European Securities and Markets Authority

Consultation paper

ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU

13 December 2011
ESMA/2011/ 444

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Date: 13 December 2011
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Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- indicate the specific question to which the comment relates;
- respond to the question stated;
- contain a clear rationale, clearly stating the costs and benefits; and
- describe any alternatives ESMA should consider.

The present Consultation Period extends from **13 December 2011** to **6 January 2012**. ESMA will consider all comments received by **6 January 2012**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input> Consultations'

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Legal notice'.

Who should read this paper

All stakeholders are invited to comment on this consultation paper, it would primarily be of interest to issuers, offerors or persons asking for admission to trading on a regulated market, investors, as well as to any market participant which is affected by Directive 2003/71/EC of 4 November 2003 (**the PD, the Prospectus Directive as amended by Directive 2010/73/EU**) and its Regulation (Commission Regulation (EC) No 809/2004).

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Acronyms used

Amended Directive

The Prospectus Directive as amended by Directive 2010/73/EU

Amending Directive

Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

Call for Evidence

Call for evidence on the request for technical advice on possible delegated acts concerning the Prospectus Directive (2003/71/EC) as amended by the Directive 2010/73/EU (Ref. : ESMA/2011/35).

IPO Initial Public Offering

Frequently Asked Questions or FAQs

Prospectuses: common positions agreed by ESMA Members.-.13th updated version – June 2011

Mandate

European Commission's "Formal request to ESMA for technical advice on possible delegated acts concerning the amended prospectus directive (2003/71/EC)". See Annex 2

Market Abuse Directive

Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse).

Profit estimate

Profit estimate means a profit forecast for a financial period which has expired and for which results have not yet been published.

Profit forecast

Profit forecast means a form of words which expressly states or by implication indicates a figure or a minimum or maximum figure for the likely level of profits or losses for the current financial period and/or financial periods subsequent to that period, or contains data from which a calculation of such a figure for future profits or losses may be made, even if no particular figure is mentioned and the word 'profit' is not used.

Prospectus Directive

Directive 2003/71/EC of the European Parliament and of the Council-and, where the context requires, the Amended Directive

Prospectus Regulation

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

SMEs

Small and Medium Enterprises as defined in the Prospectus Directive

Transparency Directive

Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC.

I. Executive Summary

The purpose of this consultation document from ESMA is to seek comments on the technical advice that ESMA proposes to give to the European Commission on a number of possible delegated acts.

On Tuesday 25 January 2011, the European Commission published its request to ESMA for advice on possible delegated acts concerning the Prospectus Directive as amended by Directive 2010/73/EU. The Mandate to ESMA sets out the areas on where the Commission is requesting advice in sections 3, 4 and 5. ESMA has already delivered its advice on sections 3.1, 3.2 and 3.3 on 30 September 2011.

Taking into account the calendar for the end of the objection period for the European Parliament and the Council to the formal adoption by the Commission of the delegated acts and thereinafter the end of the transposition period for the Amending Prospectus Directive (Directive 2010/73/EU) on the 1st of July 2012, the Commission allowed ESMA to focus in the second part of the Mandate on sections 3.5 and 4. They are regarded as the most important ones and sections 3.4 and 5 will be dealt with at a further stage (part III of the Mandate).

ESMA is aiming to send its technical advice on sections 3.5 and 4 of the Mandate (part II of the Mandate) to the Commission by 29 February 2012. Despite ESMA's strong commitment to adequately consult stakeholders, ESMA considers it necessary in order to finalise the advice by the due deadline to conduct a shortened consultation on these sections to allow the delivery of a timely and robust advice to the Commission.

With a view to find a common position acceptable to both ESMA and the stakeholders, the description of alternatives should not only reflect the perspective of market participants but also take into account any concerns which ESMA may have raised on the relevant issue(s) in its consultation paper.

To enable ESMA to best consider the relevance of comments, please indicate any material concerns over the impact of the proposals being considered, including if you consider it may lead to unfair or disproportionate financial or administrative burdens (making where possible a quantitative assessment of costs in your responses). In addition please also indicate any possible advantages or benefits deriving from the implementation of the proposals.

2. Introduction

1. The publication of the Directive 2010/73/EU of 24 November 2010[1] (**the Amending Directive**) amending the Prospectus Directive in the Official Journal of the EU took place on 11th December 2010.

2. On 20 January the European Securities and Markets Authority (**ESMA**) received a formal request (**the Mandate**) from the European Commission (**the EC or the Commission**) to provide technical advice to the Commission on possible delegated acts concerning the Prospectus Directive as amended by the Amending Directive.

3. On 25 January 2011, the European Commission published its request to ESMA on its Internal Market website and on 26 January ESMA published a call for evidence (**the Call for Evidence**) inviting all interested parties to submit views by 25 February on the issues which ESMA should consider in its advice to the Commission. ESMA received around 36 submissions by end of February and those that are public can be viewed on ESMA's website.

4. In relation to the issues on which technical advice is requested, the Mandate has the following sections:

3.1- Format of the final terms to the base prospectus (Article 5(5)).

3.2- Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5)).

3.3- Proportionate disclosure regime (Article 7).

3.4- Equivalence of third-country financial markets (Article 4(1)).

3.5- The consent to use a prospectus in a retail cascade (Articles 3 and 7).

4- Review of the provisions of the Prospectus Regulation (Articles 5 and 7).

5- Comparative table of the liability regimes applied by the Member States in relation to the PD.

6. ESMA received a letter from the Commission extending the scope of the Mandate to also include convertible bonds (Annex III).

5. As stated in the Amending Directive, the Commission is under an obligation to adopt delegated acts by 1 July 2012 in relation to the delegated acts referred to in sections 3 and 4 and that is why ESMA had been given a deadline to provide its advice by 30 September 2011 at

[1] Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market.

the latest in relation to sections 3.1 and 3.2. In addition, ESMA decided to include section 3.3. in the first part of the Mandate (which has been already delivered to the Commission in due time and published in ESMA's website), because of the importance of the areas concerned.

6. The present consultation paper (CP) addresses the technical advice on sections 3.5 and 4 of the Mandate, that ESMA in agreement with the Commission has decided to deliver by 29 February 2012. Accordingly, the consultation period has been reduced to nearly one month.

7. ESMA decided at the outset to prioritise the development of its advice in the second part of the mandate on section 3.5 and 4, in line with discussion with the Commission services having in mind the tight timeframe to develop the rest of its advice and the relative importance of each of the remaining subjects to be developed under the Mandate and leave sections 3.4, 5 and the disclosure requirements for convertible bonds for a further stage (part III of the Mandate) after delivering the final reports on technical advice on the previous mentioned sections. The Commission has confirmed its agreement on this approach in a letter dated 14 November 2011 (Annex IV)

8. To enable it to fulfil the request for advice, ESMA set up under the remit of its Corporate Finance Standing Committee (the CFSC) a Prospectus Level 2 Task Force (the Task Force). The Task Force set up two drafting groups dealing respectively with sections 3.5 and 4 of the Mandate.

9. ESMA will consider the feedback received to this consultation and will aim at providing by 29 February 2012 its advice on the sections mentioned in paragraph 6 to the Commission. With a view to find a common position acceptable to both ESMA and the stakeholders, the description of alternatives should not only reflect the perspective of market participants but also take into account any concerns which ESMA may have raised on the relevant issue(s) in its consultation paper.

10. In order for ESMA to best consider the relevance of comments, please indicate any material concerns over the impact of the advice being considered, including if you consider it may lead to unfair or disproportionate financial or administrative burden (making where possible a quantitative assessment of costs in your responses). In addition please also indicate any possible advantages or benefits deriving from the implementation of the advice.

3. The consent to use a prospectus in a retail cascade (articles 3 and 7)

3. I Introduction

1. Article 3.2.2 Prospectus Directive[2] provides that the subsequent resale of securities which were previously offered under an exemption as set out in Article 3.2 (a) to (e) Prospectus Directive should be regarded as a separate offer and requires the publication of a prospectus if the sale involves a public offer in accordance with the definition set out in Article 2.1 (d) Prospectus Directive and no exemption applies. The placement of securities through financial intermediaries requires a prospectus if no exemption applies to the final placement of the securities.

2. In the past these provisions led to a number of questions in case of retail cascades, a scheme of distribution where securities are sold to investors not directly by the issuer itself but by financial intermediaries. In particular there had been questions about who is responsible for drawing up and updating a prospectus in a retail cascade and what was the responsibility of the issuer in relation to offers made by intermediaries. Furthermore, questions had also been raised on the application of the information requirements in the Prospectus Regulation, in particular those regarding the terms and conditions of the offer, in case of retail cascades.

3. In the absence of any further regulatory provisions and prior to the Amending Directive, ESMA has issued guidance on retail cascades in its FAQ No. 56. According to the position expressed therein, ESMA identified as key principle the distinction between offers by intermediaries who are acting in association with the issuer and may rely on a prospectus drawn up by the issuer (in particular where the issuer has consented to this) and intermediaries who are not acting in association with the issuer and who therefore may not use the issuer's prospectus but would be required to draw up a separate prospectus.

4. ESMA therefore encouraged issuers to clearly disclose in the prospectus (or supplement) or through public announcements who the intermediaries acting in association with them are, and in addition, that it was considered good practice to insert a bold notice in a suitable place in the prospectus informing investors that they should verify with the offeror whether or not the offeror is acting in association with the issuer. Accordingly, the issuer was expected to update the prospectus for the duration of the period when the sub-offers from the intermediaries acting in association with it subsist, but was not required to do so where the intermediaries are not acting in association with it.

5. ESMA considered that information regarding the terms and conditions in relation to the sub-offers which is not available at the time of publication of the prospectus may be omitted on the basis of Article 23.4 Prospectus Regulation and that it would expect that such information is provided to the investor by the intermediary at the time of the sub-offer. Finally, ESMA considered it good practice to insert a bold notice in the prospectus informing investors that such information would be provided at the time of any sub-offers.

6. The Amending Directive introduced specific regulation in case of a subsequent resale or final placement of securities by financial intermediaries where a valid prospectus, drawn up by the

[2] Article 3.2.2 Prospectus Directive: "However, any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph shall be regarded as a separate offer and the definition set out in Article 2 (1) (d) shall apply for the purpose of deciding whether that resale is an offer of securities to the public. The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final placement."

issuer or a person responsible for drawing up such prospectus is available, and where the financial intermediary is acting in association with the issuer.
According to Article 3.2.3 of the amended Directive "Member States shall not require another prospectus for any subsequent resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available in accordance with Article 9 and the issuer or the person responsible for drawing up such prospectus consents to its use by means of a written agreement".

7. In this regard Recital 10 of the Amending Directive states: "A valid prospectus, drawn up by the issuer or the person responsible for drawing up the prospectus and available to the public at the time of the final placement of securities through financial intermediaries or in any subsequent resale of securities, provides sufficient information for investors to make informed investment decisions. Therefore, financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer or the person responsible for drawing up the prospectus as long as this is valid and duly supplemented in accordance with Articles 9 and 16 of Directive 2003/71/EC and the issuer or the person responsible for drawing up the prospectus consents to its use. The issuer or the person responsible for drawing up the prospectus should be able to attach conditions to his or her consent. The consent, including any conditions attached thereto, should be given in a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement. In the event that consent to use the prospectus has been given, the issuer or person responsible for drawing up the initial prospectus should be liable for the information stated therein and in case of a base prospectus, for providing and filing final terms and no other prospectus should be required. However, in case the issuer or the person responsible for drawing up such initial prospectus does not consent to its use, the financial intermediary should be required to publish a new prospectus. In that case, the financial intermediary should be liable for the information in the prospectus, including all information incorporated by reference and, in case of a base prospectus, final terms."

8. The European Commission has issued a mandate to ESMA for advice on possible delegated acts concerning the consent to use a prospectus in a retail cascade (Articles 3 and 7).

Extract of the Mandate – Section 3.5:

- **ESMA is invited to advise the Commission on the possible format and modalities according to which the consent, including the conditions attached thereto, to use the initial prospectus by financial intermediaries placing or subsequently reselling the securities should be disclosed to the relevant parties. The consent, including any conditions attached thereto, should be given in a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement.**

- **The advice should focus on the duration of the consent, what conditions should be attached, the clarification on the respective liabilities of the issuer or the person responsible for drawing up the initial prospectus consenting to its use and the financial intermediaries placing or subsequently reselling the securities entitled to rely upon the initial prospectus, what resale or final placement of securities can be considered compliant with the written agreement.**

9. On 26 January 2011, ESMA published a Call for Evidence inviting all interested parties to submit views by 25 February 2011 on issues ESMA should consider on its advice to the European Commission.

10. In relation to retail cascades, the responses to the Call for Evidence did not offer a completely homogeneous view within the market, however the majority of respondents argued in favor of a flexible approach and further detailed regulation was generally not considered necessary. In particular, market participants wanted to have confirmed that the consent to use a prospectus can be given at any time so that the group of financial intermediaries entitled to rely on the prospectus can be extended at any time. Furthermore, the majority of the respondents were of the view that the consent to use the prospectus should not need to be disclosed on a compulsory basis, while some respondents were of the view that the content of the agreement should be publicly available or that investors should be informed under which conditions a financial intermediary is allowed to use a prospectus.

11. Considering the new regulation introduced by the Amending Directive, and in accordance with the Mandate, ESMA is of the view that further regulation regarding the consent to use a prospectus in a retail cascade is needed.

3.II General principles regarding retail cascades

Concept of retail cascades under the Amended Directive

12. ESMA considers a retail cascade to be a term used to describe a distribution mechanism where securities are offered to retail investors not directly by the issuer but by a distribution network of financial intermediaries. It covers both schemes in which securities are sold by the issuer to financial intermediaries on a first step and subsequently resold by intermediaries to retail investors as well as schemes where financial intermediaries are responsible for the final placement of the securities without any previous underwriting or acquisition of the securities. The intermediaries, when subsequently reselling or placing the securities, are acting in association with the issuer, based on an agreement between the parties involved.

13. The offer by the intermediaries to the retail investors generally takes place over a period of time that can be several weeks or months. During that time the price of the securities fluctuates in accordance with market conditions (e.g. regarding changes or expected changes of interest rates or changes of the market value of an underlying asset in case of securities with a derivative element) and the price at which the intermediaries offer the securities to their customers fluctuates accordingly, sometimes even many times a day, for example in line with secondary market prices or prices set by an appointed market maker.

14. ESMA is of the view that if a financial intermediary wishes to make an offer or sub-offer and none of the exemptions from the obligation to publish a prospectus stated in Article 3.2 Prospectus Directive applies, such offer or sub-offer has to comply with the terms and conditions described in the prospectus or base prospectus/final terms, in order to be able to rely on the prospectus published by the issuer. The prospectus has to disclose e.g. the price or the method of determining the price and the process for its disclosure (see e.g. Annex V item 5.3.1. Prospectus Regulation) and any subsequent offer or placement by the intermediary would need to be in accordance with these terms (normally the market price reflecting the prevailing market conditions). That means that in case the issuer intends to use a retail cascade for the distribution of securities, the issuer needs to anticipate and include in the prospectus information e.g. on the

method of determining the price and the process for its disclosure which applies also for the offer by the intermediaries. ESMA considers it not possible that in a retail cascade the intermediary can offer securities under conditions different from those described in the prospectus or final terms, as such offer would conflict with the content of the prospectus. The issuer or the person responsible for the prospectus can only grant its consent to use the prospectus for offers that are in accordance with the terms and conditions described in the prospectus and for which it accepted liability.

15. However, ESMA wants to clarify that where a prospectus provides information on the method of determining the price, and the price at which in a retail cascade the intermediaries offer securities to retail investors varies on the basis of the method described in the prospectus, this would not be considered to be in conflict with the provisions of the prospectus. Furthermore, a financial intermediary may include contractual selling arrangements in its offer in addition to the terms and conditions described in the prospectus, provided such contractual selling arrangements are not in conflict with the terms and conditions described in the prospectus.

16. In ESMA FAQ No. 56, Part C it has been assumed that some information required by Annex V, Item 5 (Terms and Conditions) of the Prospectus Regulation might not be available at the time of publication of the prospectus, in particular information relating to allocation, distribution and pricing, and that such information will be provided by the intermediaries to the investor at the time of the sub-offer. However, having described ESMA's understanding of the concept of retail cascades under the Amended Directive above, any information to be provided by the intermediary to the investor (e.g. contractual selling arrangements including information on the price) would need to be in accordance with the terms and conditions contained in the prospectus.

Q1: In practice, for what types of securities are retail cascades used? In ESMA FAQ No. 56 it was assumed that retail cascades are only used for distribution of debt securities. However, the regulation introduced by the Amending Directive in Article 3.2 Prospectus Directive does not differentiate between equity securities and debt securities in this regard but applies to all kind of securities.

Q2: Please describe situations in which a retail cascade is normally used, how a retail cascade may be structured and the modalities of such retail cascade. What different models of retail cascades are used in practice?

Q3: Do you agree with ESMA's understanding of retail cascades and in particular that the terms and conditions of the offer by the intermediaries may not differ from the terms and conditions in the prospectus or final terms? If not, please specify which terms and conditions may differ from those stated in the prospectus or final terms and who would be responsible and liable for such information.

Q4: Can you provide examples of scenarios whereby the price would differ from that set out in the prospectus? Would you deem this to be a change of the terms and conditions?

Q5:
What information required according to the Prospectus Regulation cannot be provided in a prospectus or base prospectus/final terms in case of retail cascades but is only provided by the intermediary at the time of the sub-offer? How and when is such information communicated to the investor? Please specify and explain.

Q6:
Do you consider it necessary to clarify in the prospectus who is responsible for information that is provided by the intermediary to the investor?

Validity of a prospectus and responsibility of the issuer or the person responsible for the prospectus – Duration of consent

17. According to Recital 10 of the Amending Directive, a financial intermediary should be entitled to rely on a prospectus previously published as long as this is valid and duly supplemented in accordance with Articles 9 and 16 Prospectus Directive and the issuer or the person responsible for drawing up such prospectus consents to its use.

18. ESMA is of the opinion that the period for which the consent to use the prospectus is granted cannot extend beyond the validity of the prospectus. In a retail cascade it is the responsibility of the issuer or the person responsible for drawing up the prospectus to ensure that the prospectus stays up-to-date for the whole period it consented that the prospectus can be used by a financial intermediary.

19. Notwithstanding other reporting or disclosure requirements under the Transparency Directive or the Market Abuse Directive, in case the issuer is not in a position to keep a prospectus up-to-date because the period in which a supplement is possible is already over according to Article 16 Prospectus Directive, the issuer cannot give its consent to use the prospectus. When deciding about the duration of its consent, the issuer has to make sure that it is able to keep the prospectus up-to-date over the whole period in accordance with the Prospectus Directive.

20. With respect to the period in which a supplement is possible according to Article 16 Prospectus Directive, ESMA is of the view that the issuer or the person responsible for drawing up the prospectus should take into account the subsequent public offer by any intermediaries when determining in the prospectus or final terms the offer period (see e.g. item 5.1.3. of Annex V Prospectus Regulation).

21. As regards the prospectus liability regime, in ESMA's opinion the circumstance that the issuer has given its consent to use the initial prospectus by financial intermediaries placing or subsequently reselling the securities does not prevent that a responsibility might also attach to the financial intermediaries, where provided by National law.

Q7:
Do you agree that the period for which consent to use a prospectus may be granted cannot extend beyond the validity of the prospectus and the period in which a supplement is possible according to Article 16 Prospectus Directive? If not, please specify how in particular a standalone prospectus can be kept valid once the period according to which a supplement is possible has lapsed.

Q8:
In relation to a standalone prospectus, do you agree that once the offer which is the subject matter of the initial prospectus has been closed, financial intermediaries subsequently offering the securities in a retail cascade should prepare a new prospectus which could incorporate by reference the issuer's initial prospectus?

3.III Principles regarding disclosure requirements in relation to retail cascades in a prospectus

No disclosure of written agreement but of the consent to use the prospectus

22. ESMA discussed whether the written agreement with the consent to use the prospectus needs to be disclosed to the public, given that the Amending Directive is silent on this question and some respondents to the Call for Evidence raised confidentiality issues in this regard.

23. ESMA takes the position that the written agreement itself does not need to be disclosed to the public, as it contains provisions which are pertinent only to the parties involved in the agreement.
However, ESMA considers it necessary that the consent to use the prospectus (which is part of the written agreement) needs to be published together with the identity of the financial intermediaries and any conditions attached to the consent (including its duration) that are relevant for the use of the prospectus.

The reasoning for this approach is the following:

24. The written agreement is only an internal bilateral agreement between the parties involved (i.e. the issuer or the person responsible for the prospectus and the financial intermediary) and details of such agreement are not necessary for investors to know in order to make an informed investment decision. It is also acknowledged that there could be a legitimate interest of the parties involved to keep details of the agreement confidential.

25. The relevant information for the investor is to know whether there is a consent to use the prospectus for the offer made by the financial intermediary, and any information that could be contained in the distribution agreement which could be considered, in light of the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, as necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer, and of the rights attaching to such securities.

26. The consent needs to be disclosed because confidentiality interests of the issuer with respect to its distribution network of financial intermediaries cannot outweigh the interests and the need of investors who are addressed by the financial intermediaries to know whether they can rely on the initial prospectus and whether the issuer or the person responsible for the prospectus consented to its use, thereby accepting liability for the content of the prospectus also in respect of the offer by the financial intermediary. This information is also important for the competent authority as regards market supervision when assessing if an offer is made on the basis of a valid prospectus.

27. This view is also in line with ESMA's position as stated in FAQ 56, according to which it was considered good practice that the issuer should clearly disclose who the intermediaries acting in

association with them are. Taking into consideration that according to the Amended Prospectus Directive the consent by the issuer or the person responsible for the prospectus is a prerequisite for its liability, ESMA is of the opinion that the disclosure of the consent needs to be mandatory. A solution whereby the burden to verify whether or not the offeror is acting in association with the issuer, is placed upon the investor is not appropriate.

The consent has to be included in the prospectus or base prospectus/final terms

28. ESMA discussed by what means the consent to use the prospectus, the identity of the financial intermediaries and any relevant conditions attached to the consent needs to be published. In particular it was discussed whether the consent should be included in the prospectus or whether it should also be possible to publish it outside the prospectus, maybe just indicating in the prospectus how this information is going to be published and/or where it can be found.

29. ESMA takes the view that the consent to use the prospectus should be included in the prospectus or the base prospectus/final terms, as the case may be.

This approach is based on the following considerations:

30. Article 6.1 Prospectus Directive requires identification of all persons responsible for the information contained in the prospectus. As the consent to use the prospectus is crucial for the liability of the persons responsible for the content of the prospectus also in respect of the offer by the intermediary, such information shall also be given in the prospectus, thereby guaranteeing a maximum level of transparency and legal certainty for the investor and the competent authorities.

31. The prospectus already has to contain the name and address of the co-ordinators of the global offer and, to the extent known, of the placers in the various countries where the offer takes place (e.g. Annex V item 5.4.1. PR) as well as the name and address of the entities agreeing to underwrite the issue on a firm commitment basis or agreeing to place the issue without a firm commitment (see e.g. Annex V item 5.4.3. Prospectus Regulation). In this context it appears appropriate that also the consent to use the prospectus together with the identity of the financial intermediaries is disclosed in the prospectus.

32. Requiring such information in the prospectus has the advantage that the general rules of the Prospectus Regime apply, in particular regulation regarding language requirements, notifications to host member states and the filing of documents with the competent authority. In case the consent would be published outside of the prospectus (e.g. on the website of the issuer), problems could arise as regards the accessibility of the information on the consent, what language regime would apply to such publications, how would the competent authorities in different countries learn of such publication or how the fact of a previous consent could later be evidenced e.g. in case the consent has been withdrawn and been taken from the website.

Q9: Is it the case that the identities of the financial intermediaries, the conditions attaching to the consent and the duration of the consent are generally known at the time of the approval of the prospectus or at the time of filing the final terms? At which stage do you generally determine the precise way of distribution including the decision of which financial intermediaries to use for a specific offer?

Q10:
Is it common practice for agreements with financial intermediaries to be finalized following the approval of the prospectus or the filing of final terms? Can you estimate how often this would happen?

Q11:
Given the fact that in a retail cascade the responsibility of the issuer for the content of the prospectus is subject to its consent to use the prospectus such consent is crucial for the whole prospectus responsibility regime. Therefore ESMA believes that the consent to use the prospectus needs to be public, and furthermore, that it should be stated in the prospectus as is also the case for the general responsibility statement. Do you agree with ESMA's approach to include such consent in the prospectus or base prospectus/final terms?

Q12:
If the above elements are known at the time of approval of the prospectus or the time of filing the final terms, what are the disadvantages (if any) for including this information within the prospectus or final terms?

Q13:
ESMA believes that the means of publication to be used in relation to the existence of a consent and any conditions attached to it should allow investors and competent authorities to clearly determine the responsibilities of the persons involved. Instead of including the above elements within the prospectus do you believe that there are any other methods of publication for this information that would also provide sufficient transparency and legal certainty? If yes, please specify.

Information to be included in the prospectus or base prospectus/final terms

33. ESMA discussed what information regarding retail cascades needs to be disclosed in a prospectus or a base prospectus and final terms, as the case may be. Based on the considerations already stated above and with view to investor protection and the regulatory needs of competent authorities as regards market supervision, the following information items would need to be disclosed:

34. The prospectus should disclose

- **that the issuer intends to offer the securities via financial intermediaries,**
- **that it consents to the use of the prospectus for the offer by the financial intermediaries, thereby accepting responsibility for the content of the prospectus also with respect to the offer by the financial intermediary**
- **the identity of financial intermediaries that are allowed to rely on the prospectus**
- **any conditions attached to the consent which are relevant for the use of the prospectus (including conditions regarding the duration of the consent).**

ESMA therefore proposes to amend any relevant Annex of the Prospectus Regulation regarding securities notes to include the above listed information.

35. In case of a base prospectus the issuer or the person responsible for the prospectus should disclose in the base prospectus that it intends to offer the securities via financial intermediaries and that it consents to the use of the prospectus by these intermediaries. The identity of the intermediaries and any conditions attached to the consent could be disclosed in the final terms, if not known at the time of approval of the base prospectus.

36. In view of the system of categories proposed by ESMA in its technical advice to the Commission regarding the possible content of final terms and the delineation of information which needs to be disclosed in the base prospectus and information which is allowed to be disclosed only in the final terms if not known at the time of approval, the following categorisation would apply:

- **Information that the issuer intends to offer the securities via financial intermediaries and that it consents to the use of the prospectus for the offer by these intermediaries: CAT. A (which means that the relevant information has already to be included in the base prospectus and that the base prospectus can not include any placeholder in this respect)**
- **Identity of the intermediaries (name and address): CAT. C (which means that the base prospectus should contain a placeholder when the information has not been known at the time of the approval of the base prospectus)**
- **Conditions attached to the consent: CAT. C.**

37. As already stated above, ESMA is of the view that not all the terms and conditions of the agreement between the issuer or the person responsible for the prospectus and the intermediary need to be disclosed, but only conditions that are relevant for the use of the prospectus, e.g. because they restrict the use of the prospectus in certain ways (e.g. selling restrictions or limiting the time in which the prospectus can be used). ESMA considers that the issuer or the person responsible for the prospectus should assess the relevance of any such conditions and decide whether they need to be disclosed. This means that in case the issuer or the person responsible for the prospectus wants to restrict its consent to use the prospectus by attaching certain conditions to it (including conditions regarding the duration of the consent), these conditions have to be disclosed together with the consent. If no conditions are disclosed, this would mean that the consent is given without any conditions attached.

38. The Mandate invited ESMA to give advice on what conditions should be attached to the consent. However, ESMA considered it not appropriate to interfere in the internal agreement between the issuer and the financial intermediary. Therefore ESMA does not intend to impose any conditions that need to be attached to the consent in the agreement between the issuer or the person responsible for drawing up the prospectus and the financial intermediary, but leaves this to be decided by the parties involved. Only in case there are conditions attached to the consent in the agreement that are relevant for the use of the prospectus, should these conditions need to be disclosed together with the consent.

3.IV Principles regarding disclosure of information on retail cascades when unknown at the time of approval of the prospectus or filing of final terms.

39. The issuer can give the consent to use the prospectus at any time during which the prospectus is valid and the group of persons entitled to use the prospectus can be extended at any such time. Therefore it might not be possible to include the consent or the identity of the intermediaries in the prospectus or the final terms in case of a base prospectus. ESMA therefore discuss how the consent to use the prospectus, the identity of the intermediaries and any relevant conditions attached to the consent should be disclosed in cases where the issuer or the person responsible

for the prospectus consents to the use of the prospectus or extends the group of intermediaries only after the approval of the prospectus or the filing of the final terms.

In case of base prospectuses and final terms:

40. When drawing up a base prospectus, it should be possible for the issuer to anticipate whether or not it intends to offer the securities (also) via financial intermediaries in a retail cascade. Including this general information (categorized as CAT. A above) in the base prospectus should therefore generally be possible (bearing in mind that it is also always possible to include optional information in the base prospectus). ESMA would assume that in many cases the identity of the intermediaries is known at the time the final terms are filed with the competent authority and can therefore be included therein.

41. In case a financial intermediary is appointed after the filing of the final terms, ESMA would expect issuers to publish and file a replacement of the final terms with the new information on the (additional) financial intermediaries and the relevant conditions attached to the consent, if any.

42. This approach is considered to be in accordance with ESMA's position as provided in FAQ No. 64, stating that the issuer can provide investors and file with the competent authority more than one document with final terms for a specific issue in case of an amendment of information included in final terms. Requiring the filing and publication of a replacing set of final terms with information on (additional) financial intermediaries and any relevant conditions attached to the consent ensures in ESMA's view that the investor and the competent authorities are properly informed in accordance with the general rules of the Prospectus Regime, which might not be the case where such information is disclosed for example only by an announcement to the market.

43. However, this is without prejudice to the requirement of a supplement as discussed below for standalone prospectuses: in case the appointment of financial intermediaries after the filing of the final terms constitutes a significant new factor, material mistake or inaccuracy relating to information included in the final terms which is capable of affecting the assessment of the securities, a supplement would be required in accordance with Article 16 Prospectus Directive and FAQ NO. 64.

In case of standalone prospectuses:

44. In case the appointment of financial intermediaries occurs after the approval of a prospectus but before the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later, and such appointment constitutes a significant new factor, material mistake or inaccuracy which is capable of affecting the assessment of the securities, a supplement would be required in accordance with Article 16 of the amended Prospectus Directive. The same applies to any other relevant information regarding retail cascades that constitutes a significant new factor, material mistake or inaccuracy which is capable of affecting the assessment of the securities.

However, it might be questionable whether a supplement would be needed, as it could be argued that a new distribution agreement with a financial intermediary is not a significant new factor which is capable of affecting the assessment of the securities within the meaning of Article 16 PD. Furthermore, a supplement triggers a right of withdrawal for investors, which might not appear appropriate in a situation where only a new distribution agreement has been closed between the issuer and a financial intermediary.

Q14:
Do you consider a supplement necessary in relation to information on retail cascades? Please explain and justify your position, also taking into account different typical situations of retail cascades and any effect such retail cascade related information may have on the assessment of the securities.

Q15:
In case of standalone prospectuses:

Q15a)
If a supplement is not required, how should the consent to use the prospectus be published?

Q15b)
If a supplement is not required, how can it be safeguarded that the investor and the competent authority in the home member state but also the competent authorities in any host member states learn of the new information? Please explain and justify your position, also taking into account issues as e.g. language requirements, filing of such information with the relevant competent authorities and responsibility issues that may arise in respect of such disclosures outside of a prospectus.

Q15c)
Without prejudice to the requirement of a supplement, when information on a retail cascade is not known at the time of approval of a prospectus, do you consider it necessary to indicate in a prospectus how such information on retail cascades will be published? Should there be any specific regulation or guidance detailing by what means such information should be published (e.g. requiring publication in accordance with Article 14.2. Prospectus Directive)?

4. Review of the provisions of the Prospectus Regulation (Articles 5 and 7)

4.I Introduction.

The European Commission has invited ESMA in section 4 of the Mandate to consider some technical adjustment and clarification to four requirements of the Prospectus Regulation. For each of those disclosure requirements, ESMA has provided in the following four sections its position while taking into consideration the objectives of maintaining investor protection and increasing legal clarity as well as efficiency in the prospectus regime.

4.II Information on Taxes withheld at source

Extract of the Mandate:

Information on taxes on income from securities withheld at source (Items 4.11 of Annex III, 4.14 of Annex V, 27.11 and 28.11 of Annex X, and 4.1.14 of Annex XII). The Prospectus Regulation requires the disclosure in the prospectus of information on taxes from securities withheld at source. Does ESMA consider necessary to clarify that this only refers to information on any amount withheld at source by the issuer or by any agent appointed by it, because otherwise it would be impossible for the issuer to identify those custodians or agents in the payment chain not appointed by it?

1. The European Commission has invited ESMA to consider reflecting the rationale of ESMA's FAQ N° 45[3] in the Prospectus Regulation.

2. During ESMA's assessment of the taxes on the income of the securities offered to the public or admitted to trading on a regulated market, it became aware that no information on taxes on the income of the securities is provided in the prospectus pursuant to ESMA's FAQ No 45, due to the fact that the issuer is not acting as nor has appointed a paying agent but nevertheless a withholding tax has been levied. Accordingly, investors were deprived of sufficient information to know the "net" amount they will receive in accordance with the terms of the securities.

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[3] ESMA's FAQ No 45: "CESR considers that the wording "information on taxes on the income from securities withheld at source" refers to information on any amount withheld at source, that is, by the issuer or by any agent appointed by it for the purpose of making payment on the securities*. This item seeks to give investors enough information to know the "net" amount that they will receive when payment is collected from the issuer or its agent in accordance with the terms of the securities.

In addition a statement in the tax section of the prospectus inviting investors to seek appropriate advice on their specific situation is strongly recommended.

This item is not intended to require a full disclosure of the tax regime in each country where the offer takes place."

* I.e. when acting in its capacity as paying agent and not in other functions (e.g. as depositary or as custodian)

3. Following the above, ESMA considers inappropriate to reflect the rationale of ESMA's FAQ N° 45 in the Prospectus Regulation. Accordingly, ESMA is in favour of keeping the current requirement of the Prospectus Regulation on tax information.

4. In addition, ESMA deems it necessary to reconsider its FAQ N°45 in order to ensure that the prospectus provides investors with enough information to know the "net" amount that they will receive in accordance with the terms of the securities.

Q1: Under the circumstances where taxes on the income of the securities have been withheld at source in a country where the issuer is not acting nor has appointed a paying agent, was such information on withholding tax indeed not disclosed in the prospectus? If necessary to correctly understand the context, please provide additional legal explanations on the withholding tax mechanism.

Q2: Are there cases where a tax on the income of the securities would be withheld at source, which however would not be required to be disclosed in the prospectus in accordance with the current wording of the Prospectus Regulation on tax information? If yes, please provide specific examples.

Q3: Are there cases where the Prospectus Regulation currently requires information on taxes on the income of the securities withheld at source, which will not be levied in practice in that specific case? If so, please provide specific examples and identify any difficulties.

Q4: What information on withholding tax should be required by the Prospectus Regulation in order to ensure that the prospectus provides investors with sufficient information to know the "net" amount that they will receive in accordance with the terms of the securities?

Q5: In cases where tax treaties mitigate or prevent applicable double taxation, do you consider it useful for investors to be informed of this fact?

4.III Index Composed by the Issuer

Extract of the Mandate:

Information relating to an underlying index (Item 4.2.2 of Annex XII).
The Prospectus Regulation requires the inclusion in the prospectus of a description of the index if it is composed by the issuer. However, if the index is not composed by the issuer, where information about the index can be obtained. ESMA is invited to consider the effects of allowing both the index owner and the others just to indicate where information on the index can be found?

5. In order to assess whether the description of proprietary indices would need to be disclosed in the prospectus, ESMA has identified five key differences between indices composed by the issuer ("proprietary indices") and those not composed by the issuer:

Conflicts of interest

- The issuer may face a conflict of interest between its obligations as index creator and as the issuer of the securities to be admitted to trading on EU regulated markets or to be offered to the public. In fact, in its capacity as the index creator, the issuer may in its sole discretion compose and calculate the index. In addition, the index creator may amend or supplement the rules of the index which reflect the methodology for determining the composition and the calculation of the index, which may have an impact on the value of the securities (in particular the final redemption amount). Finally, the index creator may even, in its sole discretion, cease publication or dissemination of the index.

  In this regard, ESMA then believes that descriptions of proprietary indices should be disclosed in the prospectus, as well as any possible conditions under which the index (e.g. index composition, method of calculation) can change, so as to ensure that such information is set out in the most objective and transparent way to investors.

No past performance

- The index composed by the issuer may be newly created and thus no information about the past performance of the index exists. Although past performances and volatility do not give reliable guidance on the future performance, they still play an important role in investment decisions of derivative securities. When past index performance data is unavailable, the description of the index becomes the only criteria for investors to assess how the index might perform in the future.

  In this perspective, ESMA is of the view that descriptions of proprietary indices should be disclosed in the prospectus as they may play a defining role in investment decisions.

No general knowledge by the large public

- Proprietary indices do not include major market indices which are generally known by the large public (e.g. S&P 500, CAC 40, Dow Jones Euro Stoxx 50, Nikkei 225, FTSE 100, DAX). As a consequence, retail investors may not be familiar with- and might have less confidence in indices composed by the issuer. In addition, particularly as they are oftentimes created for (a) specific issue(s), proprietary indices generally do not have the same level of transparency as broadly recognized indices where information is freely and widely available.

Based on the above, ESMA considers that the description of proprietary indices should be disclosed in the prospectus in order to ensure that such information is set out in the most easily accessible way to investors.

Complex set of rules

- In practice, competent authorities experienced that proprietary indices are frequently governed by complex set of rules and may therefore not be all that comprehensive, in particular, to retail investors.

In this view, ESMA considers that descriptions of proprietary indices should be disclosed in the prospectus, so as to enable competent authorities to scrutinize such information with regard to "comprehensibility" as set out under article 2 of the Prospectus Directive.

Assuming full responsibility

- The description of a proprietary index has been sourced from the issuer itself, and not only from a third party and therefore the issuer should assume full responsibility for such information.

In order to ensure that the issuer could solely be considered liable under the prospectus regime for the accurateness of such description, and not only for the indication where such description can be found, ESMA is of the opinion that the proprietary index description should be disclosed in the prospectus.

6. ESMA considers that the description of an index composed by the issuer should be disclosed in the prospectus in order to ensure that issuers are more inclined to assess whether a change or an addition affecting the proprietary index should be considered as "material" pursuant to Article 16 of the Prospectus Directive, and to determine whether a supplement would be required. However, ESMA would like to clarify that not all such changes and additions may necessarily be considered as a new factor pursuant to Article 16 of the Prospectus Directive. In accordance with its FAQ No 64, ESMA would like to remind that it is up to the issuer to assess the significance or materiality of a new factor without prejudice to the powers of the home competent authority.

7. Some respondents to the Call for Evidence argued that the current requirement of the Prospectus Regulation to disclose descriptions of proprietary indices in the prospectus has a considerable impact on costs. However, ESMA currently believes that the concept of investor protection largely outweighs the relevant costs but will only make a final assessment in this regard after having received cost estimates from market participants.

8. A few respondents to the Call for Evidence argued that the current requirement of the Prospectus Regulation to disclose descriptions of proprietary indices in the prospectus affects the readability of the prospectus documentation. However, ESMA would like to point out that length and comprehensibility are not necessarily correlated, as issuers could for example annex the index descriptions to the prospectus.

9. A lot of respondents to the Call for Evidence expressed the view that the current approach, where an issuer which composes its own index is required to provide a description of that index in the prospectus is an anomaly given that a third party which issues securities linked to that same index is simply required to indicate in the prospectus where information about the index can be found. However, ESMA considers this a rather theoretical issue, due to the fact that such disclosure seems to be practically non-existent in prospectuses.

Q6: Do you agree with ESMA's observation that it is not a common market practice to issue, under prospectuses prepared for the purpose of the Prospectus Directive, derivative securities linked to an index composed by another issuer? If not, please provide specific examples.

10. **In light of all the arguments above, ESMA is in favour of keeping the requirement of Item 4.2.2. of Annex XII to produce an index description in the prospectus if the index is composed by the issuer.**

Q7: Do you agree to keep the current requirement of the Prospectus Regulation to disclose the description of an index composed by the issuer in the prospectus?
If yes, please feel free to provide additional arguments.
If not, please provide the reasoning behind your position.

11. ESMA understands that an issuer could theoretically circumvent or obtain relief from the obligation to produce an index description in the prospectus in case such index is composed by one of its subsidiaries or an entity acting in association with, or on behalf of, the issuer. This would be the case when the term "issuer" in the relevant requirement of Item 4.2.2. of Annex XII is interpreted in a restrictive sense by only referring to the issuer itself.

12. **Therefore, ESMA deems it useful to revise Item 4.2.2. of Annex XII to the extent that an index description shall also be required in the prospectus if the index is composed by any entity belonging to the same group as the issuer, or by an entity acting in association with, or on behalf of, the issuer.**

Q8: Do you agree that Item 4.2.2. of Annex XII needs to be revised to the extent that an index description should also be required for an index composed by any entity belonging to the same group as the issuer, or by an entity acting in association with, or on behalf of, the issuer? If not, please provide your reasons.

Extract of the Mandate:

Would such a solution be applicable also in Item 2.10[4] of Annex XV?

13. ESMA is of the opinion that, in respect of Item 2.10. of Annex XV, it is sufficient to only indicate where information about the index can be found, as this item only applies to a "broadly based and recognised published index". If needed, ESMA will define, at a further stage, the criteria for a "broadly based and recognised published index" and would already welcome any relevant input by market participants in their responses to this consultation paper.

14. Therefore, ESMA considers necessary to revise Item 2.10. of Annex XV to the effect that issuers are only required to indicate where information about the index can be found instead of having to provide a description of the composition of the index.

[4] Item 2.10. (Annex XV): "Point (a) of item 2.2 does not apply to a collective investment undertaking whose investment objective is to track, without material modification, that of a broadly based and recognised published index. A description of the composition of the index must be provided."

4.IV Profit Forecast and Estimate

Extract of the Mandate

Profit forecasts or estimates (Items 13.2 of Annexes I and X, 9.2 of Annex IV, and 8.2 of Annex XI) should be currently accompanied by 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. ESMA is invited to consider the effects of repealing such requirement given that market announcements are usually issued in advance of the related financial results being finalized

15. ESMA believes that reports prepared by independent accountants or auditors provide investors with confidence that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer. Accordingly, investors should be able to compare the profit forecast or estimate to historical financial information of the issuer.

16. In addition, the reports provide investors with assurance that the profit forecast or estimate has been properly prepared on the basis of the underlying assumptions.

17. In practice, independent accountants and auditors tend to play an active role by advising the issuer on what assumptions should be provided in the prospectus and how they should be worded. They might also ensure that all material assumptions have been disclosed and that no assumption has been included that appears to be unrealistic.

18. **Having considered the arguments above, ESMA is not in favour of repealing the relevant report for profit forecasts or estimates.**

Q9: Do you agree with ESMA's view to keep the current requirement of the Prospectus Regulation to produce a report for profit forecasts and profit estimates?
If yes, please feel free to provide additional arguments.
If not, please provide the reasoning behind your position.

19. Finally, ESMA would like to focus on the so called "preliminary statements", as addressed by the Mandate and the responses to the Call for Evidence, which are announced to the market prior to the related financial results being finalized.

20. Although ESMA considers that "preliminary statements" may fall under the scope of Article 2.11.[5] of the Prospectus Regulation relating to profit estimates, if the definition of "profit estimate" is interpreted in a broad sense, it has concluded that it would be most appropriate to treat them differently for the following two reasons:

[5]"profit estimate" means a profit forecast for a financial period which has expired and for which results have not yet been published.

"profit forecast" means a form of words which expressly states or by implication indicates a figure or a minimum or maximum figure for the likely level of profits or losses for the current financial period and/or financial periods subsequent to that period, or contains data from which a calculation of such a figure for future profits or losses may be made, even if no particular figure is mentioned and the word 'profit' is not used.

- preliminary statements are in general final figures

- the directors of the issuer would be unable to set out the principal assumptions underlying the preliminary figures as there are no assumptions

21. **In order to be excluded from the requirement to produce such a report, ESMA considers that "preliminary statements" should meet the following criteria:**

"Preliminary statements":

1. must contain (i) non-misleading figures to be published in the next annual audited financial statements in relation to the previous financial year and (ii) any significant explanatory information necessary to assess such figures
2. must state the fact that they have not been audited or the prospectus must include such statement
3. can not be based on underlying assumptions[6]
4. must be approved by the person(s) responsible for such statements and published as soon as practicable after such approval after such approval
5. have to be agreed by the statutory auditor

22. **Accordingly, ESMA is of the opinion that it would be most appropriate to revise the Prospectus Regulation, as to include a definition of "preliminary statements", based on the criteria above, and to exclude "preliminary statements" from the definition of "profit estimate".**

23. With a view to ensure investor protection and efficient supervision by competent authorities, ESMA considers that the prospectus must include a prominent statement in relation to the criteria (4) and (5) of paragraph 21 above.

24. For the sake of clarification, ESMA would like to point out that preliminary statements should be considered as market announcements and therefore not as historical financial information. Accordingly, notwithstanding the criteria listed in paragraph 21, preliminary statements are not subject to the relevant disclosure requirements of the annexes of the Prospectus Regulation applying to historical financial information. However, in line with its approach taken for profit estimates and forecasts (e.g. ESMA Recommendation No 43 and 44), ESMA may consider necessary to issue, at a later stage, further guidance on preliminary statements.

Q10: Do you agree with ESMA's approach to exclude "preliminary statements" from the scope of Article 2.11. relating to "profit estimate" and to provide a definition of "preliminary statements" in the Prospectus Regulation? If not, please indicate your reasons.

Q11: Do you agree with the list of criteria that have been defined for "preliminary statements"? If not, please indicate your reasons.

[6] In the sense of item 13.1 of Annex I of the Prospectus Regulation

4.V Audited Historical Financial Information

Extract of the Mandate:

Audited historical financial information (Items 20.1 of Annexes I and XI).
In order to avoid any unnecessary costs for the issuers, ESMA is invited assess the effects of a possible reduction to the latest two financial years for the coverage of the audited historical financial information, while keeping the requirement of the latest three financial years only in case of an initial public offer.

25. After having received confirmation from the Commission, ESMA would like to clarify that the proposed amendment concerns a reduction of the audited historical financial information in respect of Annex X (depository receipts issued over shares schedule) and not Annex XI (banks registration document schedule).

26. In practice, investors use financial statements to assess the financial strength of an issuer which significantly impacts on their investment decisions. It is common knowledge that year end financial statements are more meaningful when compared to the full financial statements of previous years which enables investors to evaluate whether the issuer has financially improved or deteriorated over the past years.

27. ESMA would like to outline that audited financial information of the latest 2 financial years is also required by the Prospectus Regulation for debt securities which are traditionally perceived as less risky than shares or depositary receipts over shares. In this respect, it should be pointed out that debt security holders are not subject to the short-term volatility of the stock market where investors tend to be very reactive to events impacting the markets. In particular, financial information is very significant to investors of shares or depositary over shares as they may be entitled to dividends which may vary according to the prosperity of the issuer.

28. The proposed amendment could be seen as a significant deviation from the international disclosure standards for cross-border offerings and initial listings by foreign issuers, issued by the International Organization of Securities Commissions (IOSCO) which require that “the document should include comparative financial statements that cover the latest three financial years, audited in accordance with a comprehensive body of auditing standards”. It should be pointed out in this respect that detailed delegated acts regarding specific information which must be included in a prospectus, shall be based on the standards in the field of financial and non-financial information set out by international securities commission organisations, in particular by IOSCO. (Article 7.3. of the Amending Directive)

29. Reducing the level of disclosure requirement of audited historical financial information to the latest 2 financial years in respect of Annexes I and X would mean that ESMA has proposed, under the proportionate disclosure regime, no relaxation for SMEs and companies with reduced market capitalisation drawing up a prospectus for shares or depositary receipts over shares, given that those entities shall also only disclose audited financial information covering the latest 2 financial years.

30. On a more general level, lowering disclosure requirements of audited historical financial information for shares and depositary receipts issued over shares can be viewed as inappropriate in the context of the current volatility of stock markets world-wide resulting from a weakening global economy.

31. The proposed amendment would not only reduce to the latest 2 financial years the audited historical financial information, but also lower the level of disclosure of other items of Annexes I and X as these items require specific information for each financial year for the period covered by the historical financial information to be included in the prospectus.

As a result, investors would have less extensive information on which to base the investment decision. The relevant items include information relating to:

- statutory auditors (Item 2, Annexes I and X),
- selected financial information (Item 3, Annexes I and X)
- a description of the principal investments of the issuer (Item 5.2.1, Annexes I and X),
- a description of the principal activities and markets of the issuer and a statement relating to any exceptional factors which have influenced those activities and markets (Items 6.1.1. and 6.2. and 6.3., Annexes I and X),
- a description of the financial condition of the issuer and information about operating results (Items 9.1. and 9.2., Annexes I and X),
- a description of research and development policies of the issuer (Item 11, Annexes I and X),
- disclosure of the number of employees of the issuer and if possible their main category of activity and geographical location (Item 17.1., Annexes I and X)
- a description of related party transactions (Item 19, Annexes I and X)
- the amount of dividend per share (Item 20.7.1, Annex I and Item 20.6.1. of Annex X)
- the history of the share capital of the issuer (Item 21.1.7., Annexes I and X).

32. Reponses to the Call for Evidence conveyed that the proposed amendment would reduce costs incurred by issuers and facilitate the raising of capital after an IPO. However, ESMA would like to draw attention to the fact that the proposed amendment would not always lead to a substantial reduction of costs as issuers could be in a position to incorporate by reference the financial information into the prospectus pursuant to article 11 of the Prospectus Directive.

33. **Having considered the arguments set out above, ESMA is not in favour of reducing financial information disclosure for Annexes I and X.**

Q12: Do you agree to keep the current requirement of the Prospectus Regulation to produce audited financial information covering the latest three financial years? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

Annex I

Summary of questions

With a view to find a common position acceptable to both ESMA and the stakeholders, the description of alternatives should not only reflect the perspective of market participants but also take into account any concerns which ESMA may have raised on the relevant issue(s) in its consultation paper.

To enable ESMA to best consider the relevance of comments, please indicate any material concerns over the impact of the advice being considered, including if you consider it may lead to unfair or disproportionate financial or administrative burden (making where possible a quantitative assessment of costs in your responses). In addition please also indicate any possible advantages or benefits deriving from the implementation of the advice.

3.5. The consent to use a prospectus in a retail cascade (Articles 3 and 7)

Concept of retail cascades under the Amended Directive

Q1: In practice, for what types of securities are retail cascades used? In ESMA FAQ No. 56 it was assumed that retail cascades are only used for distribution of debt securities. However, the regulation introduced by the Amending Directive in Article 3.2 Prospectus Directive does not differentiate between equity securities and debt securities in this regard but applies to all kind of securities.

Q2: Please describe situations in which a retail cascade is normally used, how a retail cascade may be structured and the modalities of such retail cascade. What different models of retail cascades are used in practice?

Q3: Do you agree with ESMA's understanding of retail cascades and in particular that the terms and conditions of the offer by the intermediaries may not differ from the terms and conditions in the prospectus or final terms? If not, please specify which terms and conditions may differ from those stated in the prospectus or final terms and who would be responsible and liable for such information.

Q4: Can you provide examples of scenarios whereby the price would differ from that set out in the prospectus? Would you deem this to be a change of the terms and conditions?

Q5: What information required according to the Prospectus Regulation cannot be provided in a prospectus or base prospectus/final terms in case of retail cascades but is only provided by the intermediary at the time of the sub-offer? How and when is such information communicated to the investor? Please specify and explain.

Q6: Do you consider it necessary to clarify in the prospectus who is responsible for information that is provided by the intermediary to the investor?

Validity of a prospectus and responsibility of the issuer or the person responsible for the prospectus. Duration of consent

Q7: Do you agree that the period for which consent to use a prospectus may be granted cannot extend beyond the validity of the prospectus and the period in which a supplement is possible according to Article 16 Prospectus Directive? If not, please specify how in particular a standalone prospectus can be kept valid once the period according to which a supplement is possible has lapsed.

Q8: In relation to a standalone prospectus, do you agree that once the offer which is the subject matter of the initial prospectus has been closed, financial intermediaries subsequently offering the securities in a retail cascade should prepare a new prospectus which could incorporate by reference the issuer's initial prospectus?

Principles regarding disclosure requirements in relation to retail cascades in a prospectus

Q9: Is it the case that the identities of the financial intermediaries, the conditions attaching to the consent and the duration of the consent are generally known at the time of the approval of the prospectus or at the time of filing the final terms? At which stage do you generally determine the precise way of distribution including the decision of which financial intermediaries to use for a specific offer?

Q10: Is it common practice for agreements with financial intermediaries to be finalized following the approval of the prospectus or the filing of final terms? Can you estimate how often this would happen?

Q11: Given the fact that in a retail cascade the responsibility of the issuer for the content of the prospectus is subject to its consent to use the prospectus such consent is crucial for the whole prospectus responsibility regime. Therefore ESMA believes that the consent to use the prospectus needs to be public, and furthermore, that it should be stated in the prospectus as is also the case for the general responsibility statement. Do you agree with ESMA's approach to include such consent in the prospectus or base prospectus/final terms?

Q12:
If the above elements are known at the time of approval of the prospectus or the time of filing the final terms, what are the disadvantages (if any) for including this information within the prospectus or final terms?

Q13:
ESMA believes that the means of publication to be used in relation to the existence of a consent and any conditions attached to it should allow investors and competent authorities to clearly determine the responsibilities of the persons involved. Instead of including the above elements within the prospectus do you believe that there are any other methods of publication for this information that would also provide sufficient transparency and legal certainty? If yes, please specify.

Principles regarding disclosure of information on retail cascades when unknown at the time of approval of the prospectus or filing of final terms

Q14:
Do you consider a supplement necessary in relation to information on retail cascades? Please explain and justify your position, also taking into account different typical situations of retail cascades and any effect such retail cascade related information may have on the assessment of the securities.

Q15:
In case of standalone-prospectuses:

Q15a)
If a supplement is not required, how should the consent to use the prospectus be published?

Q15b)
If a supplement is not required, how can it be safeguarded that the investor and the competent authority in the home member state but also the competent authorities in any host member states learn of the new information? Please explain and justify your position, also taking into account issues as e.g. language requirements, filing of such information with the relevant competent authorities and responsibility issues that may arise in respect of such disclosures outside of a prospectus.

Q15c)
Without prejudice to the requirement of a supplement, when information on a retail cascade is not known at the time of approval of a prospectus, do you consider it necessary to indicate in a prospectus how such information on retail cascades will be published? Should there be any specific regulation or guidance detailing by what means such information should be published (e.g. requiring publication in accordance with Article 14.2. Prospectus Directive)?

Section 4. Review of the provisions of the Prospectus Regulation (Articles 5 and 7)

Information on Taxes withheld at source

Q1: Under the circumstances where taxes on the income of the securities have been withheld at source in a country where the issuer is not acting nor has appointed a paying agent, was such information on withholding tax indeed not disclosed in the prospectus?
If necessary to correctly understand the context, please provide additional legal explanations on the withholding tax mechanism.

Q2: Have there been cases where a tax on the income of the securities would be withheld at source, which however would not be required to be disclosed in the prospectus in accordance with the current wording of the Prospectus Regulation on tax information?
If yes, please provide specific examples.

Q3: Are there cases where the Prospectus Regulation currently requires information on taxes on the income of the securities withheld at source, which will not be levied in practice in that specific case? If so, please provide specific examples and identify any difficulties.

Q4: What information on withholding tax should be required by the Prospectus Regulation in order to ensure that the prospectus provides investors with sufficient information to know the "net" amount that they will receive in accordance with the terms of the securities?

Q5: In cases where tax treaties mitigate or prevent applicable double taxation, do you consider it useful for investors to be informed of this fact?

Index Composed by the Issuer

Q6: Do you agree with ESMA's observation that it is not a common market practice to issue, under prospectuses prepared for the purpose of the Prospectus Directive, derivative securities linked to an index composed by another issuer? If not, please provide specific examples.

Q7: Do you agree to keep the current requirement of the Prospectus Regulation to disclose the description of an index composed by the issuer in the prospectus?
If yes, please feel free to provide additional arguments.
If not, please provide the reasoning behind your position.

Q8: Do you agree that Item 4.2.2. of Annex XII needs to be revised to the extent that an index description should also be required for an index composed by any entity belonging to the same group as the issuer, or by an entity acting in association with, or on behalf of, the issuer? If not, please provide your reasons.

Profit Forecast and Estimate

Q9: Do you agree with ESMA's view to keep the current requirement of the Prospectus Regulation to produce a report for profit forecasts and profit estimates? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

Q10: Do you agree with ESMA's approach to exclude "preliminary statements" from the scope of Article 2.11. relating to "profit estimate" and to provide a definition of "preliminary statements" in the Prospectus Regulation? If not, please indicate your reasons. Q11: Do you agree with the list of criteria that have been defined for "preliminary statements"? If not, please indicate your reasons.

Audited Historical Financial Information

Q12: Do you agree to keep the current requirement of the Prospectus Regulation to produce audited financial information covering the latest three financial years? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

Annex II

FORMAL REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE AMENDED PROSPECTUS DIRECTIVE (2003/71/EC)

With this formal mandate to ESMA, the Commission seeks ESMA's technical advice on possible delegated acts concerning the amended Prospectus Directive (the "**Amended Directive**"). These delegated acts should be adopted in accordance with Article 290 of the Treaty of the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate should not prejudge the Commission's final policy decision.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),[7] the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**"),[8] and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").[9]

This request for technical advice will be made available on DG Internal Market's website once it has been sent to ESMA.

The formal mandate consists of three separate parts:

Part I

The formal mandate focuses on technical issues which follow from the Directive 2010/73/EU amending the Prospectus Directive (the "**Amending Directive**").[10]

- The Commission is under the obligation to adopt delegated acts by 1 July 2012 in relation to the format of the final terms to a base prospectus, to the format of the summary of the prospectus, and to the detailed content and specific form of the key information to be included in the summary (Article 5(5)).
- This part relates to the proportionate disclosure regime introduced for some preemptive offers of equity securities, offers by SMEs and issuers with reduced market capitalization, and offers of non-equity securities referred to in Article 1(2)(j) by credit institutions (Article 7(1)).
- It also focuses on the criteria to be applied in the assessment of the equivalence of a third country legal and supervisory framework (Articles 4(1)).

The legal bases for the delegated acts are Articles 4(1), 5(5), 7(1), 24a, 24b and 24c of the Amended Directive.

Part II

Moreover, in order to increase legal clarity and efficiency in the prospectus regime, the second part of the formal mandate covers possible additional delegated acts for technical adjustment and clarification of some existing Level 2 measures. The legal bases are Articles 7, 24a, 24b and 24c of the Amended Directive.

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7 Communication of 9.12.2009. COM(2009) 673 final.

8 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC. OJ L331/84, 15.12.2010, p.84.

9 OJ L304/47, 20.11.2010, p.47.

10 Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. OJ L327/1, 11.12.2010, p.1.

Part III

ESMA is also invited to assist the Commission in the preparation of a comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive.

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The European Parliament and the Council have been duly informed about this mandate.

After the delivery of the technical advice by ESMA, in accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, the Commission will continue to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Articles 24b and 24c of the Amended Directive. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. Context.

1.1 Scope.

On 23 September 2009, the Commission published its proposal for the revision of the Prospectus Directive. On 17 June 2010 the European Parliament adopted a common approach, which was also endorsed by the Council on 11 October 2010. The Amending Directive was published on 11 December 2010.

The Amending Directive has three main objectives: (i) increasing efficiency in the prospectus regime, (ii) reducing administrative burdens for companies when raising capital in the European securities markets, and (iii) enhancing investor protection.

As for Parts I and II of this formal mandate, these principles taken up by the Amended Directive needs now to be translated into delegated acts:

- Part I: The Commission is under the obligation to adopt delegated acts by 1 July 2012 in relation to the format of the final terms to a base prospectus, to the format of the summary of the prospectus, and to the detailed content and specific form of the key information to be included in the summary (Article 5(5)). This part relates also to the proportionate disclosure regime introduced for some preemptive offers of equity securities, offers by SMEs and issuers with reduced market capitalization, and offers of non-equity securities referred to in Article 1(2)(j) by credit institutions (Article 7(1)). It also focuses on the criteria to be applied in the assessment of the equivalence of a third country legal and supervisory framework (Article 4(1)).

- Part II: In order to increase legal clarity and efficiency in the prospectus regime, the second part of the mandate covers possible additional delegated acts reviewing some existing Level 2 measures.

Part III of the mandate invites ESMA to assist the Commission in the preparation of a comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive.

1.2 Principles that ESMA should take into account.

On the working approach, SMA is invited to take account of the following principles:

- It should take account of the principles set out in the de Larosière Report, the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.

- The high level of investor protection that is the guiding principle of the Prospectus Directive.

- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the Amended Directive. It should be simple and avoid creating excessive administrative or procedural burdens for issuers, in particular SMEs, and the national competent authorities.

- ESMA should respond efficiently by providing comprehensive advice on all subject matters covered by Parts I and II of the mandate regarding the delegated powers included in the Amended Directive.

- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.

- In accordance with the ESMA Regulation, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness. Moreover, where relevant it may indicate how the delegated acts should relate to technical standards to be developed in areas where empowerments for technical standards are given by the legislative act.[11]

- ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by ESMA.

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[11] See Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority). OJ L331/120, 15.12.2010, p.120.

- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants (practitioners, consumers and end-users) in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.

- The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.

- ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the advice produced by ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.

- ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the Amended Directive, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.

- The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology used in the field of securities markets in the Union.

- ESMA should address to the Commission any question they might have concerning the clarification on the text of the Amended Directive, which they should consider of relevance to the preparation of its technical advice.

2 Procedure.

The Commission would like to request the technical advice of ESMA on the content of the possible delegated acts to be adopted pursuant to the Amended Directive.

The mandate follows the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002, the 290 Communication, the ESMA Regulation, and the Framework Agreement.

According to Article 19 of the ESMA Regulation, ESMA should serve as an independent advisory body to the Commission, and may, upon a request from the Commission or on its own initiative provide opinions to the Commission on all issues related to its area of competence. More-

over, according to Article 6(1)(gc) of the ESMA Regulation, ESMA shall take over, as appropriate, all existing and ongoing tasks from CESR.[12]

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate should not prejudge the Commission's final decision.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice, the Commission will continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the Prospectus Directive.

Moreover, in accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts possible delegated acts, it will notify them simultaneously to the European Parliament and the Council.

3 ESMA is invited to provide technical advice on the following issues:

3.1 Format of the final terms to the base prospectus (Article 5(5)).

When the final terms of an offer are not included in either the base prospectus or a supplement, Article 5(4) of the Amended Directive clarifies that the final terms must not be used to supplement the base prospectus but they must contain only information relating to the securities note which is specific to the issue and which can be determined only at the time of the individual issue.

Such information should, for example, include the international securities identification number, the currency, the issue price and date, the maturity date, any coupon, the exercise date, the exercise price, the redemption price and other terms not known at the time of drawing up the prospectus. Instead, any new information capable of affecting the assessment of the issuer and the securities must be included in the supplement to the prospectus.

- ESMA is invited to develop the possible format of the final terms as a separated document and provide technical advice on possible schedules and building blocks for the final terms to the base prospectus while at the same time preserving the flexibility of the base prospectus regime.

[12] Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators, OJ L25, 29.1.2009, p.18.

- It should clarify what new information, capable of affecting the assessment of the issuer and the securities should be included in a supplement to the base prospectus rather than in the final terms.

- It should specify the disclosure requirements of the securities note the final terms should contain and what information can be considered specific to the issue and can be determined only at the time of the individual issue. Such information might, for example, include the international securities identification number, the issue price and date, the date of maturity, any coupon, the exercise date, the exercise price, the redemption price and other terms not known at the time of drawing up the prospectus.

- When the final terms are presented in the form of a separate document containing only the final terms, in order to fulfill the obligation to provide key information in the summary document also under the base prospectus regime, ESMA is also invited to specifically define the mechanism and the procedure according to which issuers should combine the summary of a base prospectus with relevant parts of its final terms in a way that is easily accessible to investors. In such cases no subsequent approval of the summary and the final terms should be required.

3.2 Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5)).

The co-legislators have clarified in the Amended Directive the fundamental objectives and guiding principles of the summary document and the key information to be provided in the summary of the prospectus. This is an essential part of the Commission's drive to improve the effectiveness of disclosures and to increase investors' confidence in the financial markets.

In the prospectus regime, the summary of the prospectus is a key source of information for retail investors. It is a self-contained part of the prospectus and should be short, simple, clear and easy for targeted investors to understand. For this reason, it should focus on key information that investors need in order to be able to decide which offers and admissions of securities to consider further.

The format and the content of the summary should provide, in conjunction with the prospectus, appropriate information about the essential characteristics and the risks of the issuer, guarantor and the securities that are being offered or admitted to trading on a regulated market. A common format should facilitate comparability among summaries of similar products by ensuring that equivalent information always appears in the same position in the summaries.

ESMA is encouraged to reflect on possible ways to assist the persons responsible for drawing up the summary of the prospectus in practically achieving the fundamental objectives and observing the guiding principles as set by the co-legislators.

ESMA is invited to advise the Commission on possible schedules and building blocks of the summary document. It should develop common formats of the summary document and its key information in order to facilitate comparability among summaries of similar products and to ensure that equivalent information always appears in the same position in the summary document.

In relation to the content of the summary document, ESMA is invited to reflect on a detailed and exhaustive description of the essential and appropriately structured key information to be provided to investors as generally defined in Article 2(1)(s) of the Amended Directive. In particular, the summary document should contain:

- An introduction stating the purpose of the summary document.

- A short description of the essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position. This section should briefly and clearly summarize at least the "Information about the issuer" and the guarantor, the "Business overview," and the "Financial information concerning assets and liabilities, financial position, and profits and losses," as described in the Regulation (EC) 809/2004 (the "**Prospectus Regulation**").[13]

- A short description of the essential characteristics of the security, including any rights attaching to the securities. This section should briefly and clearly summarize at least the "Information concerning the securities," the items of "Terms and the conditions of the offer" relevant to the security, the nature and scope of the guarantee, the "Admission to trading and dealing arrangements," as described in the Prospectus Regulation.

- A short description of the risks involved in investing in the securities such as factors that are specific to the issuer, the guarantor and their industry, which can affect their ability to fulfill their obligations, and factors which are material for the purpose of assessing the inherent and market risks associated with an investment in the securities.

- A short description of the offer. This section should briefly and clearly summarize the relevant items of the "Terms and the conditions of the offer," the "Reasons for the offer and use of proceeds," as described in the Prospectus Regulation, including the estimate of the total expenses of the issue and any selling restrictions.

ESMA may reflect on possible schedules and building blocks to this proposed outline. The disclosure requirements should take into account the typical main features of the different types of issuers, guarantors and securities. They should also be adapted to the characteristics of the base prospectus.

ESMA, when delivering its advice in respect of the possible content and format of the summary including key information, should also take into account the objectives of the Communication on Packaged Retail Investment Products (PRIPs) and the work undertaken under this initiative.[14] In particular, in relation to PRIPs within the scope of the Prospectus Directive, the summary should take into account eventually the "key investor information" as developed under the PRIPs initiative in order to avoid any duplication of disclosure requirements and thus any additional costs and liability for PRIPs' offerors.

3.3 Proportionate disclosure regime (Article 7).

[13] Commission Regulation (EC) 809/2004 of 29 April 2004. OJ L215, 16.6.2004, p.3.
[14] SEC (2009) 1223 of September 23, 2009, p. 4.

Without prejudice to investor protection, the co-legislators have agreed to introduce in Article 7 of the Amended Directive the principle of a proportionate disclosure regime for the following types of offers:

- Offers of shares by companies whose shares of the same class are admitted to trading on a regulated market or a multilateral trading facility, which are subject to appropriate disclosure requirements and rules on market abuse, provided that the issuer has not disapplied the statutory pre-emption rights;

- Offers by SMEs, by issuers with reduced market capitalization, and by credit institutions issuing non-equity securities referred to in Article 1(2)(j) of the Prospectus Directive within the scope of the Directive.

Such proportionate disclosure regime aims at improving the efficiency of the Union's securities markets and reducing the administrative costs of issuers when raising capital. It should strike a balance between the need to improve investor protection and the amount of information already disclosed to the markets and the size of the issuers.

- ESMA is invited to deliver its advice on the possible adaptation of the specific information requirements of Article 7 of the Prospectus Directive to the above-mentioned types of offers. In particular, ESMA should identify and select the disclosure requirements, as currently specified in the Prospectus Regulation, which are necessary to these types of offers taking into account a high level of investor protection, the amount of information already disclosed to the markets and the size of the issuers. ESMA should develop specific draft annexes in this respect.

- In relation to preemptive offers of equity securities, ESMA is invited to identify items which could possibly be considered redundant in annexes I and III to the Prospectus Regulation considering that shares of the same class are already admitted to trading on a regulated market or a multilateral trading facility (subject to appropriate disclosure requirements and rules on market abuse) and therefore a certain amount of information is already available to the investors and the financial markets.

- In relation to issues by credit institutions issuing non-equity securities referred to in Article 1(2)(j) of the Prospectus Directive which decided to opt into the regime of the Prospectus Directive, ESMA should advice the Commission on what information could be omitted from annexes XI and V of the Prospectus Regulation. ESMA should consider that these issuers are authorized and regulated to operate in the financial markets and that a proper balance should be sought so that the disclosure requirements are not excessively burdensome compared to the amount raised (EUR 75 000 000).

- Concerning SMEs and companies with reduced market capitalisation, ESMA is invited to advice the Commission on a possible annex containing the minimum information to be disclosed in the registration document for SMEs and companies with reduced market capitalisation. Considering their size, the amount raised and, where appropriate, their shorter track record, ESMA is invited to identify the information which could be omitted from the registration document applicable to other issuers.

3.4 Equivalence of third-country financial markets (Article 4(1)).

The Amending Directive extends the exemption in Article 4(1)(e) of the Prospectus Directive to employee share schemes of companies established outside the European Union whose securities are admitted to trading on a third-country market provided that:

- adequate information, including the document containing information on the number and nature of the securities and the reasons for and details of the offer, is available in a language customary in the sphere of international finance; and

- the Commission adopt an equivalence decision stating whether the regulatory (legal and supervisory) framework of that third country ensures that that market is authorized in that third-country, it complies with legally binding requirements which are, for the purpose of the application of this exemption, equivalent to the requirements resulting from the Market Abuse Directive,[15] from Title III of the MiFID,[16] and from the Transparency Directive,[17] and it is subject to effective supervision and enforcement in that third country.

The Commission should adopt such equivalence decision in accordance with the procedure referred to in Article 24(2) of the Prospectus Directive upon assessment and request of the competent authority of a Member State which should indicate why it considers that the legal and supervisory framework of the third country concerned is to be considered equivalent, and should provide relevant information to this end.

Definition of equivalence

The Market Abuse Directive, the Transparency Directive and the MiFID have set up a strict legal and supervisory framework in the Union, which should be preserved by all actors and market participants in order to underpin confidence in the financial markets.

Given the objectives of the Market Abuse Directive, the Transparency Directive and the MiFID, it is appropriate that equivalence should be defined by reference respectively to the ability of a third-country regulatory framework to ensure a similar integrity of its financial markets, to the ability of investors to make similar informed assessment of the financial situation of issuers with securities admitted to trading on those financial markets, and to the ability of that third-country regulatory framework to ensure that those markets are subject to similar authorization, supervision and enforcement on an ongoing basis.

Therefore in the assessment in the request by the competent authority of a Member State whether a third-country financial market comply with legally binding requirements which are equivalent to the requirements resulting from the Market Abuse Directive, the Transparency Directive and the MiFID and whether it are subject to effective supervision and enforcement in that third coun-

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[15] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). OJ L 96, 12.4.2003, p.16.

[16] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments. OJ L 145, 30.4.2004, p.1.

[17] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. OJ L 390, 31.12.2004, p.38.

try, the priority should lie in assuring that investors would benefit from similar protections in terms of market integrity and transparency.

The global and holistic assessment of the third-country regulatory framework should be based on its entirety and carried out from a technical point of view. The regulatory framework of the third country must include mandatory and not voluntary requirements. The assessment should focus on the differences between the regulatory regime established at the EU level and the third-country regulatory framework. It should evaluate the material importance of such differences. In doing so it should focus on technical criteria and not take into account any considerations of political nature.

Elements of the equivalence assessment

The third subparagraph in Article 4(1) of the Amended Directive set the minimum criteria for the assessment of such equivalence. A third-country legal and supervisory framework may be considered equivalent where that framework fulfills at least the following conditions:

- the markets are subject to authorization and to effective supervision and enforcement on an ongoing basis;

- the markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;

- security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and

- market transparency and integrity are ensured by the prevention of market abuse in the form of insider dealing and market manipulation.

The fourth subparagraph in Article 4(1) empowers the Commission to adopt delegated acts in order to specify those criteria or to add further ones to be applied in the assessment of the equivalence.

ESMA is invited to specify the abovementioned criteria and to reflect on the possibility of adding further ones to be applied in the assessment of the equivalence by the requesting competent authority of a Member States.

An indicative description of the regulatory principles, which need to be respected by the to be assessed third-country regulatory framework and which need be considered in the assessment and request by the competent authority of a Member State for an equivalence decision by the Commission, should include the following:

Measures to ensure market integrity

- The third country regulatory regime provides for a prohibition of insider dealing and market manipulation and for an obligation to disclose inside information similar to Articles 2, 3, 4, 5, 6 and 9 of the Market Abuse Directive.

Measure to ensure market transparency and investor protection

- The third-country regulatory regime provides for disclosure requirements for the admission of the securities to trading on that third-country financial market similar to the minimum information of Articles 5 and 7 of the Prospectus Directive.

- The third-country regulatory regime provides for transparency requirements about issuers with securities admitted to trading on that third-country financial market similar to the periodic information requirements of Articles 4, 5 and 6 of the Transparency Directive and to the ongoing information requirements, relating to major holdings and for holders of those securities, of Chapter III of the Transparency Directive.

- The third-country regulatory regime ensures that its markets are subject to authorization and to effective supervision and enforcement on an ongoing basis; and that the markets have clear and transparent rules regarding admission of securities (equity and non-equity) to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable. The requirements of the third-country regulatory regime should be similar to those in Articles 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45 of MiFID.

- The third-country regulatory regime ensures effective supervision and enforcement taking into consideration the legal and institutional setting in which the third-country supervisory authority operates as well as of its supervisory program and operational ability to ensure effective compliance. A cooperation framework between the third-country supervisory authority and the requesting competent authority or ESMA should be in place.

ESMA is also invited to take into consideration and ensure consistency with the ongoing reviews of the Market Abuse Directive, the Transparency Directive, and the MiFID.

3.5 The consent to use a prospectus in a retail cascade (Articles 3 and 7).

According to the Amending Directive, a valid prospectus, drawn up by the issuer or the person responsible for drawing up the prospectus and available to the public at the time of the final placement of securities through financial intermediaries or in any subsequent resale of securities, provides sufficient information for investors to make informed investment decisions. Therefore, financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer or the person responsible for drawing up the prospectus as long as this is valid and duly supplemented in accordance with Articles 9 and 16 of the Prospectus Directive and the issuer or the person responsible for drawing up the prospectus consents to its use.

The issuer or the person responsible for drawing up the prospectus should be able to attach conditions to his or her consent. The consent, including any conditions attached to it, should be given in a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement.

- ESMA is invited to advise the Commission on the possible format and modalities according to which the consent, including the conditions attached thereto, to use the initial prospectus by financial intermediaries placing or subsequently reselling the securities should be disclosed to the relevant parties. The consent, including any conditions attached thereto, should be given in

a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement.

- The advice should focus on the duration of the consent, what conditions should be attached, the clarification on the respective liabilities of the issuer or the person responsible for drawing up the initial prospectus consenting to its use and the financial intermediaries placing or subsequently reselling the securities entitled to rely upon the initial prospectus, what resale or final placement of securities can be considered compliant with the written agreement.

4 Review of the provisions of the Prospectus Regulation (Articles 5 and 7).

Six years after the entry into force of the Prospectus Regulation, in consideration of the technical developments on the financial markets in the Union, the amendments to the Prospectus Directive, and the objectives of increasing legal clarity and efficiency in the prospectus regime, the Commission takes the opportunity of this mandate to ESMA to consider some technical adjustment and clarification to a number of requirements of the Prospectus Regulation.

ESMA is invited to reflect and advise the Commission on the possible technical adjustment and clarification of the following disclosure requirements of the Prospectus Regulation:

- Information on taxes on income from securities withheld at source (Items 4.11 of Annex III, 4.14 of Annex V, 27.11 and 28.11 of Annex X, and 4.1.14 of Annex XII). The Prospectus Regulation requires the disclosure in the prospectus of information on taxes from securities withheld at source. Does ESMA consider necessary to clarify that this only refers to information on any amount withheld at source by the issuer or by any agent appointed by it, because otherwise it would be impossible for the issuer to identify those custodians or agents in the payment chain not appointed by it?

- Information relating to an underlying index (Item 4.2.2 of Annex XII). The Prospectus Regulation requires the inclusion in the prospectus of a description of the index if it is composed by the issuer. However, if the index is not composed by the issuer, where information about the index can be obtained. ESMA is invited to consider the effects of allowing both the index owner and the others just to indicate where information on the index can be found? Would such a solution be applicable also in Item 2.10 of Annex XV?

- Profit forecasts or estimates (Items 13.2 of Annexes I and X, 9.2 of Annex IV, and 8.2 of Annex XI) should be currently accompanied by 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. ESMA is invited to consider the effects of repealing such requirement given that market announcements are usually issued in advance of the related financial results being finalized?

- Audited historical financial information (Items 20.1 of Annexes I and XI). In order to avoid any unnecessary costs for the issuers, ESMA is invited assess the effects of a possible reduction to the latest two financial years for the coverage of the audited historical financial information, while keeping the requirement of the latest three financial years only in case of an initial public offer.

5. Comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive.

Given the divergences among the liability regimes of the Member States in the application of the prospectus regime, the co-legislators have asked the Commission to prepare a comparative table in order to identify and monitor the different arrangements in the Member States.

- ESMA is invited to assist the Commission in compiling this comparative table. ESMA is invited to provide a complete and coherent set of information comparing the civil, administrative and government liability, criminal liability and sanctions applied in each Member State.

6. Indicative timetable.

This mandate takes into consideration that ESMA needs enough time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Articles 24b and 24c of the Amended Directive.

In particular, the Commission is under the obligation to adopt delegated acts by 1 July 2012 in relation to the format of the final terms to a base prospectus, to the format of the summary of the prospectus, and to the detailed content and specific form of the key information to be included in the summary (Article 5(5) of the Amended Directive). Therefore it is of outmost importance to start working on these measures as soon as possible.

The deadline set to ESMA to deliver the technical advice is **30 September 2011** at least with regard to the questions raised in sections 3.1 and 3.2. The establishment of the deadline is based on the following timetable.

Deadline	**Action**
31 December 2010	Entry into force of the Amending Directive (20 days after publication in the Official Journal of the European Union – 11 December 2010).
January 2010	Submission by the Commission of the formal mandate to ESMA.
30 September 2011	ESMA provides its technical advice.
October – December 2011	*Preparation of the delegated acts*: In the preparation of the delegated acts, the Commission will consult with experts appointed by the Member States within the European Securities Committee. The Commission will provide the European Parliament with full information and docu-

	mentation on those meetings. If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.
End of December 2011	*Adoption of the delegated acts*: Formal adoption by the Commission of the delegated acts and notification to the European Parliament and the Council.
March 2012 or June 2012	End of the objection period for the European Parliament and the Council (three months + three months).
1 July 2012	End of the transposition period for the Amending Directive (18 months after the entry into force of the Amending Directive).

Annex III

Letter from the Commission services on the extension of the scope of the Mandate to convertible bonds

EUROPEAN COMMISSION
Directorate General Internal Market and Services

Director General

Brussels,
MARKT/G3/ET/cr Ares (2011)

Mr Steven Maijoor
Chairman
European Securities and Markets Authority
(ESMA)
11-13 avenue de Friedland
F – 75008 Paris

Subject: **Prospectus disclosure requirements for convertible/exchangeable debt securities – Reply to a question regarding ESMA Level 2 works for preparing the technical advice on possible European Commission's delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/UE**

Dear Steven,

In the context of the Commission's mandate to ESMA for advice on possible delegated acts concerning the Prospectus Directive sent to ESMA on 19 January 2011, the DG MARKT Services thank you for sharing the outcome of the fact finding exercise on the annexes to the Prospectus Regulation No 809/2004/EC applicable in case of an offer/admission to trading of convertible or exchangeable debt securities.
After careful review of Recital 7, Article 4, and Annex XVIII of the Prospectus Regulation and of the outcome of the above-mentioned fact finding, we consider that also the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities should fall within the scope of the mandate to ESMA for advice on possible delegated acts.
Differences regarding disclosure requirements prejudice the proper functioning of the prospectus passport, discourage cross-border offers, and undermine the completion of the Union's securities market.
It is essential to achieve a level playing field, with respect to disclosure requirements for convertible/exchangeable debt securities, for all market participants and ensure a uniform application of Union's legislation on prospectuses.

Therefore, the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities should also be included within the scope of the mandate to ESMA, and in particular in the context of its work on the proportionate disclosure regime (Point 3.3 of the mandate) and the review of the provisions of the Prospectus Regulation (Point 4 of the mandate).
I thank you in advance for your cooperation and I am confident that the ESMA's technical advice and assistance will permit the European Commission to successfully clarify this issue.

Yours sincerely,

Jonathan FAULL

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Emiliano TORNESE, Telephone: +32-2-29 85400, emiliano.tornese@ec.europa.eu

Annex IV

Letter from the Commission services on the content and timetable of the part 2 of the requests for ESMA's technical advice

EUROPEAN COMMISSION
Directorate General Internal Market and Services

Director General

esma
ARRIVE
ON: 18/11/2011
N°: 11-2156

Brussels, 14 NOV. 2011 - 1208615
MARKT.G3/SF/jj (2011) 1289648

Mr. Steven Maijoor
The Chairman
ESMA
Rue de Grenelle 103
75007 Paris
France

Subject: **Content and timetable of the part 2 of the request for ESMA's Technical Advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU.**

Dear Mr. Maijoor,

First of all I would like to thank you for sending us the first part of the ESMA's Technical Advice referred to above and published on 4 October 2011.

We note in your response that you have started working in order to deliver ESMA's Technical Advise on the remaining part of the mandate. At the initial stage, the second part of the formal mandate was expected to cover the following:

(1) a possible format and form of a consent to use a prospectus in a retail cascade;

(2) a review of other provisions of the Prospectus Regulation including possible additional delegated acts for technical adjustment and clarification of some existing Level 2 measures;

(3) the criteria to be applied in assessing the equivalence of a third-country financial market; and finally

(4) assistance to the Commission in the preparation of a comparative table recording the liability regimes applied by the Member States in relation to the Prospectus Directive.

Commission européenne, B-1049 Bruxelles / Europese Commissie, B-1049 Brussel - Belgium. Telephone: (32-2) 299 11 11.

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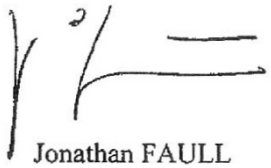
Considering the proposals adopted on 20 October 2011 by the Commission on the review of the Markets and Financial Instruments Directive (MiFID)[1] and Market Abuse Directive (MAD)[2] we consider that the issues (3) and (4) could be considered at a later stage.

This will substantially reduce the ESMA's work needed for providing its Technical Advice on the remaining second part of the mandate and as such is likely to speed up your timetable.

I would like to thank again ESMA for this fruitful cooperation.

Yours sincerely,



Jonathan FAULL

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[1] Proposal for a Directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (COM(2011)652)
Proposal for a Regulation on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories (COM(2011)656)

[2] Proposal for a Directive on criminal sanctions for insider dealing and market manipulation (COM(2011)654)
Proposal for a Regulation on insider dealing and market manipulation (market abuse) (COM(2011)651)