

## UNPICKING THE PROSPECTUS REGULATION RULES ON PROFIT FORECASTS, PROFIT ESTIMATES, TREND INFORMATION AND OBJECTIVES IN THE COVID-19 CONTEXT

On 24 January 2020, the then French Minister of Health, Agnès Buzyn, confirmed the first cases of coronavirus in France. Eight months and an eight week lockdown later, the pandemic continues to dominate the French political, social and economic agenda. Few, if any, companies have come through the crisis unscathed. In this context, the publication of forward-looking financial information, in particular the use of financial indicators to illustrate the levels of expected recoveries, has been an important tool for companies seeking to give investors and commercial partners a better indication of the financial prospects of their organisations.

In this article we break down how [Regulation \(EU\) 2017/1129](#) and the supporting legislation (together, the "**Prospectus Regulation**"), fully in force in France since 21 July 2019, categorises the different kinds of forward-looking financial information that might be published by companies and look at how the categorisation of information as profit forecasts, profit estimates, trend information or objectives can have an impact on the content of prospectuses<sup>1</sup> for the issuance of wholesale debt securities that fall within its purview.

It is important for issuers of debt securities, and more specifically those individuals responsible for the preparation and publication of forward-looking financial information in press releases, universal registration documents, interim financial reports or other publicly-available documents, to be aware of these different categories of forward-looking financial information. In order to respect the Prospectus Regulation requirements and facilitate future issuances of wholesale debt securities, issuers may need to complete their disclosure with

### Key issues

- Since the outbreak of the Covid-19 pandemic, forward-looking financial information is arguably more important than ever for companies.
- The disclosure requirements for prospectuses for wholesale debt securities prepared in accordance with the Prospectus Regulation vary according to whether such forward-looking information is classified by the issuer as (i) profit forecasts, (ii) profit estimates, (iii) trend information or (iv) objectives.

<sup>1</sup> Wholesale securities are issued in minimum denominations of €100,000 and are aimed mainly at institutional investors. Under the Prospectus Regulation, such issuances benefit from 'lighter' disclosure requirements than retail securities aimed at a wider base of investors.

additional information, adjust the language employed therein or make other changes that may be deemed necessary or appropriate.

## PROFIT FORECASTS

Under the Prospectus Regulation, a '**profit forecast**' is a statement that expressly or by implication indicates a figure or a minimum or maximum figure (or a range of figures)<sup>2</sup> for the likely level of profits or losses (including measures of profitability derived from profit and loss accounts)<sup>3</sup> for current or future financial periods, or contains data from which a calculation of such a figure for future profits or losses can be made, even if no particular figure is mentioned and the word 'profit' is not used<sup>4</sup>.

Information does not need to relate to the entirety of the issuer's results to be a profit forecast. Where one or more segments of the issuer's business generates the vast majority of the issuer's profit / loss, and predictions are made about the level of the segment's profit / loss, this can also constitute a profit forecast.<sup>5</sup>

The European Securities and Markets Authority ("**ESMA**") adopts a "substance over form" approach with regards to what financial measures may be viewed as profit forecasts for the purposes of the Prospectus Regulation.<sup>6</sup> However, it has in the past provided the below examples of forward-looking financial information which could be classified as profit forecasts:<sup>7</sup>

**Examples from ESMA of forward-looking financial information that could constitute a profit forecast**

*"We expect this year's profits before taxes to be between €30 million and €50 million."*

*"We hope to reach a profit of €10 million this year."*

*"We aim to reach a profit of €10-12 million earnings before taxes next year."*

*"The profit / loss is expected to be higher / lower / in line with the previous year."*

*"This year's annual results will be positive / negative."*

*"Our target is to become profitable by the end of Q3 this year."*

*"Turnover for Q4 as well as costs are expected to remain the same as last year."*

*"We are expecting this year's turnover to remain the same and this year's EBITDA margin to rise by 5%."*

*"Before the estimated impact of disposals, [...] current expectations for the 20XX Financial Year are Adjusted Operating Profit of around €100 million and EBITDA [...] of around €160 million."*

In addition, ESMA has indicated that any (i) forecasted Gross Profit (if the issuer normally communicates financial performance on Gross Profit level or if the issuer has rigid cost structures), (ii) projected cash flow metrics (if indications making it possible to deduce the likely profit level from it are given elsewhere in the prospectus) or (iii) Alternative Performance Measures or Key Performance

<sup>2</sup> Q102, [ESMA Q&A on Prospectuses, April 2019](#) ("**ESMA Q&A April 2019**").

<sup>3</sup> For example, EBITDA (Earnings before Interest, Taxes, Depreciation and Amortization), EBIT (Earnings before Interest and Taxes), EBT (Earnings before Taxes) or Recurring Net Income. See Q102, [ESMA Q&A April 2019](#).

<sup>4</sup> Article 1(d) of [Commission Delegated Regulation \(EU\) 2019/980](#) ("**CDR 2019/980**").

<sup>5</sup> Q102, [ESMA Q&A April 2019](#).

<sup>6</sup> Q102, [ESMA Q&A April 2019](#).

<sup>7</sup> Taken from Q102, [ESMA Q&A April 2019](#).

Indicators, calculated in full or in part based on profit/loss measures could also be deemed to constitute profit forecasts.<sup>8</sup>

Just as useful are the examples that ESMA has provided as to what are not, by themselves, profit forecasts,<sup>9</sup> although attention should be paid when a profit forecast could be derived by combining such information with other information in the prospectus:

**Examples from ESMA of forward-looking financial information that does not, by itself, constitute a profit forecast**

*"We expect our sales/revenue to decline to €560 million."*

*"Turnover is expected to rise by 5 % compared to last year."*

*"Our target is to maintain an operating margin of 7% in the medium to long term."*

*"Announcement of an amount of dividend per share."*

*"Description of the issuer's dividend policy."*

## PROFIT ESTIMATES

Under the Prospectus Regulation, a '**profit estimate**' is a profit forecast (as defined above) for a financial period which has expired and for which results have not yet been published.<sup>10</sup> ESMA has made clear that 'for which results have not yet been published' refers to the period of time before (i) such results have been approved by the person responsible within the issuer's organisation and (ii) the relevant auditors' report has been published.<sup>11</sup> This means that technically any annual financial information relating to an issuer's profits and losses which is published before the publication of the auditors' report (i.e. unaudited annual financial information relating to profit and loss) constitutes a 'profit estimate'.

In France, the Autorité des Marchés Financiers ("**AMF**") has highlighted that the degree of uncertainty attached to profit estimates is much less than that attached to profit forecasts, on the basis that profit estimates relate to a period of time that has already elapsed, rather than a period of time in the future in which 'certain events cannot be anticipated or do not take place in the manner that was anticipated' or where 'the actions of management may differ from what was intended at the outset'.<sup>12</sup>

## TREND INFORMATION

Section 7 of Annex 7 of CDR 2019/980, which is the relevant annex for wholesale securities, is entitled 'Trend Information' and states that the prospectus must contain a description of (a) any material adverse change in the prospects of the issuer since the date of its last published audited financial statements and (b) any significant change in the financial performance of the group since the end of the last financial period for which financial information has been published to the date of the prospectus, or, if there is none, an appropriate negative statement.

Given this broad language and the absence of definitions in the Prospectus Regulation of the key terms (e.g. 'prospects' or 'financial performance'), forward-looking financial information should only be considered as potentially being

<sup>8</sup> Q102, [ESMA Q&A April 2019](#).

<sup>9</sup> Q102, [ESMA Q&A April 2019](#).

<sup>10</sup> Article 1(c) of [CDR 2019/980](#).

<sup>11</sup> Q84, [ESMA Q&A April 2019](#).

<sup>12</sup> 3.9.2, [Position-Recommandation AMF Doc-2020-06 \(Guide d'élaboration des prospectus et information à fournir en cas d'offre au public ou d'admission de titres financiers\)](#) ("**AMF-2020-06**").

trend information when it does not fall within the definitions of profit forecasts or profit estimates.

If an issuer publishes information relating to the level of a result in the future (or information which allows for such level to be calculated), the AMF has made clear that such information constitutes a profit forecast unless the information is not sufficiently certain (probable), in which case appropriate language describing the trend information should be used to avoid any confusion. The AMF has also suggested that information relating to the level of a result for a period of time further in the future (the AMF uses the terminology 'N+2'<sup>13</sup>), this should not, in general, be considered a profit forecast, provided appropriate language is used to describe the trend information.<sup>14</sup> This is presumably because the information could not be deemed to be sufficiently certain. In any event, there is an onus on issuers to make it clear for investors whether information is a profit forecast, trend information or an objective.<sup>15</sup>

The Committee of European Securities Regulators ("**CESR**") helpfully clarified that general discussion about the future or prospects of the issuer will not normally constitute a profit forecast or profit estimate,<sup>16</sup> something that has been picked up on by the AMF recently.<sup>17</sup> Forward-looking financial disclosure which is narrative-heavy and figure-light, or which centres on the impact of recent events, is most likely to fall under the category of trend information, though whether or not a statement constitutes a profit forecast, a profit estimate, trend information or an objective is a question of fact and will depend on the circumstances of the particular issuer.<sup>18</sup>

## OBJECTIVES

Disclosure published by an issuer may also fall within the definition of 'objectives', which pursuant to the Prospectus Regulation are required to be included in registration documents relating to equity securities. The lack of a definition for 'objectives' in the Prospectus Regulation makes it hard to distinguish them from profit forecasts, profit estimates and trend information. Indeed the AMF has indicated that the communication of objectives should be reconsidered in light of CDR 2019/980 and that issuers wishing to communicate objectives to the market should consider that notwithstanding the use of such terminology, objectives could be considered as being, in reality, profit forecasts.<sup>19</sup>

One clue as to the meaning of objectives can be found in item 5.4, Annex 1 of CDR 2019/80. According to this provision, any registration document for equity securities should include 'a description of the issuer's business strategy and objectives, both financial and non-financial (if any)' which 'shall take into account the issuer's future challenges and prospects.' Whilst Annex 1 does not apply to prospectuses relating to the issuance of wholesale securities, it could nonetheless be seen as evidence that 'objectives' should be limited to financial information of a strategic nature or strategic importance.

<sup>13</sup> The AMF distinguishes between the financial periods of N+1 (relevant to the previous sentence) and N+2 (relevant to the financial period further in the future).

<sup>14</sup> Q10.5, [AMF-2020-06](#).

<sup>15</sup> Q102, [ESMA Q&A April 2019](#).

<sup>16</sup> Paragraph 49, [ESMA update of the CESR recommendations](#) ("[ESMA/2013/319](#)").

<sup>17</sup> 3.9.3, [AMF-2020-06](#).

<sup>18</sup> Paragraph 49, [ESMA/2013/319](#).

<sup>19</sup> Q10.4, [AMF-2020-06](#).

## WHY DOES THE CATEGORISATION MATTER?

Whilst the determination of the relevant category of forward-looking financial information is the issuer's sole responsibility, the relevant competent authority (e.g. the AMF) has a responsibility to ensure that the issuer has made such determination in accordance with the rules of the Prospectus Regulation. As ESMA has emphasised, the mere inclusion of a disclaimer that certain information is not a profit forecast, is not necessarily enough to stop such information from being a profit forecast under the Prospectus Regulation.<sup>20</sup> In addition, given that in the wholesale prospectus context profit forecasts, profit estimates, trend information and objectives are usually incorporated by reference from other publicly available documents such as an issuer press release, a universal registration document or a half year financial report, it is worth giving due thought to the categorisation before such financial information is published for the first time (i.e. rather than at the moment the wholesale prospectus is prepared).

The below table sets out the requirements for the content of a wholesale prospectus, depending on the category of financial information. Where reference is made to information being included in a prospectus, that refers to information being either incorporated by reference in the prospectus or reproduced in the body of the prospectus itself.

| Category                | Requirements in context of a prospectus for wholesale debt securities  |
|-------------------------|--|
| <b>Profit forecasts</b> | <p>The inclusion of a profit forecast in a prospectus for wholesale debt securities is voluntary, but there is an argument that such information is material to an investor for making an informed assessment of 'the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor' or 'the reasons for the issuance [of the bonds] and its impact on the issuer.'<sup>21</sup></p> <p>If included, the profit forecast must be clear and unambiguous and contain a statement setting out the principal assumptions upon which it has been based.</p> <p>The profit forecast must comply with the following principles:</p> <ul style="list-style-type: none"> <li>(a) there must be a clear distinction between assumptions about factors which the members of the administrative, management or supervisory bodies can influence and assumptions about factors which are exclusively outside the influence of the members of the administrative, management or supervisory bodies;</li> <li>(b) the assumptions must be reasonable, readily understandable by investors, specific and precise and not relate to the</li> </ul> |

<sup>20</sup> Q102, [ESMA Q&A April 2019](#).

<sup>21</sup> Article 6(1), the [Prospectus Regulation](#).

| Category                 | Requirements in context of a prospectus for wholesale debt securities  |
|--------------------------|--|
|                          | <p>general accuracy of the estimates underlying the forecast; and</p> <p>(c) in the case of a forecast, the assumptions shall draw the investor's attention to those uncertain factors which could materially change the outcome of the forecast.</p> <p>In addition, the prospectus shall include a statement that the profit forecast has been compiled and prepared on a basis which is both:</p> <p>(a) comparable with the historical financial information; and</p> <p>(b) consistent with the issuer's accounting policies.<sup>22 23</sup></p> |
| <b>Profit estimates</b>  | As for 'Profit forecasts' above, though principle (c) is not required. <sup>24</sup>   |
| <b>Trend information</b> | <p>The prospectus must include a description of (a) any material adverse change in the prospects of the issuer since the date of its last published audited financial statements and (b) any significant change in the financial performance of the group since the end of the last financial period for which financial information has been published to the date of the prospectus.</p> <p>If neither of the above is applicable, the issuer should include an appropriate negative statement in the prospectus.<sup>25</sup></p>                   |
| <b>Objectives</b>        | There is no formal requirement to include such information, unless such information is material to an investor for making an informed assessment of 'the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor' or 'the reasons for the issuance [of the bonds] and its impact on the issuer.' <sup>26</sup>  |

## A LOOK TO THE FUTURE

Historically, for wholesale debt, most investment grade issuers have tended to avoid including profit forecasts or profit estimates, not only because of the above

<sup>22</sup> Item 8 of Annex 7 of [CDR 2019/980](#).

<sup>23</sup> Note that since the entry into force of the Prospectus Regulation there is no longer a requirement to include a report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer. This was a requirement under the Prospectus Directive (Directive 2003/71/EC).

<sup>24</sup> Item 8 of Annex 7 of [CDR 2019/980](#).

<sup>25</sup> Item 7 of Annex 7 of [CDR 2019/980](#).

<sup>26</sup> Article 6(1), the [Prospectus Regulation](#). For the avoidance of doubt, Annex 7 of CDR 2019/980 does not include any reference to objectives.

additional requirements, but also because such forward-looking financial information is an additional source of liability. However, it is perhaps more difficult to maintain such an approach in the Covid-19 context. The AMF in particular has made clear in their review of recent prospectuses that strong consideration should be given to including profit forecasts or profit estimates in wholesale prospectuses where such information has already been made publicly available by the issuer elsewhere. In a changing world, one thing is certain - all companies issuing wholesale debt under a Prospectus Regulation-compliant prospectus should give due and careful consideration to how they classify any forward-looking financial information that they have published or are planning to published and be ready to adapt their wholesale debt prospectus, or the financial disclosure itself, accordingly.



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