**Version as of 8 January 2019**

**Draft compromise amendments - Art. 9 (Prospectus)**

***COMP ?***

Article 9

Amendments to Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market

Regulation (EU) 2017/1129 is amended as follows:

(1) Article 2 is amended as follows:

(a) point (iii) of the definition of 'home Member State' under letter (m) is deleted.

***(276 Balz-Berès, 1169 Loones, 1170 Karas)***

(2) in Article 4, paragraph 2 is replaced by the following:

"2. Such voluntarily drawn up prospectus approved by the competent authority of the home Member State, as determined in accordance with point (m) of Article 2, or by ESMA in accordance with Article 31a, shall entail all the rights and obligations provided for a prospectus required under this Regulation and shall be subject to all provisions of this Regulation, under the supervision of that competent authority." ;

(3) in Article 20, paragraph 8 is replaced by the following:

"8. On request of the issuer, the offeror or the person asking for admission to trading on a regulated market, the competent authority of the home Member State may transfer the approval of a prospectus to the competent authority of another Member State, subject to the agreement of that competent authority and, unless ESMA assumes the role of competent authority of the home Member State in accordance with Article 31a, the prior notification to ESMA. The competent authority of the home Member State shall transfer the documentation filed, together with its decision to grant the transfer, in electronic format, to the competent authority of the other Member State on the date of its decision. Such a transfer shall be notified to the issuer, the offeror or the person asking for admission to trading on a regulated market within three working days from the date of the decision taken by the competent authority of the home Member State. The time limits set out in the first subparagraph of paragraph 2 and paragraph 3 shall apply from the date the decision was taken by the competent authority of the home Member State. Article 28(4) of Regulation (EU) No 1095/2010 shall not apply to the transfer of the approval of the prospectus in accordance with this paragraph. Upon completion of the transfer of the approval, the competent authority to whom the approval of the prospectus has been transferred shall be deemed to be the competent authority of the home Member State for that prospectus for the purposes of this Regulation.";

(4) Article 22 is amended as follows:

(a) the following paragraph 6a is inserted:

"6a. By derogation from paragraph 6, ESMA shall have the power to exercise control over compliance of advertising activity with the requirements set out in paragraphs 2 to 4 in each host Member State where advertisements are disseminated, in any of the following cases:.

(a) where ESMA is the competent authority in accordance with Article 31a;

(b) for any prospectus drawn up in accordance with the laws of a third country and used in the Union in accordance with Article 29.

Without prejudice to Article 32(1), scrutiny of the advertisements by ESMA shall not constitute a precondition for the offer of securities to the public or the admission to trading to a regulated market to take place in any host Member State.

The use of any of the supervisory and investigatory powers set out in Article 32 in relation to the enforcement of this Article by ESMA shall be communicated without undue delay to the competent authority of the relevant host Member State.

At the request of the competent authority of a Member State, ESMA shall exercise the control referred to in the first subparagraph for all advertisements disseminated in its jurisdiction in relation to all, or some, categories of prospectuses approved by ESMA in accordance with Article 31a. ESMA shall publish and regularly update a list of the Member States for which it exercises such control and the categories of prospectuses concerned. .";

(b) paragraph 7 is replaced by the following:

"7. Competent authorities of host Member States and ESMA may only charge fees that are linked to the performance of their supervisory tasks pursuant to this Article. The level of fees shall be disclosed on the websites of the competent authorities and ESMA. Fees shall be non-discriminatory, reasonable and proportionate to the supervisory task. Competent authorities of host Member States and ESMA shall not impose any requirements or administrative procedures in addition to those required for the exercise of their supervisory tasks pursuant to this Article."

(c) paragraph 8 is replaced by the following:

"8. By way of derogation from paragraphs 6 and 6a, any two competent authorities, including ESMA where applicable, may conclude an agreement whereby, for the purposes of exercising control over compliance of advertising activity in cross-border situations or in situations where paragraph 6a applies, the competent authority of the home Member State, or, where paragraph 6a applies, the competent authority of the host Member State, is to retain control over that compliance. Any such agreement shall be notified to ESMA, unless ESMA is a signatory to the agreement in its capacity of competent authority of the Home Member State in accordance with Article 31a. ESMA shall publish and regularly update a list of such agreements.";

(5) Article 25 is amended as follows:

(a) paragraph 4 is replaced by the following:

"4. Where the final terms of a base prospectus are neither included in the base prospectus, nor in a supplement, the competent authority of the home Member State shall communicate them electronically, as soon as practicable after they are filed, to ESMA and, where the base prospectus has been previously notified, to the competent authority of the host Member State(s)."

(b) the following paragraph 6a is inserted:

"6a. For all prospectuses drawn up by a third country issuer in accordance with Article 29, the certificate of approval referred to in this article shall be replaced by a certificate of filing.";

(6) in Article 27, the following paragraph 3a is inserted:

"3a. By way of derogation from paragraphs 1, 2 and 3, where ESMA is the competent authority in accordance with Article 31a, the prospectus shall be drawn up 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.

The competent authority of each host Member State shall require that the summary referred to in Article 7 be available in its official language, or at least one of its official languages, or in another language accepted by the competent authority of that Member State, but it shall not require the translation of any other part of the prospectus.";

(7) Article 28 is replaced by the following:

"Article 28

Offer of securities to the public or admission to trading on a regulated market made under a prospectus drawn up in accordance with this Regulation

Where a third country issuer intends to offer securities to the public in the Union or to seek admission to trading of securities on a regulated market established in the Union under a prospectus drawn up in accordance with this Regulation, it shall obtain approval of its prospectus from ESMA in accordance with Article 20.

Once a prospectus is approved in accordance with the first subparagraph, it shall entail all the rights and obligations provided for a prospectus under this Regulation and the prospectus and the third country issuer shall be subject to all of the provisions of this Regulation under the supervision of ESMA.";

(8) Article 29 is replaced by the following:

"Article 29

Offer of securities to the public or admission to trading on a regulated market made under a prospectus drawn up in accordance with the laws of a third country

1. A third country issuer may offer securities to the public in the Union or seek admission to trading of securities on a regulated market in the Union after prior

publication of a prospectus drawn up and approved in accordance with, and which is subject to, the national laws of the third country issuer, provided that:

(a) the Commission has adopted an implementing decision in accordance with paragraph 3;

(b) the third country issuer has filed the prospectus with ESMA;

(c) the third country issuer has provided a written confirmation that the prospectus has been approved by a third country supervisory authority and has provided the contact details of that authority;

(d) the prospectus fulfils the language requirements set out in Article 27;

(e) all advertisements disseminated in the Union by the third country issuer in relation to the offer or admission to trading comply with the requirements set out in paragraphs 2 to 5 of Article 22;

(f) ESMA has concluded cooperation arrangements with the relevant supervisory authorities of the third country issuer in accordance with Article

30.

References to 'the competent authority of the home Member State' in this Regulation shall be understood as referring to ESMA with regard to any provision applied to prospectuses referred to in this paragraph.

2. The requirements set out in Articles 24 and 25 shall apply to the prospectus drawn up in accordance with the laws of a third country where the conditions set out in paragraph 1 are fulfilled.

3. The Commission is empowered to adopt delegated acts in accordance with Article 44 to supplement this Regulation by establishing general equivalence criteria, based on the requirements laid down in Articles 6, 7, 11, 12, 13 and in Chapter IV of this Regulation.

On the basis of the criteria set out in these delegated acts, the Commission may adopt an implementing decision stating that the legal and supervisory arrangements of a third country ensure that prospectuses drawn up in accordance with the national law of that third country comply with legally binding requirements which have an equivalent regulatory effect to the requirements set out in this Regulation. Such implementing decision shall be adopted in accordance with the examination procedure referred to in Article 45(2).

The Commission may make the application of the implementing decision subject to the effective fulfilment by a third country, on a continuous basis, of any requirements set out within that implementing decision and to ESMA's ability to effectively exercise its responsibilities in relation to monitoring referred to in paragraph 2a of Article 33 of Regulation (EU) No 1095/2010.";

(9) Article 30 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. For the purposes of Article 29, and, where deemed necessary, for the purposes of Article 28, ESMA shall conclude cooperation arrangements with supervisory authorities of third countries on the exchange of information with those third country authorities and the enforcement of obligations in third countries pursuant to this Regulation. Those cooperation arrangements shall ensure, at a minimum, the

efficient exchange of information allowing ESMA to carry out their duties under this

Regulation.

By way of derogation from the first subparagraph, where a third country is included in the list of jurisdictions which are considered to have national anti-money laundering policies and policies countering the financing of terrorism regimes with strategic deficiencies that pose significant threats to the financial system of the Union, as referred to in a delegated act in force adopted by the Commission pursuant to Article 9 of Directive (EU) 2015/849 of the European Parliament and of the Council\*, ESMA shall not conclude cooperation arrangements with supervisory authorities of that third country.

ESMA shall inform all the competent authorities designated in accordance with Article 31(1) of any cooperation arrangement concluded in accordance with the first subparagraph.

\* Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May

2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (OJ L 141, 5.6.2015, p. 73).";

(b) paragraph 2 is deleted;

(c) paragraph 3 is renumbered as paragraph 2 and is replaced by the following:

"2. ESMA shall conclude cooperation arrangements on exchange of information with the supervisory authorities of third countries only where the information disclosed is subject to guarantees of professional secrecy which are at least equivalent to those set out in Article 35.";

(d) paragraph 4 is deleted;

(10) in Chapter VII, the following Articles 31a and 31b are inserted:

"Article 31a

Supervision by ESMA of certain types of prospectuses

For the following prospectuses, including any supplement thereto, ESMA shall be the competent authority with regard to scrutiny and approval of those prospectuses as laid out in Article 20 and notifications to competent authorities of host Member States as laid out in Article 25:

(a) prospectuses drawn up by any legal entity or person established in the Union and relating to the admission of non-equity securities ***, whose denomination per unit amounts to at least EUR 100000, to trading on*** regulated ***markets in more than one Member State; (1175 Giegold, 1176 Berès, 1177 Klinz et al)***

(b) prospectuses drawn up by any legal entity or person established in the Union and relating to ***the trading of*** asset backed securities ***in more than one Member State***; ***(1178 Klinz et al)***

***(277 Balz-Berès, 1179 Karas, 1180 Giegold, 1181 Loones)***

(d) prospectuses drawn up by third country issuers in accordance with Article 28 of this Regulation.

References to 'the competent authority of the home Member State' in this Regulation shall be understood as referring to ESMA with regard to any provision applied to prospectuses listed in the first subparagraph.";

(11) a new Article 34 b is inserted:

"Article 31b

Transitional measures related to ESMA

1. Prospectuses listed in Article 31a which have been submitted to a competent authority for approval prior to [PO: Please insert date 36 months after entry into force] shall continue to be supervised by that competent authority, including where applicable as regards any supplements and final terms thereto, until the end of their validity.

The approval granted by a competent authority for those prospectuses prior to [PO: Please insert date 36 months after entry into force] shall remain valid after the transfer of competences to ESMA referred to in paragraph 2.

The supervision of those prospectuses, including where applicable as regards any supplements and final terms thereto, shall remain subject to the rules applicable at the time of submission to the competent authority.

2. All competences and duties related to the supervisory and enforcement activity of the prospectuses listed in Article 31a and submitted for approval from [PO: Please insert date 36 months after entry into force] shall be taken-up by ESMA

."

(12) Article 32 is amended as follows:

(a) the introductory sentence of the first subparagraph of paragraph 1 is replaced by the following:

"1. In order to fulfil their duties under this Regulation, competent authorities and ESMA shall have, in accordance with national law, at least the following supervisory and investigatory powers:";

(b) point (j) of the first subparagraph of paragraph 1 is replaced by the following:

"(j) to suspend the scrutiny of a prospectus submitted for approval or suspend or restrict an offer of securities to the public or admission to trading on a regulated market where ESMA or the competent authority is making use of the power to impose a prohibition or restriction pursuant to Article 40 or 42 of Regulation (EU) No 600/2014 of the European Parliament and of the Council, until such prohibition or restriction has ceased;";

(c) the second subparagraph of paragraph 1 is replaced by the following:

"Where necessary under national law, the competent authority or ESMA may ask the relevant judicial authority to decide on the use of the powers referred to in the first subparagraph.";

(d) paragraph 2 is replaced by the following:

"2. Competent authorities and ESMA shall exercise their functions and powers referred to in paragraph 1 in any of the following ways:

(a) directly;

(b) in collaboration with other authorities or ESMA;

(c) under their responsibility by delegation to such authorities or ESMA;

(d) by application to the competent judicial authorities."

(e) paragraph 5 is replaced by the following:

"5. A person making information available to the competent authority or ESMA in accordance with this Regulation shall not be considered to be infringing any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not be subject to liability of any kind related to such notification.";

(13) the second paragraph of Article 35 is replaced by the following:

"2. The obligation of professional secrecy shall apply to all persons who work or who have worked for the competent authority, for ESMA or for any third party to whom the competent authority or ESMA has delegated its powers. Information covered by professional secrecy may not be disclosed to any other person or authority except by virtue of provisions laid down by Union or national law.";

(14) the last subparagraph of paragraph 1 of Article 38 is replaced by the following:

"By 21 July 2019, Member States shall notify, in detail, the rules referred to in the first and second subparagraph to the Commission and to ESMA. They shall notify the Commission and ESMA of any subsequent amendment thereto without delay.";

(15) the following chapter is inserted:

"CHAPTER VIIIA

ESMA POWERS AND COMPETENCES

SECTION 1

COMPETENCES AND PROCEDURES

Article 43a

Exercise of the powers by ESMA

The powers conferred on ESMA or any official of or other person authorised by ESMA by Articles 43b to 43d shall not be used to require the disclosure of information or documents which are subject to legal privilege.

Article 43b

Request for information

1. ESMA may by simple request or by decision require the following persons to provide all necessary information to enable ESMA to carry out its duties under this Regulation:

(a) issuers, offerors or persons asking for admission to trading on a regulated market, and the persons that control them or are controlled by them;

(b) the managers of the persons referred to under (a);

(c) the auditors and advisors of the persons referred to under (a);

(d) the financial intermediaries commissioned by the persons referred to under (a) to carry out the offer of securities to the public or ask for admission to trading on a regulated market.

(e) the guarantor of the securities offered to the public or admitted to trading on a regulated market.

2. Any simple request for information referred to paragraph 1 shall:

(a) refer to this Article as the legal basis of that request;

(b) state the purpose of the request;

(c) specify the information required;

(d) include a time limit within which the information is to be provided;

(e) include a statement that there is no obligation on the person from whom the information is requested to provide that information but that in case of a voluntary reply to the request, the information provided must not be incorrect or misleading;

(f) indicate the amount of the fine to be issued in accordance with Article 43f where the information provided is incorrect or misleading.

3. When requiring to supply information under paragraph 1 by decision, ESMA shall:

(a) refer to this Article as the legal basis of that request;

(b) state the purpose of the request;

(c) specify the information required;

(d) set a time limit within which the information is to be provided;

(e) indicate the periodic penalty payments provided for in Article 43g where the production of the required information is incomplete;

(f) indicate the fine provided for in Article 43f, where the answers to questions asked are incorrect or misleading;

(g) indicate the right to appeal the decision before ESMA’s Board of Appeal and to have the decision reviewed by the Court of Justice of the European Union (‘Court of Justice’) in accordance with Articles 60 and 61 of Regulation (EU) No 1095/2010.

4. The persons referred to in paragraph 1 or their representatives and, in the case of legal persons or associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested. Lawyers duly authorised to act may supply the information on behalf of their clients. The latter shall remain fully responsible if the information supplied is incomplete, incorrect or misleading.

5. ESMA shall, without delay, send a copy of the simple request or of its decision to the competent authority of the Member State where the persons referred to in paragraph 1 concerned by the request for information are domiciled or established.

Article 43c

General investigations

1. In order to carry out its duties under this Regulation, ESMA may conduct necessary investigations of persons referred to in Article 43b(1). To that end, the officials and other persons authorised by ESMA shall be empowered to:

(a) examine any records, data, procedures and any other material relevant to the execution of its tasks irrespective of the medium on which they are stored;

(b) take or obtain certified copies of or extracts from such records, data, procedures and other material;

(c) summon and ask any person referred to in Article 43b(1) or their representatives or staff for oral or written explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers;

(d) interview any other natural or legal person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation;

(e) request records of telephone and data traffic.

2. The officials and other persons authorised by ESMA for the purposes of the investigations referred to in paragraph 1 shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the investigation. That authorisation shall also indicate the periodic penalty payments provided for in Article 43g where the production of the required records, data, procedures or any other material, or the answers to questions asked to persons referred to in Article 43b(1) are not provided or are incomplete, and the fines provided for in Article 43f, where the answers to questions asked to persons referred to in Article 43b(1) are incorrect or misleading.

3. The persons referred to in Article 43b(1) are required to submit to investigations launched on the basis of a decision of ESMA. The decision shall specify the subject matter and purpose of the investigation, the periodic penalty payments provided for in Article 43g, the legal remedies available under Regulation (EU) No 1095/2010 and the right to have the decision reviewed by the Court of Justice.

3. In good time before an investigation referred to in paragraph 1, ESMA shall inform the competent authority of the Member State where the investigation is to be

carried out of the investigation and of the identity of the authorised persons. Officials of the competent authority concerned shall, upon the request of ESMA, assist those authorised persons in carrying out their duties. Officials of the competent authority concerned may also attend the investigations upon request.

5. If a request for records of telephone or data traffic referred to in point (e) of paragraph 1 requires authorisation from a national judicial authority according to applicable national law, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

6. Where a national judicial authority receives an application for the authorisation of a request for records of telephone or data traffic referred to in point (e) of paragraph 1, that authority shall verify the following:

(a) the decision adopted by ESMA referred to in paragraph 3 is authentic;

(b) any measures to be taken are proportionate and not arbitrary or excessive.

For the purposes of point (b), the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the investigation or demand that it be provided with the information on ESMA’s file. The lawfulness of ESMA’s decision shall be subject to review only by the Court of Justice following the procedure set out in Article 61 of Regulation (EU) No 1095/2010.

Article 43d

On-site inspections

1. In order to carry out its duties under this Regulation, ESMA may conduct all necessary on-site inspections at any business premises of the persons referred to in Article 43b(1).

2. The officials and other persons authorised by ESMA to conduct an on-site inspection may enter any business premises of the persons subject to an investigation decision adopted by ESMA and shall have all the powers stipulated in Article 43c(1). They shall also have the power to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection.

3. In sufficient time before the inspection, ESMA shall give notice of the inspection to the competent authority of the Member State where the inspection is to be conducted. Where the proper conduct and efficiency of the inspection so require, ESMA, after informing the relevant competent authority, may carry out the on-site inspection without prior notice. Inspections in accordance with this Article shall be conducted provided that the relevant authority has confirmed that it does not object to those inspections.

4. The officials and other persons authorised by ESMA to conduct an on-site inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the periodic penalty payments provided for in Article 43g where the persons concerned do not submit to the inspection.

5. The persons referred to in Article 43b(1) shall submit to on-site inspections ordered by decision of ESMA. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the periodic penalty payments provided for in Article 43g, the legal remedies available under Regulation (EU) No 1095/2010 as well as the right to have the decision reviewed by the Court of Justice.

6. Officials of, as well as those authorised or appointed by, the competent authority of the Member State where the inspection is to be conducted shall, at the request of ESMA, actively assist the officials and other persons authorised by ESMA. Officials of that competent authority may also attend the on-site inspections upon request.

7. ESMA may also require competent authorities to carry out specific investigatory tasks and on-site inspections as provided for in this Article and in Article 43c(1) on its behalf. To that end, competent authorities shall enjoy the same powers as ESMA as set out in this Article and in Article 43c(1).

8. Where the officials and other accompanying persons authorised by ESMA find that a person opposes an inspection ordered pursuant to this Article, the competent authority of the Member State concerned shall afford them the necessary assistance, requesting, where appropriate, the assistance of the police or of an equivalent enforcement authority, to enable them to conduct their on-site inspection.

9. If the on-site inspection provided for in paragraph 1 or the assistance provided for in paragraph 7 requires authorisation by a national judicial authority according to the applicable national law, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

10. Where a national judicial authority receives an application for the authorisation of an on-site inspection provided for in paragraph 1 or the assistance provided for in paragraph 7, that authority shall verify the following:

(a) the decision adopted by ESMA referred to in paragraph 4 is authentic;

(b) any measures to be taken are proportionate and not arbitrary or excessive.

For the purposes of point (b), the national judicial authority may ask ESMA for detailed explanations, in particular relating to the grounds ESMA has for suspecting that an infringement of this Regulation has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the investigation or demand that it be provided with the information on ESMA’s file. The lawfulness of ESMA’s decision shall be subject to review only by the Court of Justice following the procedure set out in Article 61 of Regulation (EU) No 1095/2010.

SECTION 2

ADMINISTRATIVE SANCTIONS AND OTHER MEASURES

Article 43e

Supervisory measures by ESMA

1. Where, in accordance with Article 43i(5), ESMA finds that a person has committed one of the infringements listed in point (a) of Article 38(1), it shall take one or more of the following actions:

(a) adopt a decision requiring the person to bring the infringement to an end;

(b) adopt a decision imposing fines pursuant to Article 43f;

(c) issue public notices.

2. When taking the actions referred to in paragraph 1, ESMA shall take into account the nature and seriousness of the infringement, having regard to the following criteria:

(a) the duration and frequency of the infringement;

(b) whether financial crime has been occasioned, facilitated or otherwise attributable to the infringement;

(c) whether the infringement has been committed intentionally or negligently.

(d) the degree of responsibility of the person responsible for the infringement;

(e) the financial strength of the person responsible for the infringement, as indicated by the total turnover of the responsible legal person or the annual income and net assets of the responsible natural person;

(f) the impact of the infringement on retail investors’ interests;

(g) the importance of the profits gained, losses avoided by the person responsible for the infringement or the losses for third parties derived from the infringement, insofar as they can be determined;

(h) the level of cooperation of the person responsible for the infringement with ESMA, without prejudice to the need to ensure disgorgement of profits gained or losses avoided by that person;

(i) previous infringements by the person responsible for the infringement;

(j) measures taken after the infringement by the person responsible for the infringement to prevent its repetition.

3. Without undue delay, ESMA shall notify any action taken pursuant to paragraph 1 to the person responsible for the infringement, and shall communicate it to the competent authorities of the Member States and to the Commission. It shall publicly disclose any such action on its website within 10 working days from the date when it was adopted.

The disclosure to the public referred to in the first subparagraph shall include the following:

(a) a statement affirming the right of the person responsible for the infringement to appeal the decision;

(b) where relevant, a statement affirming that an appeal has been lodged and specifying that such an appeal does not have suspensive effect;

(c) a statement asserting that it is possible for ESMA’s Board of Appeal to suspend the application of the contested decision in accordance with Article 60(3) of Regulation (EU) No 1095/2010.

Article 43f

Fines

1. Where, in accordance with Article 43i(5), ESMA finds that any person has, intentionally or negligently, committed one or more of the infringements listed in point (a) of Article 38(1), it shall adopt a decision imposing a fine in accordance with paragraph 2 of this Article.

An infringement shall be considered to have been committed intentionally if ESMA finds objective factors which demonstrate that a person acted deliberately to commit the infringement.

2. The maximum amount of the fine referred to in paragraph 1 shall be:

(i) in the case of a legal person, EUR 10 000 000, or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 20 July 2017, or 6 % of the total annual turnover of that legal person according to the last available financial statements approved by the management body.

(ii) in the case of a natural person, EUR 1 400 000, or, in the Member States whose currency is not the euro, the corresponding value in the national currency on 20 July 2017.

For the purposes of point (i), where the legal person is a parent undertaking or a subsidiary of a parent undertaking which is required to prepare consolidated financial accounts in accordance with Directive 2013/34/EU, the relevant total annual turnover shall be the total annual turnover or the corresponding type of income in accordance with the relevant Union law in the area of accounting according to the last available consolidated accounts approved by the management body of the ultimate parent undertaking.

3. When determining the level of a fine pursuant to paragraph 1, ESMA shall take into account the criteria set out in Article 43e(2).

4. Notwithstanding paragraph 3, where a person has directly or indirectly benefited financially from the infringement, the amount of the fine shall be at least equal to that benefit.

5. Where an act or omission of a person constitutes more than one infringement listed in point (a) of Article 38(1), only the higher fine calculated in accordance with paragraph 3 and relating to one of those infringements shall apply.

Article 43g

Periodic penalty payments

1. ESMA shall, by decision, impose periodic penalty payments in order to compel:

(a) a person to put an end to an infringement in accordance with a decision taken pursuant to Article 43e(1)(a);

(b) a person referred to in Article 43b(1):

(i) to supply complete information which has been requested by a decision pursuant to Article 43b;

(ii) to submit to an investigation and in particular to produce complete records, data, procedures or any other material required and to complete and correct other information provided in an investigation launched by a decision pursuant to Article 43c;

(iii) to submit to an on-site inspection ordered by a decision taken pursuant to Article 43d.

2. A periodic penalty payment shall be effective and proportionate. The periodic penalty payment shall be imposed for each day of delay.

3. Notwithstanding paragraph 2, the amount of the periodic penalty payments shall be 3% of the average daily turnover in the preceding business year, or, in the case of natural persons, 2% of the average daily income in the preceding calendar year. It shall be calculated from the date stipulated in the decision imposing the periodic penalty payment.

4. A periodic penalty payment shall be imposed for a maximum period of six months following the notification of ESMA’s decision. Following the end of the period, ESMA shall review the measure.

Article 43h

Disclosure, nature, enforcement and allocation of fines and periodic penalty payments

1. ESMA shall disclose to the public every fine and periodic penalty payment that has been imposed pursuant to Articles 43f and 43g unless such disclosure to the public would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

2. Fines and periodic penalty payments imposed pursuant to Articles 43f and 43g shall be of an administrative nature.

3. Where ESMA decides to impose no fines or penalty payments, it shall inform the European Parliament, the Council, the Commission, and the competent authorities of the Member State concerned accordingly and shall set out the reasons for its decision.

4. Fines and periodic penalty payments imposed pursuant to Articles 43f and 43g shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the Member

State or third-country in which it is carried out.

5. The amounts of the fines and periodic penalty payments shall be allocated to the general budget of the European Union.

SECTION 3

PROCEDURES AND REVIEW

Article 43i

Procedural rules for taking supervisory measures and imposing fines

1. Where, in carrying out its duties under this Regulation, ESMA finds that there are serious indications of the possible existence of facts liable to constitute one or more of the infringements listed in point (a) of Article 38(1), ESMA shall appoint an independent investigation officer within ESMA to investigate the matter. The appointed officer shall not be involved or have been directly or indirectly involved in the approval of the prospectus to which the infringement relates and shall perform his functions independently from ESMA's Board of Supervisors.

2. The investigation officer referred to in paragraph 1 shall investigate the alleged infringements, taking into account any comments submitted by the persons who are subject to the investigations, and shall submit a complete file with his findings to ESMA's Board of Supervisors.

3. In order to carry out his tasks, the investigation officer shall have the power to request information in accordance with Article 43b and to conduct investigations and on-site inspections in accordance with Articles 43c and 43d.

4. Where carrying out his tasks, the investigation officer shall have access to all documents and information gathered by ESMA in its supervisory activities.

5. Upon completion of his investigation and before submitting the file with his findings to ESMA's Board of Supervisors, the investigation officer shall give the persons subject to the investigations the opportunity to be heard on the matters being investigated. The investigation officer shall base his findings only on facts on which the persons concerned have had the opportunity to comment.

6. The rights of the defence of the persons subject to the investigations shall be fully respected during investigations under this Article.

7. Upon submission of the file with his findings to ESMA's Board of Supervisors, the investigation officer shall notify the persons who are subject to the investigations. The persons subject to the investigations shall be entitled to have access to the file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information affecting third parties.

8. On the basis of the file containing the investigation officer’s findings and, when requested by the persons subject to the investigations, after having heard those persons in accordance with Article 43j, ESMA shall decide if one or more of the infringements listed in point (a) of Article 38(1) has been committed by the persons subject to the investigations and, in such a case, shall take a supervisory measure in accordance with Article 43e and impose a fine in accordance with Article 43f.

9. The investigation officer shall not participate in the deliberations of ESMA's Board of Supervisors or in any other way intervene in the decision-making process of ESMA’s Board of Supervisors.

10. The Commission shall adopt delegated acts in accordance with Article 44 to specify the rules of procedure for the exercise of the power to impose fines or periodic penalty payments, including provisions on rights of defence, temporal provisions, and the collection of fines or periodic penalty payments, and the limitation periods for the imposition and enforcement of fines and periodic penalty payments.

11. ESMA shall refer matters for criminal prosecution to the relevant national authorities where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences. In addition, ESMA shall refrain from imposing fines or periodic penalty payments where a prior acquittal or conviction arising from identical fact or facts which are substantially the same has already acquired the force of res judicata as the result of criminal proceedings under national law.

Article 43j

Hearing of the persons subject to investigations

1. Before taking any decision pursuant to Articles 43e, 43f and 43g, ESMA shall give the persons subject to investigations the opportunity to be heard on its findings. ESMA shall base its decisions only on findings on which the persons subject to investigations have had an opportunity to comment.

The first subparagraph shall not apply if urgent action pursuant to Article 43e is needed in order to prevent significant and imminent damage to the financial system. In such a case ESMA may adopt an interim decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision.

2. The rights of defence of the persons subject to investigations shall be fully respected in the investigations. They shall be entitled to have access to ESMA’s file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information or ESMA’s internal preparatory documents.

Article 43k

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction to review decisions whereby ESMA has imposed a fine or a periodic penalty payment. It may annul, reduce or increase the fine or periodic penalty payment imposed.

SECTION 4

FEES AND DELEGATION

Article 43l

Supervisory fees

1. ESMA shall charge fees to issuers, offerors or persons asking for admission to trading on a regulated market in accordance with this Regulation and in accordance with the delegated acts adopted pursuant to paragraph 3. Those fees shall fully cover ESMA’s necessary expenditure relating to the scrutiny and approval of prospectuses, including supplements thereto, and to their notification to competent authorities of host Member States, and the reimbursement of any costs that the competent authorities may incur carrying out work pursuant to this Regulation in particular as a result of any delegation of tasks in accordance with Article 43m.

2. The amount of an individual fee charged to a particular issuer, offeror or person asking for admission to trading on a regulated market shall cover all administrative costs incurred by ESMA for its activities in relation to the prospectus, including supplements thereto, drawn up by such issuer, offeror or person asking for admission to trading on a regulated market. It shall be proportionate to the turnover of the issuer, offeror or person asking for admission to trading on a regulated market.

3. The Commission shall adopt delegated acts in accordance with Article 44 to specify the type of fees, the matters for which fees are due, the amount of the fees and the manner in which they are to be paid.

Article 43m

Delegation of tasks by ESMA to competent authorities

1. Where necessary for the proper performance of a supervisory task, ESMA may delegate specific supervisory tasks to the competent authority of a Member State in accordance with the guidelines issued by ESMA pursuant to Article 16 of Regulation (EU) No 1095/2010. Such specific supervisory tasks may, in particular, include the power to carry out requests for information in accordance with Article 43b and to conduct investigations and on-site inspections in accordance with Article 43c and Article 43d.

By way of derogation from the first subparagraph, the scrutiny, approval and notification of prospectuses, including supplements thereto, the final assessments and follow-up decisions concerning infringements shall not be delegated.

2. Prior to the delegation of a task in accordance with paragraph 1, ESMA shall consult the relevant competent authority about:

(a) the scope of the task to be delegated;

(b) the timetable for the performance of the task; and

(c) the transmission of necessary information by and to ESMA.

3. ESMA shall reimburse a competent authority for costs incurred as a result of carrying out delegated tasks in accordance with the delegated act referred to in Article 43l(3).

4. ESMA shall review any delegation made in accordance with paragraph 1 at appropriate intervals. A delegation may be revoked at any time.

5. A delegation of tasks shall not affect the responsibility of ESMA and shall not

limit ESMA’s ability to conduct and oversee the delegated activity."

*AMs tabled to Article 9 that fall if COMP is adopted: 276 Balz-Berès, 277 Balz-Berès, 1167 Delvaux-Gill, 276 Balz-Berès, 1169 Loones, 1170 Karas, 1171 Giegold, 1172 Giegold, 1173 Berès, 1174 Berès, 1175 Giegold, 1176 Berès, 1177 Klinz-Tremosa i Balcells-Cornillet, 1178 Klinz-Tremosa i Balcells-Cornillet, 1179 Karas, 1180 Giegold, 1181 Loones*

*AMs not addressed in COMP: 1164 Swinburne, 1166 Ferber, 1168 Hayes*