



The City of London Law Society



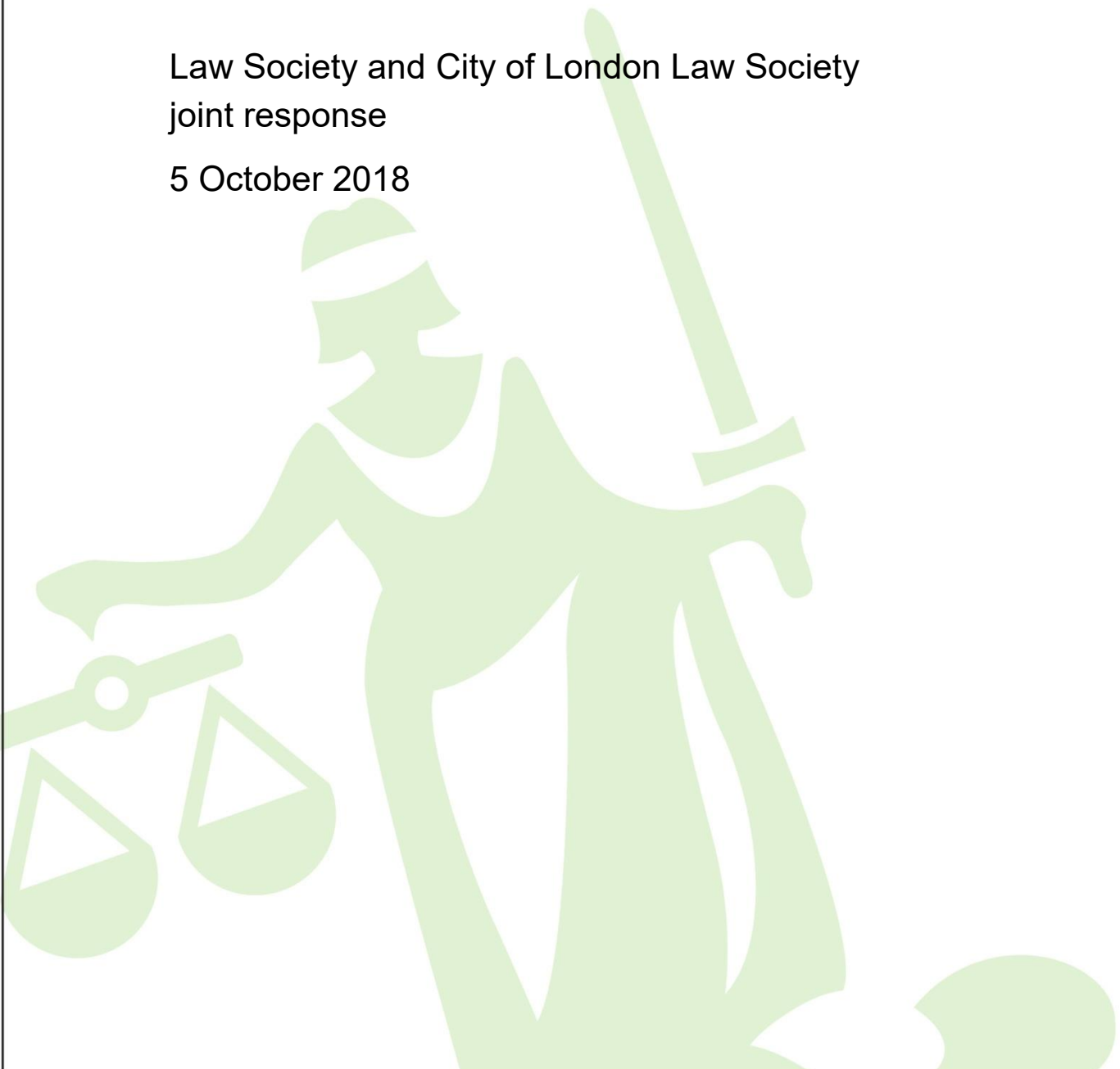
The Law Society

## **ESMA**

### **Consultation on the draft technical advice on minimum information content for prospectus exemption**

Law Society and City of London Law Society  
joint response

5 October 2018



## **Introduction**

1. The views set out in this paper have been prepared by a Joint Working Party of the Company Law Committees of the City of London Law Society (**CLLS**) and the Law Society of England and Wales (the **Law Society**).
2. The CLLS represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multijurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.
3. The Law Society is the professional body for solicitors in England and Wales, representing over 160,000 registered legal practitioners. It represents the profession to Parliament, Government and regulatory bodies in both the domestic and European arena and has a public interest in the reform of the law.
4. The Joint Working Party is made up of senior and specialist corporate lawyers from both the CLLS and the Law Society who have a particular focus on issues relating to capital markets.

## **General remarks on the proposed technical advice**

5. We welcome the opportunity to comment on ESMA's proposed technical advice. We would make the following general points.

*Further harmonisation of contents requirements with existing legislation is desirable*

6. In its mandate to ESMA to provide technical advice regarding these exemptions, the European Commission notes that ESMA's minimum content proposal will represent an alleviation compared to the exemptions available under the Prospectus Directive (2003/73/EC as amended or superseded). The changes under the Regulation aim to minimise interference with the requirements for information provided to the public in the context of takeovers and mergers prescribed in national corporate laws, including those implementing the Takeovers Directive (2004/25/EC). The Prospectus Regulation (PR) aims to restrict the focus of these exemptions to ensure a minimum harmonisation of these documents for the purposes of applying the exemptions set out in Article (1) (4) (f) and (g) of the PR, in respect of the public offer requirement, and Article (1) (5) (e) and (f) of the PR, with respect to an admission to trading.
7. As the proposed content requirements are neither fully aligned with the contents requirements imposed by the Takeovers Directive nor significantly alleviated, a bidder may consider it preferable to produce an approved prospectus than an exempted document, as the market is familiar with the former concept. Given that an exempted document will not be subject to the review process of a competent authority under Article 20 of the PR, unlike a prospectus, it is possible that inconsistent approaches to the content of exempted documents will arise, in practice. The production of an exempted document may therefore result in adaptive costs for market participants, as the market will need to adjust to applying its contents regime in practice.
8. We acknowledge that a maximum harmonisation approach to exempted documents is not within the scope of ESMA's mandate from the Commission.
9. In addition, an approved prospectus will be required, in any event, where the bidder wishes to passport the document into an EU jurisdiction

*ESMA's letter to the European Commission of 11 July 2018*

10. We note that ESMA raised concerns in the Consultation and in a letter to the European Commission dated 11 July 2018 ([here](#)) regarding the scope of the takeover exemptions. ESMA considers that the exemption should not be available where the issuer's securities are not already admitted to trading on a regulated market. In the letter, ESMA expresses its serious concerns regarding lack of scrutiny and approval in this context and considers this could be potentially detrimental to investor protection. ESMA also expresses its concerns that some of the transactions that qualify for the exemption may lead to the admission to trading on a regulated market of unlisted issuers without the publication of a scrutinised and approved IPO prospectus. ESMA's express preference would be for the Commission to deal with these matters by way of amendments to the Prospectus Regulation. ESMA may wish to resolve these concerns with the Commission, and explain the position in its Final Report, so that market participants are clear on their expectations.

*Specific comment about the Exempted Document content requirements*

11. ESMA's proposal includes different appendixes setting out the minimum information requirements, depending on whether the issuer issuing or admitting securities is known, and information is already available, to the market. Given ESMA's reservations as expressed to the Commission in its July 2018 letter, we limit our remarks to the situation where the issuer is known, and information is already available, to the market. ESMA's proposed Appendix 1 does not sufficiently reduce the substantive mandatory disclosure requirements as against a full Prospectus as might have been possible, and so may not meet the objectives of the Level 1 measures to reduce the costs of producing an exempted document to make a compelling case for companies to seek to make use of it.

**Regulatory disclosures – paragraph 13.1**

12. We would suggest that ESMA make the amendments set out below to the proposed Level 2 requirement set out in Appendix 1, paragraph 13.1 of the Consultation.
13. "The summary of the relevant information disclosed under Regulation (EU) 596/2014 featured in an Exempted Document shall be presented in an easily analysable, concise and comprehensible form. It shall not replicate information already published under Regulation 596/2014 and shall be an intelligible summary of the last relevant information".
14. We would also recommend that ESMA:
- Include a provision in Level 2 that, without prejudice to the concise summary of an issuer's MAR and TD disclosures included in the prospectus, an Issuer's MAR and TD disclosures (whether or not summarised) do not form part of an issuer's prospectus unless expressly incorporated by reference.
  - Require an issuer to include specific wording in a prospectus stating that its MAR and TD disclosures do not form part of an issuer's Exempted Document.

**FOR FURTHER INFORMATION PLEASE CONTACT:**

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