

III

(Preparatory acts)

EUROPEAN CENTRAL BANK

OPINION OF THE EUROPEAN CENTRAL BANK

of 17 March 2016

on a proposal for a 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

(CON/2016/15)

(2016/C 195/01)

Introduction and legal basis

On 8 March 2016 the European Central Bank (ECB) received a request from the Council for an opinion on a proposal for a 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 ⁽¹⁾ (hereinafter the 'proposed regulation').

The ECB's competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union as the proposed regulation contains provisions affecting the European System of Central Bank's (ESCB's) tasks to implement monetary policy and contribute to the smooth conduct of policies pursued by the competent authorities relating to the stability of the financial system, as referred to in Articles 127(2), first indent, and 127(5) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

1. General observations

The main objective of the proposed regulation, which would repeal Directive 2003/71/EC of the European Parliament and of the Council ⁽²⁾, is to simplify the existing rules for the drawing up, approval and distribution of prospectuses and thus reduce the costs and burdens associated with their production. More specifically, the proposed regulation will lay down disclosure requirements that are tailored to an issuer's specific needs and will facilitate companies', in particular small and medium-sized companies, ability to raise capital throughout the Union. In addition, the proposed regulation aims to reduce divergent and fragmented rules across the Union resulting from the heterogeneous implementation of Directive 2003/71/EC in some Member States. The ECB generally welcomes and supports the aims pursued by the proposed regulation and views it as a positive step towards the completion of the Capital Markets Union (CMU).

2. Specific observations**2.1 Exemptions for offers of non-equity securities issued by the ECB and the ESCB national central banks (NCBs) and for shares in the capital of ESCB NCBs**

The ECB welcomes the fact that non-equity securities issued by the ECB and ESCB NCBs are excluded from the scope of the proposed regulation ⁽³⁾. This exclusion is vital to ensure that Eurosystem monetary policy operations are not hampered, including, for example, any possible issuance of debt instruments by the ECB and the ESCB NCBs. The ECB also welcomes the exemption for the shares in the capital of the ESCB NCBs ⁽⁴⁾, which is of direct relevance to those NCBs with shares that are held by private investors and/or are listed on a regulated market or other trading venue.

⁽¹⁾ COM(2015) 583 final.

⁽²⁾ 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 (OJ L 345, 31.12.2003, p. 64).

⁽³⁾ See Article 1(2)(b) of the proposed regulation.

⁽⁴⁾ See Article 1(2)(c) of the proposed regulation.

2.2 Mandatory requirements regarding the use of the International Securities Identification Number (ISIN) and the global legal entity identifier (LEI)

The proposed regulation aims to ensure investor protection and market efficiency while enhancing the single market for capital⁽¹⁾. To that end, information made available to investors should be 'sufficient and objective' and presented in 'an easily analysable, succinct and comprehensible form'⁽²⁾. This information should include unique identifiers for both the security and the issuer. As stated on previous occasions⁽³⁾, the ECB strongly supports the use of internationally agreed standards, such as the ISIN and the global LEI. The unique identification of issuers, offerors and guarantors and of securities offered to the public or admitted to trading on regulated financial markets can only be successful if international standards such as the ISIN and the global LEI are used.

First, the ISIN, which uniquely identifies a securities issue, is a well-established identifier that is widely used in financial markets. The necessity of a unique identifier for securities is acknowledged in the proposed regulation, in Commission Regulation (EC) No 809/2004⁽⁴⁾ and in Regulation (EU) 2015/2365⁽⁵⁾. The proposed regulation provides for the prospectus summary to include a section with key information on securities that should feature 'any security identification number'⁽⁶⁾. In a similar fashion, Regulation (EC) No 809/2004 establishes that prospectuses for debt securities, shares and derivatives must contain 'a description of the type and the class of the securities being offered and/or admitted to trading, including the ISIN ... or other such security identification code'⁽⁷⁾. However, the nature of such alternative security identification codes is not further specified, leaving it open to interpretation whether codes with a limited application could constitute alternatives. This lack of specificity limits the usefulness of this information for the investor and raises barriers to the CMU. Finally, Regulation (EU) 2015/2365 provides that when securities financing transactions are reported, they must include, *inter alia*, the ISIN of those securities⁽⁸⁾. A large majority of the euro-area-issued debt securities have an ISIN code, while debt securities without an ISIN are generally concentrated in specific markets and sectors and used for specific purposes. Available information indicates that in certain circumstances, the issuance of securities without an ISIN seems to be intended to reduce the traceability of such operations, while still allowing them to benefit from the legal regime for debt securities. Furthermore, there are concerns that securities without an ISIN could be issued in order to avoid disclosing information to supervisors and policymakers. For these reasons, the ECB recommends that any information gaps that exist should be eliminated to ensure a level playing field across markets and jurisdictions by making it mandatory to include the ISIN in prospectuses for securities that are subject to the proposed regulation.

Second, the ECB supports the use of the global LEI system, as endorsed by the European Banking Authority (EBA) and European Securities and Markets Authority (ESMA)⁽⁹⁾, in a manner which is in line with the Financial Stability Board's (FSB's) recommendations⁽¹⁰⁾. The global LEI allows the issuers, offerors and guarantors of the security to be uniquely identified, thus providing key information to the investor. Furthermore, the use of the global LEI is growing rapidly with regard to the identification of legal persons and structures and therefore the ECB sees merit in expanding its use by making it compulsory to include the global LEI in prospectuses or registration documents for securities covered by the proposed regulation.

⁽¹⁾ See recital 7 of the proposed regulation.

⁽²⁾ See recital 21 of the proposed regulation.

⁽³⁾ See the sixth subparagraph of paragraph 2.4 of Opinion CON/2014/49 on a proposal for a Regulation of the European Parliament and of the Council on reporting and transparency of securities financing transactions. All ECB opinions are published on the ECB's website at www.ecb.europa.eu

⁽⁴⁾ 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 (OJ L 149, 30.4.2004, p. 1).

⁽⁵⁾ Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012 (OJ L 337, 23.12.2015, p. 1).

⁽⁶⁾ See the first indent of Article 7(7)(a) of the proposed regulation.

⁽⁷⁾ See Item 4.1 of Annex III, item 4.1 of Annex V, item 4.1.1 of Annex XII, item 4.2 of Annex XIII of Regulation (EC) No 809/2004.

⁽⁸⁾ See Article 4(10)(b) of Regulation (EU) 2015/2365.

⁽⁹⁾ See the EBA recommendation 'On the use of the Legal Entity Identifier (LEI)' (EBA/REC/2014/01), available on the EBA's website at www.eba.europa.eu and ESMA's 'Questions and Answers' document, 'Implementation of the Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (EMIR)' (ESMA/2016/242), 4 February 2016, p. 73, available on ESMA's website at www.esma.europa.eu

⁽¹⁰⁾ See the FSB report 'A Global Legal Entity Identifier for Financial Markets', 8 June 2012, available on the FSB's website at www.financialstabilityboard.org

The ECB is of the opinion that the obligation to report the ISIN and LEI should be established both in the proposed regulation and in any related Commission delegated acts implementing the proposed regulation, which the Commission is required to adopt to specify the format of prospectuses⁽¹⁾. The ECB provides drafting proposals on this issue⁽²⁾.

2.3 *Publication of prospectuses in an online storage mechanism*

The proposed regulation makes ESMA responsible for publishing all prospectuses that it receives from the competent authorities on its website. Publication is to be ensured by ESMA through a centralised storage mechanism⁽³⁾. The ECB understands that this storage mechanism will have a search function. The ECB considers that the storage mechanism should also present the information contained in the prospectuses in a machine-readable manner, using metadata, at least for certain key attributes, such as the identification of the securities, issuers, offerors and guarantors, as this information is vital in ensuring that (institutional) investors have access to reliable data that can be used and analysed in a timely and efficient manner. The ECB provides drafting proposals on this issue⁽⁴⁾.

2.4 *Removal of incentives for issuing debt securities in large denominations*

In order to receive favourable treatment under Directive 2003/71/EC, some issuers currently impose minimum and/or multiple amount settlement rules for certain securities they issue at the central securities depository (CSD) level. However, settlements that are not compliant with these rules may still take place at the CSD level, e.g. central counterparty (CCP) netting of trading activities in standard amounts or other non-trading related activities, such as the processing of corporate actions. As a consequence, instructions for such settlements, even if they do not contradict the requirements of Directive 2003/71/EC, cannot be carried out through the standard processing provided by the technical platforms of national financial market infrastructures. This is normally mitigated by the usage of inefficient and risky manual workaround solutions (non-straight-through processing (non-STP) technical procedures) or more complex technical functionalities.

In the light of the above, the ECB welcomes the removal of the incentives to issue debt securities in large denominations, i.e. above EUR 100 000⁽⁵⁾. Furthermore, the ECB is of the view that imposing minimum denominations and minimum amounts at the settlement level runs counter to the spirit of Directive 2003/71/EC. Even though this Directive only imposes such restrictions at the initial offering or trading level, some Union issuers impose these at the CSD level, which creates additional burdens for the efficiency of financial market infrastructures and for their users, i.e. CSDs, CCPs and their participants, which may need to resort to non-STP technical procedures or develop additional complex functionalities to address non-standard settlements. Moreover, in the context of Regulation (EU) No 909/2014 of the European Parliament and of the Council⁽⁶⁾ and the launch of the Eurosystem's TARGET2-Securities settlement platform, the current inefficiencies, originating from the minimum settlement amount rules will be amplified due to the expected proliferation of cross-border securities settlement activity.

2.5 *Technical observations and drafting proposals*

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text. The technical working document is annexed to this Opinion and is available in English on the ECB's website.

Done at Frankfurt am Main, 17 March 2016.

The President of the ECB

Mario DRAGHI

⁽¹⁾ See Articles 13 and 42 of the proposed regulation.

⁽²⁾ See proposed Amendments 2, 3, 4 and 5 in the Annex to this Opinion.

⁽³⁾ See Article 20(6) of the proposed regulation.

⁽⁴⁾ See proposed Amendment 6 in the Annex to this Opinion.

⁽⁵⁾ See proposed Amendment 1 in the Annex to this Opinion.

⁽⁶⁾ Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1).



EUROPEAN CENTRAL BANK

EUROSYSTEM

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ECB-PUBLIC

Technical working document
produced in connection with ECB Opinion (CON/2016/15)¹
Drafting proposals

Text proposed by the European Commission	Amendments proposed by the ECB²
Amendment 1 Recital 47	
<p>'(47) Favourable treatments granted to issuances of non-equity securities with a denomination per unit in excess of EUR 100 000 may distort the structure of debt markets, create impediments to proper diversification of portfolios and to the development of electronic trading platforms, thus undermining liquidity on the secondary market, and may reduce investment choice for retail investors by depriving them of the opportunity to acquire investment-grade corporate bonds. It is therefore appropriate to remove the prospectus exemption for offers of non-equity securities whose denomination per unit amounts to at least EUR 100 000 and the lower standard of disclosure granted to prospectuses concerning such non-equity securities, featured originally in Directive 2003/71/EC. In particular, it is appropriate to unify the minimum information requirements for non-equity prospectuses, thereby replacing the dual standard of disclosure between issuances targeting qualified investors only and issuances targeting non-qualified investors.'</p>	<p>'(47) Favourable treatments granted to issuances of non-equity securities with a denomination per unit in excess of EUR 100 000 may distort the structure of debt markets, create impediments to proper diversification of portfolios and to the development of electronic trading platforms, thus undermining liquidity on the secondary market, and may reduce investment choice for retail investors by depriving them of the opportunity to acquire investment-grade corporate bonds. In addition, the high minimum settlement amount rules, imposed on central securities depositories by some Union issuers, create operational inefficiencies and risks for financial market infrastructures and their participants in relation to post-trade services. It is therefore appropriate to remove the prospectus exemption for offers of non-equity securities whose denomination per unit amounts to at least EUR 100 000 and the lower standard of disclosure granted to prospectuses concerning such non-equity securities, featured originally in Directive 2003/71/EC. In particular, it is appropriate to unify</p>

¹ This technical working document is produced in English only and communicated to the consulting Union institution(s) after adoption of the opinion. It is also published in the Legal framework section of the ECB's website alongside the opinion itself.

² Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Text proposed by the European Commission	Amendments proposed by the ECB ²
	the minimum information requirements for non-equity prospectuses, thereby replacing the dual standard of disclosure between issuances targeting qualified investors only and issuances targeting non-qualified investors.’;
<u>Explanation</u>	
This amendment seeks to reinforce the reasoning for removing the favourable treatment of issuances of debt securities in large denominations. See paragraph 2.4 of this Opinion.	
Amendment 2 Article 7(5), first paragraph	
‘5. The introduction of the summary shall contain the name of the securities, the identity and contact details of the issuer, the offeror or the person seeking admission, the identity and contact details of the home competent authority and the date of the document. [...]’	‘5. The introduction of the summary shall contain: (a) the name of the securities; (b) the identity and contact details of the issuer, including their legal entity identifier (LEI) ; (c) the identity and contact details of the offeror, including their LEI if the offeror has legal personality , or of the person seeking admission; (d) the identity and contact details of the home competent authority and the date of the document. [...]’;
<u>Explanation</u>	
This amendment lays down a mandatory requirement for including the LEI of the issuer and the offeror in a prospectus. See paragraph 2.2 of this Opinion.	
Amendment 3 Article 7(6)(a), first indent	
‘(a) under a sub-section titled “Who is the issuer of the securities?”, a brief description of the issuer of	‘(a) under a sub-section titled “Who is the issuer of the securities?”, a brief description of the issuer of

Text proposed by the European Commission	Amendments proposed by the ECB ²
<p>the securities, including at least the following:</p> <ul style="list-style-type: none"> – its domicile and legal form, the legislation under which it operates and its country of incorporation;’; 	<p>the securities, including at least the following:</p> <ul style="list-style-type: none"> – its domicile and legal form, the legislation under which it operates, and its country of incorporation and its LEI;’;
<p><i>Explanation</i></p> <p>This amendment lays down a mandatory requirement for including the issuer's LEI in a prospectus. See paragraph 2.2 of this Opinion.</p>	
<p>Amendment 4</p> <p>Article 7(7)(a), first indent</p>	
<p>‘(a) under a sub-section titled “What are the main features of the securities?”, a brief description of the securities being offered and/or admitted to trading including at least:</p> <ul style="list-style-type: none"> – their type and class, any security identification number, their currency, denomination, par value, the number of securities issued, the term of the securities;’ 	<p>‘(a) under a sub-section titled “What are the main features of the securities?”, a brief description of the securities being offered and/or admitted to trading including at least:</p> <ul style="list-style-type: none"> – their type and class, any security identification number their ISIN, their currency, denomination, par value, the number of securities issued, the term of the securities;’;
<p><i>Explanation</i></p> <p>This amendment lays down a mandatory requirement for including securities' ISIN in prospectuses. See paragraph 2.2 of this Opinion.</p>	
<p>Amendment 5</p> <p>Article 7(7)(c)</p>	
<p>‘(c) under a sub-section titled “Is there a guarantee attached to the securities?” a brief description of the nature and scope of the guarantee, if any, as well as a brief description of the guarantor.’.</p>	<p>‘(c) under a sub-section titled “Is there a guarantee attached to the securities?” a brief description of the nature and scope of the guarantee, if any, as well as a brief description of the guarantor, including its LEI.’;</p>
<p><i>Explanation</i></p> <p>This amendment lays down a mandatory requirement for including the guarantor's LEI in a prospectus.</p>	

Text proposed by the European Commission	Amendments proposed by the ECB ²
See paragraph 2.2 of this Opinion.	
Amendment 6 Article 20(6)	
<p>‘At the latest from the beginning of the offer to the public or the admission to trading of the securities involved, ESMA shall publish all prospectuses received from the competent authorities on its website, including any supplements thereto, final terms and related translations where applicable, as well as information on the host Member State(s) where prospectuses are notified in accordance with Article 24. Publication shall be ensured through a storage mechanism providing the public with free of charge access and search functions.’</p>	<p>‘At the latest from the beginning of the offer to the public or the admission to trading of the securities involved, ESMA shall publish all prospectuses received from the competent authorities on its website, including any supplements thereto, final terms and related translations where applicable, as well as information on the host Member State(s) where prospectuses are notified in accordance with Article 24. Publication shall be ensured through a storage mechanism providing the public with free of charge access and a search functions. Key information contained in the prospectuses, such as the ISIN identifying the securities and the LEI identifying the issuers, offerors and guarantors, should be machine-readable, including meta-data.’</p>
<p><u>Explanation</u></p> <p>This amendment seeks to ensure that the centralised online storage mechanism to be established by ESMA will not only have a search function for the prospectuses in portable document format, but that it will also ensure that the most relevant information contained in the prospectuses is machine-readable using meta-data, allowing certain fields in the prospectus file to be directly machine-readable in order to enable a database to be established either by ESMA or third parties that contains this key information in a bulk downloadable format. The key attributes which must be machine-readable using meta-data include: the identification of the securities (via the ISIN) and of issuers, offerors and guarantors (via the LEI), and other attributes vital to ensuring that investors have effective access to reliable data that can be used and analysed in a timely and efficient manner. See paragraph 2.3 of this Opinion.</p>	