article 16 of the draft RTS mainly carries over the contents of article 2 of the Delegated Regulation (EU) No 382/2014, **we do not foresee – and there should be no – additional costs for issuers**. <ESMA_QUESTION_PR_27>

Publication

Q28: Do you agree that only Article 6(1)(c) and 6(3) of the Second Commission Delegated Regulation need to be carried over to Level 2 under the new regime?

<ESMA_QUESTION_PR_28>

Afep agrees with ESMA's proposal to carry over only article 6(1)(c) and 6(3) of Commission Delegated Regulation (EU) 2016/301. <ESMA_QUESTION_PR_28>



Q29: Do you agree that no other publication provisions of the new Prospectus Regulation need to be specified by way of RTS? If not, please identify the provisions which should be specified.

<ESMA_QUESTION_PR_29>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_PR_29>

Q30: Do you believe that the proposed publication provisions will impose additional costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the type and nature of such costs, including whether they are one-off or ongoing, and quantify them.

<ESMA_QUESTION_PR_30>
[TYPE YOUR TEXT HERE]
<ESMA_QUESTION_PR_30>