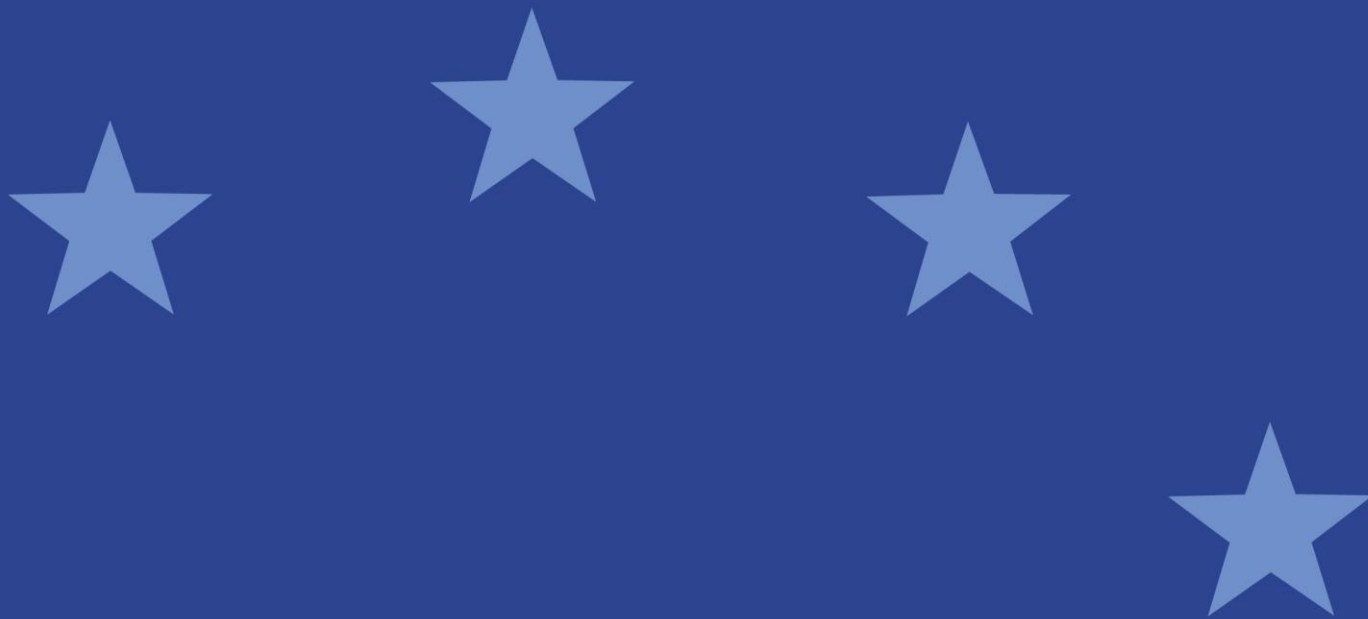




European Securities and  
Markets Authority

## Final Report

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



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## **Acronyms used**

### **Amended Directive**

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

### **Amending Directive, AD, Amending Prospectus Directive**

Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directive 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).

### **Commission**

**European Commission**

### **CWG**

Consultative Working Group

### **ESMA**

European Securities and Markets Authority

### **FB**

Feedback Statement

### **Frequently Asked Questions or FAQs**

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

### **IOSCO**

International Organization of Securities Commissions

### **IPO**

Initial Public Offering

### **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 1

### **MiFID**

Markets in Financial Instruments Directive

Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC

**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 or PD**

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

**Prospectus Regulation or PR**

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 Sized Enterprises as defined in the Prospectus Directive

**TA** Technical Advice

**Takeover Bids Directive**

Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids

**TF** Task Force

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## **I. Executive Summary**

### **Reasons for publication**

The European Commission (the Commission) sent a formal request on 20 January 2011 to ESMA to provide technical advice on possible delegated acts concerning the Prospectus Directive as amended by Directive 2010/73/EU. The Mandate to ESMA set out the areas where the Commission was requesting advice in sections 3, 4 and 5. The advice on sections 3.1 and 3.2 and 3.3 has already been delivered to the Commission on October 4 2011 (Part I of the Mandate)

Taking into account the objection period for the European Parliament and the Council to the formal adoption by the Commission of the delegated acts and thereafter 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 as these are regarded to be more important and leave sections 3.4, 5 and the issue of convertible bonds for a further stage (part III of the Mandate).

On 13 December 2011, ESMA released a Consultation Paper (Ref. ESMA/2011/444) requesting input from markets participants to assist it in providing advice to the European Commission.

### **Contents**

In accordance with the terms of the Mandate, ESMA presents by means of this Final Advice a combined document that comprises both its feedback statement (FB) and its final technical advice (TA) for both section 3.5 the consent to use the prospectus in a retail cascade (articles 3 and 7) and section 4 review of the provisions of the Prospectus Regulation (articles 5 and 7). This combined document has been structured in such a way that the Technical Advice immediately follows the Feedback Statement in relation to each individual section of the Mandate.

In relation with the drafting of the FB and TA, the Task Force has carefully considered all comments received during the consultation process. The FB discusses in detail the comments which emerged during the consultation process and provides in this advice the relevant position for which ESMA has finally opted. The TA takes into account the changes set out in the feedback statement.

### **Next steps**

The Commission is under the obligation to adopt delegated acts by 1 July 2012 (18 months after the entry into force of the Amending Directive) in relation to the areas covered in the sections 3.1 and 3.2. Due to the need to provide market actors with legal clarity by 1 July 2012 (date of application of the Amended Directive) and in light of the importance of areas covered in sections 3.3, 3.5 and 4, the delegated acts dealing with these matters should be published in the Official Journal of the EU by 1st of July 2012. All these areas are detailed in paragraph 4 of the Introduction to this Final Report on ESMA's Technical Advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU (Part II of the Mandate).

ESMA will start after delivering the present advice the work on the remaining part of the mandate which covers in section 5 a comparative table recording the liability regimes applied by the Member States in

relation to the Prospectus Directive. The work on section 3.4, the criteria to be applied in assessing the equivalence of a third-country financial market (Article 4 (1)), is postponed due to the on-going review of the Transparency Directive<sup>1</sup>, Market Abuse Directive<sup>2</sup> and MiFID. Finally, the disclosure requirements for convertible bonds will be dealt with under the same technical advice (Part III of the Mandate).

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<sup>1</sup> 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 Commission Directive 2007/14/EC (Transparency Directive).

<sup>2</sup> Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)

## II. General Introduction

### Background

1. Directive 2010/73/EU of 24 November 2010<sup>3</sup> (the Amending Directive) amending the Prospectus Directive was published in the Official Journal of the EU on 11th December 2010.

2. On 20 January 2011, 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 Prospectus Directive.

3. Following receipt of the Mandate, on 26 January 2011 ESMA launched a call for evidence (the Call for Evidence) for interested parties to submit comments by 25 February 2011 on the issues which ESMA should consider in its advice to the Commission. ESMA received 36 submissions 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 II).

5. As part of the process for producing its advice, ESMA published, on 13 December 2011, a Consultation Paper covering the sections 3.5 and 4 (Part II of the Mandate).

6. ESMA received 23 responses to the consultation document and these can be viewed on ESMA's website to the extent permission has been given for their publication. The responses came from European and national associations representing issuers and financial service providers, as well as regulated markets, stock exchanges and individual issuers.

7. 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 3.1 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

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<sup>3</sup> 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.

on October 4, 2011 and published on ESMA's website on October 5, 2011), because of the importance of the areas concerned.

8. 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 III).

9. In this context, ESMA has 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 is composed of two drafting groups dealing respectively with sections 3.5 and 4 of the Mandate.

10. ESMA has benefited from the advice of the Consultative Working Group (the CWG), established to assist the CFSC on an on-going basis.

The members of the CWG are:

- Wouter Kuijpers, Senior Legal Counsel and Policy Advisor, Eumedion Corporate Governance Forum
- Klaus Künzel, Senior Legal Counsel, Group Legal, Commerzbank AG
- Henri Wagner, Managing Partner, Allen & Overy
- Luis de Carlos, Managing Partner, Uría Menéndez
- Klaus Ilmonen, Partner, Hannes Snellman Attorneys Limited
- José Neves Adelino, Professor, the New University of Lisbon
- João Ramalho Talone, Magnum Capital
- Laurent Guillot, Chief Financial Officer, Saint-Gobain
- Peter Montagnon, The Financial Reporting Council
- Steen Lønberg Jørgensen, Head of Corporate Finance & Equity, Denmark Nordea
- Leif Vindevåg
- Alexander Russ, Legal Counsel, Oesterreichische Kontrollbank AG

The CWG has met once with the Task Force to give guidance on the drafting of the Consultation Paper. Furthermore, its members have provided written comments on the Consultation Paper which have been taken into account when drafting ESMA's Feedback Statement and Technical Advice.

11. ESMA asked the EC whether an impact assessment was needed when discussing the mandate. The Commission responded that a formal impact assessment might not be needed but that all the proposals included in the advice should be well justified. ESMA has taken the largely qualitative information on costs and administrative burdens that were provided by respondents to the consultation into account in formulating its final proposals.

Annex I: European Commission's request for ESMA technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU.

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



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

### **III. Feedback Statement on the consent to use a prospectus in a retail cascade**

#### **III.I General Observations**

12. ESMA received 23 responses from market participants, of which 16 commented on part 3 of the Consultation Paper "The consent to use a prospectus in a retail cascade".

13. Almost all respondents took a critical view on ESMA's proposal for retail cascades, in particular on the proposal to publish the consent to use the prospectus and to identify any financial intermediaries that were granted consent to use the prospectus in the prospectus itself or in the final terms in case of base prospectuses.

14. Respondents claimed that ESMA's proposal would be based on the incorrect assumption that intermediaries were acting in association with the issuer and therefore the issuer would know all distributors, while in the most relevant distribution models this was generally not the case. Respondents stated that most distribution schemes in which securities are distributed via several steps do not involve any contractual relationship between the issuer and the financial intermediaries further down the distribution chain. Therefore it would not be possible to name the distributors in the prospectus or final terms. Requiring the disclosure of the consent to use the prospectus and the identity of each distributor in the prospectus or final terms would therefore in practice prohibit the use of retail cascades.

15. Some respondents feared that the additional requirements proposed by ESMA would likely influence issuers to withdraw from the retail market, which would result in a loss of investment opportunities for retail investors in Europe and might increase issuer's costs for the raising of debt capital and reduce funding opportunities for European enterprises. In particular in the current economic environment where bank lending becomes increasingly restricted, the ability of issuers to raise capital quickly was considered of high importance.

16. Furthermore, some respondents expressed the view that requiring an extensive list of intermediaries in prospectuses causes considerable additional costs and administrative burdens to issuers while other means of information would fulfil the same objectives. Generally a more flexible approach was favoured.

#### ***ESMA's response:***

17. ESMA observed that there is no uniform model of retail cascades within the European financial market and acknowledges that market practice may differ from ESMA's notion of retail cascades as laid down in the Consultation Paper and in ESMA's FAQ No. 56<sup>4</sup>. In particular ESMA takes notice that in most cases financial intermediaries in a retail cascade are not appointed by, or acting in association with, the issuer (or the person responsible for drawing up the prospectus), when subsequently offering securities of the issuer.

18. ESMA therefore partially revised its position regarding retail cascades to accommodate market practice, but also taking into consideration the legal requirements of the Amended Directive and the objective

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<sup>4</sup> Frequently Asked Questions, Prospectuses, Common Positions agreed by ESMA Members, 13<sup>th</sup> updated version – June 2011 (ESMA/2011/85).

of the Commission's Mandate. In particular the following considerations were taken into account when developing its revised approach:

- Article 3.2 of the amended Prospectus Directive requires the issuer to consent to the use of the prospectus by means of a written agreement. Recital 10 of the Amending Directive states that "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."

- Protection of Issuers (or persons responsible for drawing up the prospectus):

The issuer shall be able to control use of the prospectus and its liability for the prospectus by granting consent to use the prospectus or attaching conditions to the use, including a limitation of the duration of the use. The issuer shall know for how long it has the responsibility to update the prospectus via supplements.

- Protection of financial intermediaries:

Intermediaries shall know whether they can use, and rely on, the prospectus of the issuer, because by granting consent to use the prospectus the issuer or person responsible for drawing up the prospectus remains responsible for the content of the prospectus, including responsibility to update the prospectus via supplements.

- Protection of Investors:

Investors shall have clarity whether the issuer also accepts responsibility for use of the prospectus by financial intermediaries; otherwise it would be unclear if the investor shall seek recourse against the issuer or the intermediary in case of a prospectus containing incorrect or incomplete information.

- Information for competent authorities:

In terms of market supervision, competent authorities need to know whether a public offer is made on the basis of an approved prospectus or not.

19. As a result, ESMA keeps its approach to require publication of the consent in the prospectus, but is proposing to allow for a general consent to use the prospectus to be included in the prospectus, subject to certain conditions as will be explained in more detail below (the "general consent approach"). It shall be still possible for an issuer or a person responsible for drawing up a prospectus to restrict its consent to individual financial intermediaries, based on an individual bilateral written agreement between the parties (the "individual consent approach"). In this regard ESMA proposes to facilitate the disclosure of new information on financial intermediaries which is unknown at the time of approval of the prospectus or the filing of final terms in case of base prospectuses.

20. In this Feedback Statement the responses of market participants to the individual questions of the Consultation Paper regarding retail cascades will be described in more detail, together with ESMA's position in respect of the feedback received from the market and ESMA's final approach on retail cascades.

### **III.II Responses to Questions**

#### **General principles regarding retail cascades**

## 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?*

21. Market participants indicated that retail cascades were mainly used for simple and structured debt securities, but were also used for equity securities.

22. Respondents reported that in practice different distribution schemes were used for different kinds of securities and might vary from country to country. However, according to the responses received, a typical distribution scheme for bonds generally involved several or many layers of distributors or financial intermediaries and might be structured as follows:

23. In a first step securities are offered by the issuer via underwriting financial intermediaries ("Underwriter") to a group of institutional investors. These investors purchase from the Underwriter and have no contractual relationship with the issuer. Such institutional investors may be financial intermediaries that distribute the securities in a second step to 'end-investors' (retail or institutional investors) or to other financial intermediaries who intend to distribute the securities again to end-investors or financial intermediaries and so on. All these financial intermediaries are not acting in association with the issuer. The issuer does not control or plan this process, and it is not possible for the issuer to anticipate the concrete distribution chain.

24. Respondents advised that there were variations of this model (e.g. the issuer sells directly to institutional investors/financial intermediaries without involving an underwriter or dealer) which would face the same problem, that the issuer has no contractual relationship or contact with financial intermediaries further down the distribution chain and therefore no knowledge of the identity of such distributors. As such a distribution chain emerges generally only after the offer was initiated, members of the cascade were generally not, and could not be, determined at that time, or even thereafter.

25. Some respondents advised that there were also more 'integrated' or 'centralised' forms of retail cascades in which the issuer might have a contractual relationship with the financial intermediaries, in which financial intermediaries might belong to the issuer's group or in which financial intermediaries were at least known by the issuer (or its permanent dealer). However, from an economic point of view cascade offerings involving subsequent offerings beyond the knowledge of the issuer were considered more common and efficient as opposed to centralised offerings, because in the end more investors could be reached with an "inclusive" approach of distribution rather than an "exclusive" one.

26. One respondent provided the following structure as an example of a more centralised form of distribution:

A lead manager procures consent from the issuer to use the prospectus and to pass the consent on to other intermediaries at the lead manager's discretion. The prospectus is electronically distributed to a large number of intermediaries, of whom, however, not all will choose to participate. The issuer and the manager will not know in advance which intermediaries will choose to place orders. The manager will accept orders only from intermediaries that have consent to use the prospectus.

**ESMA's response:**

27. ESMA takes notice of these market practices and has considered them in its technical advice. The technical advice was revised in order to allow for a more flexible approach in cases where financial intermediaries are appointed only after the beginning of the offer or not appointed at all and therefore unknown to the issuer or the person responsible for drawing up the prospectus. The revised principles regarding disclosure on retail cascades will be provided below under the part "Principles regarding disclosure requirements in relation to retail cascades in a prospectus".

**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?*

28. In particular, the majority of the respondents did not agree with ESMA's notion that financial intermediaries are always known by, or acting in association with, the issuer or the person responsible for drawing up the prospectus.

29. With respect to the terms and conditions, respondents partially agreed. Respondents argued that the terms and conditions of offers –in particular by financial intermediaries not acting in association with the issuer- cannot and need not be known at the time the prospectus or final terms are drawn up and might therefore be omitted in the prospectus on the basis of Article 23.4 Prospectus Directive, except for information relating to location and duration of offers made within a retail cascade which should be included. Information on the offeror and the terms and conditions of the offer (in particular any allocation and the pricing of the securities) was considered best delivered by the offeror itself and forms part of the contractual relationship between offeror and retail investor. The financial intermediary would be responsible for such information and because this information was omitted in the prospectus/final terms, there would be no deviation of the terms and conditions and no liability of the issuer.

30. In this regard respondents made a distinction between the terms and conditions of the security (e.g. as regards interest rate, redemption amount, redemption date, etc.) on one hand which could not differ from the one described in the prospectus and the terms and conditions of the offer on the other hand (in particular the price), which vary generally according to market conditions. In that sense the offer price was not considered as part of the terms and conditions of the securities, but of the terms and conditions of the offer.

31. Regarding ESMA's view that a fluctuation of the price in accordance with prevailing market conditions does not constitute a change of the terms and conditions, all respondents agreed. The offer price would not alter the payment obligations and other product terms of the securities set out in the prospectus.

32. A prospectus or final terms would always specify only an initial offer price at the time of the pricing or during a subscription period.

***ESMA's response:***

33. It is acknowledged that market practice differs to some extent from ESMA's notion of retail cascades as stated in the Consultation Paper and also in ESMA FAQ No. 56. In particular the concept that financial intermediaries were generally acting in association with the issuer should be revised.

34. ESMA agrees overall with the view of respondents that differentiate between the terms and conditions of the securities as described in the prospectus and the terms and conditions of the offer. While the terms and conditions of the offered securities must not differ from the terms described in the prospectus, the terms and conditions of the individual offer or sub-offer made by the intermediary, may, or probably in general will, be different from the terms and conditions of the issuer's offer described in the prospectus (except for the duration and location of the public offers or sub-offers by the financial intermediaries which need to comply with the terms determined in the prospectus in this regard). This is in particular true for terms and conditions regarding the offer price, which is expected to fluctuate in accordance with the prevailing market 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.*

35. Respondents named the following information items which can only be provided by the financial intermediary at the time of the sub-offer:

- name of offeror/identity of the distributor
- offer price
- allocation
- minimum amount of application (each distributor can determine a different subscription amount)
- application process
- time period, during which the offer will be open and description of the application process (each distributor can determine its own subscription period)
- information on costs in relation to distribution or placing of financial instruments (e.g. subscription fees)

36. One respondent stated that almost all information required in item 5 of Annex V Prospectus Regulation relating to the terms and conditions of the offer (and similar for the other respective Annexes of the Prospectus Regulation, e.g. item 5 of Annex XII) would possibly be omitted in a prospectus on the basis of Article 23.4 Prospectus Directive. Only information relating to the duration and location of the offers could be included in any case. With regard to financial intermediaries appointed and therefore known, this respondent stated that they might be in huge numbers (possibly thousands) that would change continuously and irrespective of any specific offers under a base prospectus.

37. As such information would be obvious for the investor (identity of the offeror who is in direct contact with the investor) or part of the negotiation or contractual agreement between offeror and investor (offer price, any minimum amount of application, and information on the application process), no further communication of such information was considered necessary.

38. Most respondents were of the view that such information should be communicated to the investors by the relevant intermediaries and that such communication would be covered by MiFID.

***ESMA's response:***

39. ESMA agrees that the information identified by respondents relating to the public offer or sub-offer of financial intermediaries (other than information on duration and location of the offers and sub-offers) might not be available at the time the prospectus is approved or, in case of a base prospectus, the final terms are filed. Such information may therefore be omitted in the prospectus on the basis of Article 23.4 Prospectus Regulation and will be provided only by the financial intermediary at the time of the sub-offer.

40. In line with its view provided in ESMA FAQ No. 56 Part C, ESMA considers it helpful to insert a bold notice in a suitable place in the prospectus informing investors that such information would be provided at the time of any sub-offers.

**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?*

41. The majority of respondents did not consider it necessary to further clarify who is responsible for information provided by the intermediary to the investor. It was considered obvious that the issuer is only responsible for information provided in the prospectus and the intermediary for any information or advice given to the investor.

42. Few respondents considered a general clarification helpful that the issuer is responsible for the content of the prospectus including the final terms, but that any information provided by the intermediary is the responsibility of the intermediary.

***ESMA's response:***

43. ESMA agrees that the prospectus should not contain a statement referring to the responsibility of the financial intermediary for information provided by it to investors, as such statement would in fact refer to the responsibility of a third person. The responsibility of financial intermediaries follows different rules (e.g. MiFID) and can be subject to national legislation. Requiring information on this in the prospectus under the European prospectus regime was therefore not considered appropriate.

44. However, when an issuer grants financial intermediaries its consent to use a prospectus, ESMA considers it necessary to specify in the prospectus itself that the issuer or the person responsible for drawing up the prospectus thereby also accepts responsibility for its content with respect to its use for public offers made by financial intermediaries acting with the consent of the issuer.

45. Such clarification is considered valuable information for the investor, and it also ensures that the issuer or the person responsible for drawing up the prospectus is aware that it is responsible for the content of the prospectus not only for the time of its own offer, but also for the whole period it granted consent to use the prospectus.

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?*

46. The responses to these questions were rather heterogeneous. While some respondents agreed with ESMA's view, others disagreed or agreed only partially.

47. One respondent agreed with ESMA's understanding only to the extent that the period for which consent to use the prospectus may be granted cannot extend beyond the validity of the prospectus. However, this respondent did not agree with the (further) limitation to the period in which a supplement is possible according to Article 16 Prospectus Directive, because this was considered to be in conflict with Article 9 Prospectus Directive and Recital 10 of the Amending Directive, and furthermore, would increase potential liability of distributors, relying on the prospectus drawn up by the issuer for these purposes. It was argued that in particular distributors which do not enter into a contractual agreement with the issuer do not know when the issuer intends to finally close its offer to the public or whether a supplement is necessary. Limiting the validity of the prospectus to the period in which a supplement is possible according to Article 16 Prospectus Directive would result in distributors not being able to know whether they can still rely on the existing prospectus.

48. One respondent argued in favour of an interpretation of Article 16 Prospectus Directive which would allow the issuer to update the prospectus via supplements during the entire time span of the prospectus' validity to enable use of the prospectus in a retail cascade.

49. With regard to standalone prospectuses and the possibility for financial intermediaries to prepare a new prospectus by incorporating by reference the issuer's initial prospectus, some respondents agreed, while others provided a more differentiated position.

50. Respondents advised that in practice it never happened that a financial intermediary or any person other than the issuer prepared a prospectus, as only the issuer has access to the required information. In particular the financial intermediary could not rely on and incorporate by reference publicly available information because there is no guarantee that this information is up to date. One respondent argued against incorporating the issuer's initial prospectus by reference because thereby incorrect and not up-to-date information could be perpetuated, without the issuer's consent, by other intermediaries through their own prospectuses.

51. Respondents expressed the view that a retail cascade involves a series of offers and that the issuer produces the prospectus to cover all subsequent offers in the whole retail cascade to enable the distribution of its securities under the EU prospectus regime, thereby accepting all the sub-offers to be its offer for prospectus purposes. Requiring the publication of a new prospectus for a subsequent sub-offer in a retail



cascade only because a previous offer which was the subject-matter of the initial prospectus has been closed, would appear formalistic. Investors' interests were sufficiently protected if such a prospectus was updated by a supplement prior to its use for another offer and allowing the issuer to update the initial prospectus in such case would appear the more practicable concept.

***ESMA's response:***

52. ESMA does not agree with an interpretation of the Prospectus Directive according to which a prospectus would be valid for 12 month irrespective of whether it is supplemented or not. Article 9.1 Prospectus Directive stipulates that a prospectus shall be valid for 12 months, provided that the prospectus is completed by any supplements required pursuant to Article 16. Furthermore, Recital 10 of the Amended Directive states that a financial intermediary is entitled to rely upon the initial prospectus, as long as this is valid and duly supplemented in accordance with Articles 9 and 16. As a prospectus that cannot be supplemented anymore cannot be kept up-to-date, ESMA considers such a prospectus not valid any more.

53. ESMA therefore keeps its position that an issuer or the person responsible for drawing up the prospectus may grant its consent to use the prospectus only for such period in which the prospectus is valid, and that a prospectus is only valid as long as it can be kept up-to-date via supplements in accordance with Article 16 Prospectus Directive.

54. ESMA acknowledges however that in a retail cascade an issuer or the person responsible for drawing up the prospectus may expressly determine an offer period upon which public offers or sub-offers by financial intermediaries can be made with its consent following the closing of its own offer. In such case these public offers or sub-offers would be considered to be the subject-matter of the prospectus and therefore taken into account when determining the period in which a supplement is required and possible according to Article 16 Prospectus Directive. This means that the issuer or the person responsible for drawing up the prospectus remains responsible to supplement the prospectus in accordance with Article 16 Prospectus Directive until the end of the determined offer period in which sub-offers by intermediaries are possible under the consent granted.

55. In order to avoid any uncertainty as regards the validity of the prospectus and the requirement to supplement it, ESMA is of the view that the issuer or the person responsible for drawing up the prospectus must clearly state in the prospectus the offer period upon which public offers or sub-offers by financial intermediaries can be made, corresponding to the period for which it grants consent to use the prospectus in a retail cascade, whereby it accepts responsibility to supplement the prospectus, if necessary. Without specifying in the prospectus the duration upon which any public sub-offers can be made in a retail cascade, the issuer or the person responsible for drawing up the prospectus would not be able to keep the prospectus up to date in accordance with Article 16 Prospectus Directive, and financial intermediaries as well as investors would not be able to know whether they can still rely on a valid prospectus.

56. In ESMA's view a standalone prospectus remains valid as long as it is possible to supplement it in accordance with Article 16 Prospectus Directive. However, linking the validity of the prospectus to the period in which a supplement is possible according to Article 16 Prospectus Directive does not have any additional limiting effect, provided the issuer or the person responsible for drawing up the prospectus has already taken into account possible offers or sub-offers in a retail cascade. By granting its consent to use the prospectus and determining a period in which financial intermediaries can rely on the prospectus when doing their sub-offers, the issuer or the person responsible for drawing up the prospectus obligates itself, and enables itself for such period to update a prospectus via supplements.

57. ESMA acknowledges that in practice it is not likely to be possible for a third party to draw up a new prospectus for the issuer's securities.

58. However, once the period in which a supplement is possible according to Article 16 Prospectus Directive has lapsed (i.e. including any period for which consent to use the prospectus has been granted as described above), ESMA considers such prospectus not valid any more. Therefore it would not be possible to grant a (new) consent to use the prospectus, or extend the period of a previous consent, once the period for supplements has lapsed. Issuers or persons responsible for drawing up a prospectus should therefore in particular in case of standalone prospectuses anticipate when determining the offer period whether or not the prospectus shall also be used for retail cascades, and for which period financial intermediaries shall be able to use the prospectus for public offers or sub-offers with its consent.

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

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

*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?*

59. Almost all respondents claimed that in a retail cascade the identities of the financial intermediaries on the various levels were generally unknown to the issuer as there was no contractual relationship between them.

60. Only the initial underwriters (if any) or permanent dealers (if any) could be known at this stage. The identity of financial intermediaries could only be known by potential investors during the commercialization process.

61. Some respondents stated that even in cases where intermediaries were identified, appointed, and agreements finalised, this would often happen only after the prospectus has been approved or the final terms have been filed. Requiring disclosure of the intermediaries in the prospectus or final terms would have the effect that the issuer would constantly be preparing and filing updates, which was not considered to strengthen investor protection.

62. Another respondent reported a model of retail cascade in which the identity of the financial intermediary, the conditions attaching to the consent and the duration of the consent would generally be known at the time of filing the final terms. However, in case the initiative comes from the intermediary, it would not be possible to know beforehand.

63. Respondents raised the point that intermediaries might be in huge numbers and that the issuer will not know in advance which intermediaries will decide to participate in any specific issue. Therefore it would be impossible to identify all potential distributors in advance.

64. The stage in which the precise way of distribution is determined was said to depend on the contractual relationships in place between the issuer and the distributors.

**ESMA's response:**

65. ESMA took notice that retail cascades generally do not involve a pre-determined group of financial intermediaries but emerge only after the issue of the securities at the discretion of the intermediaries rather than by appointment through the issuer. Identifying all financial intermediaries in the prospectus or, in case of base prospectuses, in the final terms might therefore often be not possible. ESMA therefore revised its proposal to provide a more flexible approach, taking into account the requirements of the amended Prospectus Directive as well as the needs of investors and issuers, as explained in more detail below.

**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?*

66. While a few respondents agreed with ESMA's approach, the majority of respondents did not agree with ESMA's proposal to include the consent in the prospectus or base prospectus/final terms.

67. One respondent who agreed with ESMA's view based its position to make the consent and the duration of the consent public on the consideration that the general possibility of the issuer to use a retail cascade was subject to its consent. Another respondent agreed but was of the view that ultimately it would be the intermediary's responsibility to obtain written evidence that it has obtained the issuer's consent if using the prospectus.

68. Some respondents referred to the fact that the requirement to include the consent to use the prospectus in the prospectus introduces an approach which has been discussed when amending the Prospectus Directive but ultimately found no consensus in the legislating process.

69. Respondents disagreed mainly on the basis that the identity of the financial intermediaries would generally be unknown to the issuer or the person responsible for drawing up the prospectus. Mandating publication of such information in a prospectus would constrain to an extent the ability of European companies to obtain funding and of European investors to seek saving opportunities, without providing a material benefit.

70. In case the consent would nevertheless need to be included in the prospectus, some respondents proposed to allow for an 'open' or 'general' written consent in the prospectus. Such consent addressed to any distributor it may concern would allow any distributor in a retail cascade to rely on the prospectus drawn up by the issuer but omit the disclosure of the identity of the financial intermediary in the prospectus.

71. One respondent based its disagreement on the argument that the written agreement and the consent do not generate an additional liability. As an investor could always take recourse either against the issuer (or person responsible for drawing up the prospectus) or against the intermediary in case the latter could not produce evidence that it has consent to use the prospectus, information on the consent was considered

not necessary. Some respondents were of the view that the underlying assumption that the issuer's liability is subject to its consent would only apply to a small part of the EU.

72. Another respondent referred to Recital 10 of the Amending Directive pursuant to which the consent should be given in a written agreement between the parties enabling assessment by the relevant parties of whether the resale of final placement of securities complies with the agreement. In this regard the term 'relevant parties' was interpreted as not to include investors, thus it was concluded that the consent would not need to be public. Furthermore, the requirement to include the consent in the prospectus would jeopardize the flexibility of the issuer which was needed in the context of large capital market transactions.

73. One respondent disagreed on the basis that any solution of having a limited set of financial intermediaries who can take part in the offer would be significantly damaging to both issuers and investors as it would limit size and liquidity in the issue and exclude investors wanting to participate, thereby having overall a negative impact on the market.

74. In particular with respect to structures of distribution chains including hundreds of intermediaries, respondents failed to see a benefit of providing investors with long lists of intermediaries which would possibly change continuously. Distribution chains were generally structured to be inclusive rather than exclusive, with the intention to maximize the potential of the market.

***ESMA's response:***

75. ESMA keeps its position that the consent to use the prospectus needs to be public, and furthermore, that it shall be included in the prospectus, or in case of a base prospectus, in the final terms. ESMA considers it essential for investors and competent authorities to know whether a financial intermediary can rely on a prospectus previously approved or not when publicly offering the issuer's securities. ESMA explicitly disagrees with the view that regarding liability the consent of the issuer or the person responsible for drawing up the prospectus would be irrelevant. Recital 10 of the Amending Directive states that "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". That means in contrast that the issuer or person responsible for drawing up the prospectus should not be responsible if such prospectus is used without its consent. Any investor seeking recourse in respect of loss suffered following publication of a misleading prospectus should know in advance whether it is able to take recourse against the issuer or person responsible for drawing up the prospectus or against the intermediary.

76. However, ESMA acknowledges that the issuer's ability (or the ability of the person responsible for drawing up the prospectus) to identify all financial intermediaries in the prospectus or final terms might be limited. ESMA therefore agrees in principal with a proposal made by some respondents to allow a 'general consent' to use the prospectus to be included in the prospectus, addressed to any financial intermediary it may concern.

77. ESMA feels it important to point out in this regard that in terms of legal certainty it would be important and necessary for issuers when giving their consent to clearly define the period for which such consent is granted (which needs to cover the determined offer period for public offers by financial intermediaries), and furthermore, in which Member States financial intermediaries may use the prospectus for a public offer. Such information is crucial for competent authorities to review the prospectus as regards its completeness (e.g. regarding information on taxes withheld at source in respect of the country where the offer is made) and with view to necessary notifications of the prospectus, but also highly relevant for market participants.

78. Provided such general consent and any conditions attached to it are clear and objective and allow any interested party to easily determine whether a financial intermediary may rely on the prospectus for its offer, ESMA considers such approach to be in accordance with the wording and rationale of the amended Prospectus Directive:

79. Article 3.2 Prospectus Directive requires that the issuer consents to the use of the prospectus by means of a written agreement. ESMA interprets in this regard that including a general consent in the prospectus means the consent is given in written form, the issuer or the person responsible for drawing up the prospectus gives its agreement to use the prospectus in writing.

80. Furthermore, Recital 10 of the Amending Directive states that "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". ESMA understands that Recital 10 appears to be based on the notion of a bilateral agreement between issuer and financial intermediary. In this context ESMA interprets a general consent as an offer by the issuer or the person responsible for drawing up the prospectus addressed to any financial intermediary, to use the prospectus for any sub-offer of its securities, that complies with the conditions attached. Any financial intermediary using the prospectus for its sub-offer would thereby accept the offer to use the prospectus, closing the agreement between issuer and intermediary.

81. However, though the closing of a bilateral agreement between issuer and financial intermediary could be construed solely on the basis of a silent acceptance through the use of the prospectus by the intermediary, ESMA considers it necessary in terms of market transparency and investor protection to make such acceptance public. Any financial intermediary, who wants to rely on a prospectus previously approved on the basis of a general consent granted in the prospectus, shall make public on its own website that it relies for its offer on the prospectus with the consent of the issuer or the person responsible for drawing up the prospectus. ESMA deems it appropriate to require publishing such information in a manner provided for in Article 14.2 c)<sup>5</sup> Prospectus Directive, and would furthermore expect that such information is provided in the context of information required according to Article 15.2 Prospectus Directive<sup>6</sup>. That means that the financial intermediary shall inform investors that a prospectus has been published and indicate where they are able to obtain it; the financial intermediary shall also inform that it relies on the prospectus for its offer with the consent of the issuer or person responsible for drawing up the prospectus.

82. ESMA considered requiring a central list containing all financial intermediaries that wish to make use of the general consent, but found that such solution would be overly burdensome for market participants without providing any added value in terms of investor protection or legal certainty. Given that for each set of final terms (which numbers are in the millions) a separate list with financial intermediaries would need to be established and frequently updated, such approach was considered to be at odds with the principle of proportionality, as it would create excessive administrative burdens.

83. In ESMA's view this approach allows a wide use of retail cascades for the benefit of the European financial market, avoids burdensome and costly bureaucracy, while the protection of issuers, intermediaries and investors is safeguarded at the same time.

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<sup>5</sup> Art. 14.2 (c) Prospectus Directive: "in electronic form on the issuer's website or, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents;"

<sup>6</sup> Art. 15.2 Prospectus Directive: "Advertisements shall state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it."

84. In case an issuer or a person responsible for drawing up a prospectus does not want to grant a general consent in the prospectus but wants to allow individual financial intermediaries the use of its prospectus in a retail cascade, it would of course be able to do so, but would nevertheless in principle be required to identify in the prospectus or final terms the individual financial intermediaries that are granted consent.

**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?*

85. Respondents reiterated that such elements are generally unknown.

86. Information on the identity of the financial intermediary in the prospectus was considered by some respondents as an important disadvantage because disclosing its distribution structure vis-à-vis competitors would severely harm the business interests of the issuer or of the underwriter/financial intermediary, as the case may be. Furthermore, the proposed regulation was considered as an overregulation not intended by the amended Prospectus Directive and which would severely harm competition.

87. Some respondents considered the identity of their sub-distributors as commercially sensitive or proprietary information. Requiring disclosure of such information could have the effect that financial intermediaries would curtail their activities in the retail market.

88. One respondent made the point that, for commercial reasons, so called primary intermediaries (who are in direct contact or have a contractual relationship with the issuer) typically would not wish to disclose the identity of their sub-distributors or intermediaries to the issuer.

89. Some respondents stated that the requirement to include known details regarding the retail cascade in the prospectus must not be applied to prohibit use of the prospectus by financial intermediaries not described in the prospectus when not known.

90. Adding hundreds or maybe even thousands of intermediaries to the prospectus would add significant length to a prospectus, causes drafting and verification costs and significantly delay the deal's timetable, because it would be necessary to seek approval from all intermediaries to use their name in the prospectus.

91. One respondent argued that in case of base prospectuses financial intermediaries should only be included in the final terms when some single intermediaries are already known at the time of the base prospectus, because it would be confusing to find some intermediaries listed in the base prospectus and some in the final terms. The base prospectus should only include an indication where information on financial intermediaries is found.

**ESMA's response:**

92. ESMA acknowledges that the identity of financial intermediaries in a distribution chain might be considered commercially sensitive or proprietary information and that for competitive reasons members of the distribution chain might not want such information to be disclosed. However, for reasons of investor protection ESMA continues to be of the view that generally the reasons for making public the identities of financial intermediaries outweigh the interests of issuers not to disclose them. Furthermore, allowing issuers to include a general consent in the prospectus as described above, avoids many of the disad-

vantages brought forward by respondents. ESMA therefore keeps its position that in principle information required for retail cascades needs to be included in the prospectus or, in case of base prospectuses, in the final terms, if such information is known at the time of approval or filing of those documents.

**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.*

93. In case publication of the consent was considered necessary at all, some respondents proposed as an alternative publication of the consent in a manner provided for in Article 14.2 Prospectus Directive (e.g. on the website of the issuer) as this would provide sufficient transparency. One respondent proposed that such publications could also be filed with the competent authority, if considered necessary to ensure legal certainty.

94. Other respondents suggested this type of information could be included in the marketing material or subscription form and be provided by the intermediary. Alternatively publication of a notice on the website of the issuer or the regulators was considered a possibility.

95. Some respondents recommended a flexible approach which would allow issuers to appoint additional intermediaries or remove intermediaries post publication of prospectus/final terms without undue administrative burden. One respondent suggested therefore publication of such changes via existing investor notification channels as e.g. regulatory news systems.

96. One respondent raised the point that due to the constantly changing nature of a consent list, irrespective of the method of publication, significant cost would likely be involved in keeping such a list up-to-date.

97. Another suggestion was to apply the same methods of publication as for 'price sensitive information' that would provide sufficient transparency and legal certainty.

**ESMA's response:**

98. ESMA considers that in terms of transparency and legal certainty information on retail cascades is best provided by including such information in the prospectus (in particular information on the issuer's consent, the duration of the consent, and the Member States in which the prospectus can be used) or final terms if not known at the time of approval of the base prospectus (e.g. information on the period upon which sub-offers can be made, and the identity of individual financial intermediaries in case of the individual consent approach). However, in case of the individual consent approach and with respect to information on individual financial intermediaries not known at the time of approval of the prospectus or filing of final terms, ESMA considers that publication of such information in a manner provided for in Article 14.2 c) Prospectus Directive would be an appropriate alternative, as explained in more detail below.

**Principles regarding disclosure of information on retail cascades when unknown at the time of approval of the prospectus or filing of final terms – Requirement of a supplement**

**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.*

99. All respondents considered a supplement not necessary in relation to information on retail cascades. The appointment of financial intermediaries was not considered being capable of affecting the assessment of the securities themselves by investors, as it would not change the nature or characteristics of the investment. The identity of the intermediary would not have any impact on the risks and opportunities resulting from an investment. In addition, a right of withdrawal was not considered appropriate.

100. Respondents pointed out that information on the offeror would be known by any investor at the time the offer is made; therefore no additional publication was felt necessary.

**ESMA's response:**

101. ESMA agrees in general with the assessment of market participants that information on retail cascades should have no effect on the assessment of the securities and therefore does not require a supplement. However, in case such information constitutes a new factor, material mistake or inaccuracy relating to information in the prospectus which is capable of affecting the assessment of the securities, a supplement would be necessary in accordance with Article 16 of the Prospectus Directive. ESMA points out that it is within the responsibility of the issuer or person responsible for drawing up the prospectus to assess the significance or materiality of a new factor, mistake or inaccuracy, without prejudice to the powers of the competent authority. If considered necessary, ESMA will provide further guidance in this regard at a later stage.

*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)?*

102. In case publication of the consent was considered necessary at all, some respondents proposed as an alternative publication of the consent in a manner provided for in Article 14.2 Prospectus Directive (e.g. on the website of the issuer) as this would provide sufficient transparency. One respondent proposed in addition to file such publications with the competent authority to ensure legal certainty.



103. One respondent expressed the view that the same methods of publication as for 'price sensitive information' (through a press release and on the website of the issuer) should be applied, together with an obligation to inform the competent authorities of any host member states.

104. Indication in the prospectus how information on retail cascades and additional financial intermediaries will be published was generally considered not necessary but useful.

### ***ESMA's response:***

105. ESMA takes into consideration that in many cases information regarding retail cascades, in particular information regarding the identity of financial intermediaries, might only be known at a time after the prospectus has been approved or final terms have been filed in case of base prospectuses. ESMA therefore seeks to ensure a sufficient level of transparency and legal certainty for all market participants with regard to such information, while at the same time any disproportionate administrative burden and costs should be avoided.

106. ESMA therefore revised its approach for base prospectuses and final terms regarding retail cascades that involve an individual agreement with financial intermediaries, which required 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. In particular in cases where the group of financial intermediaries would change frequently, ESMA agrees with market views that a high number of replacing final terms for a single issue of securities would not foster transparency but be rather confusing for investors. Furthermore, a consistent approach for both standalone prospectuses and base prospectuses was favoured.

107. As a result ESMA is of the view that for the individual consent approach it is in general necessary but also sufficient to publish new information on retail cascades regarding individual financial intermediaries in a manner provided for in Article 14.2 c) Prospectus Directive. In addition, the prospectus should indicate how such information will be published and where it can be found. However, this is without prejudice to the requirement of a supplement, as laid down above. Furthermore, in case of the general consent approach ESMA considers it necessary to point out that all information on retail cascades needs to be disclosed in the prospectus or base prospectus itself and cannot be amended by way of public announcements, as such announcements would not meet the requirements of Article 3.2 of the Amended Directive, stipulating that the consent needs to be given in written form.

108. This approach applies to any new information on retail cascades regarding individual financial intermediaries which the issuer or the person responsible for drawing up the prospectus is required to disclose under the principles laid down for retail cascades, irrespective of whether a standalone prospectus has been prepared or a base prospectus with final terms, thus providing a uniform level of transparency for both forms of prospectuses.

## **IV. Technical Advice on the consent to use a prospectus in a retail cascade**

### **IV.I Introduction**

109. Article 3.2.2 Prospectus Directive<sup>7</sup> 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.

110. 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 issuer or a person responsible for drawing up such prospectus is available. 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".

111. 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."

112. 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 par-

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<sup>7</sup> 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."

ties 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.

## **General principles regarding retail cascades**

### Concept of retail cascades under the Amended Directive

113. 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 (e.g. on the basis of an underwriting agreement) 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.

114. The intermediaries, when subsequently reselling or placing the securities, may act either in association with the issuer, on the basis of an individual agreement between the parties involved, or act independently from the issuer, on the basis of the issuer's general consent to rely on its initial prospectus. Such offers by intermediaries to retail investors, which are often seen as a series of different offers, may take place over a period of time that can be several weeks or months.

115. 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 3.2.1 Prospectus Directive applies, in principle 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 as provided for in Article 3.2.3 Prospectus Directive. In particular the terms and conditions of the securities must not deviate from the terms and conditions laid down in the prospectus.

116. However, due to the nature of offers or sub-offers made within a retail cascade by different financial intermediaries over a certain period of time, it may not be possible for the issuer or person responsible for drawing up the prospectus to include in the prospectus or final terms information on the terms and conditions of the offers or sub-offers subsequently made by the financial intermediaries, since it may be unknown at the time of the prospectus approval or filing of final terms. This is in particular true for offers by intermediaries acting independently from the issuer. Such information may therefore be omitted in the prospectus on the basis of Article 23.4 Prospectus Regulation and will be provided by the financial intermediaries at the time of any sub-offers and within the responsibility of such financial intermediary. It is assumed that such information would in particular relate to the offer price which is generally expected to fluctuate in accordance with prevailing market conditions, but could generally relate also to any other information on the intermediary's individual sub-offer (except for the location and offer period upon which public offers or sub-offers in retail cascade can be made).

117. Issuers granting consent to use a prospectus for sub-offers shall insert in a suitable place in the prospectus a bold notice informing investors that information regarding such sub-offers will be provided at

the time of any sub-offers. ESMA would expect such notice to be included in the prospectus in the context of the other information items required in case of retail cascades.

118. Notwithstanding the fact that financial intermediaries may rely on an initial prospectus with the consent of the issuer or person responsible for drawing up the prospectus, ESMA points out that financial intermediaries making public offers under the retail cascades regime should be aware that they need to comply with all applicable laws. Irrespective of the responsibility of the issuer or of the person responsible for drawing up the prospectus, financial intermediaries reselling or placing the securities could be subject to liability according to national law.

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

119. According to Recital 10 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.

120. 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.

121. Article 9.1 Prospectus Directive stipulates that a prospectus shall be valid for 12 months, provided that the prospectus is completed by any supplements required pursuant to Article 16. 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 financial intermediaries (such period needs to cover the offer period with respect to public offers or sub-offers as determined in the prospectus). In a retail cascade the period in which a supplement is required and possible according to Article 16 Prospectus Directive is therefore (also) determined by the period for which the issuer granted consent to use the prospectus in respect of public offers by financial intermediaries, which itself should depend on the determined offer period upon which public sub-offers can take place in a retail cascade. This means that the issuer or the person responsible for drawing up the prospectus remains responsible to supplement the prospectus in accordance with Article 16 Prospectus Directive until the end of the period in which sub-offers by intermediaries are possible.

122. Therefore ESMA considers it essential and necessary to specify in the prospectus the offer period with regard to public offers or sub-offers by financial intermediaries, and corresponding to that, the period for which consent to use the prospectus is granted in order to avoid any uncertainty as regards the validity of the prospectus and the requirement to supplement it.

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

123. ESMA initially based its approach on retail cascades and the disclosure requirements thereto on the assumption that financial intermediaries would act in association with the issuer on the basis of an individual bilateral agreement between the parties involved. However, according to the responses received from market participants, this is often not the case. In fact financial intermediaries act generally independently from the issuer or person responsible for drawing up the prospectus, the latter having no knowledge of the identity of the financial intermediaries. In addition, financial intermediaries often only decide after the beginning of the issuer's offer whether to participate or not in a certain issue of securities.

Therefore even in case the identity of financial intermediaries would be known by the issuer, including them in the prospectus or final terms in case of base prospectuses would often not be possible.

124. Considering that Article 3.2.3 of the Amended Directive requires the issuer to consent to the use of the prospectus by means of a written agreement, ESMA sought to develop a solution which accommodates market practice, but takes also into account the rationale and legal requirements of the amended Prospectus Directive and the objectives of the European Commission's Mandate.

125. When developing its approach ESMA took in particular account of the following principles and legal requirements, as also required by the Mandate and the Amending Directive:

- The high level of investor protection that is the guiding principle of the Prospectus Directive.
- The principle of proportionality, meaning that the technical advice should not go beyond what is necessary to achieve the objective of the Amended Directive, and should be simple and avoid creating excessive administrative and procedural burdens for issuers and the national competent authorities.
- Facilitating access to the financial market.

And more specifically with respect to retail cascades:

- Recital 10 of the Amending Directive states that "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."

- Protection of Issuers (or persons responsible for drawing up the prospectus):  
Issuers shall be able to control use of the prospectus and their liability for the prospectus by granting or not granting consent to use to prospectus, or by attaching conditions to the use, including a limitation of the duration of the use. The Issuer shall know for how long it has the responsibility to update the prospectus via supplements.

- Protection of financial intermediaries:  
Intermediaries shall know whether they can use, and rely on, the prospectus of the issuer, because by granting consent to use the prospectus the issuer or person responsible for drawing up the prospectus remains responsible for the content of the prospectus, including responsibility to update the prospectus via supplements.

- Protection of Investors:  
Investors shall have clarity whether the issuer accepts responsibility for the content of the prospectus also with respect of offers by financial intermediaries.

- Information for competent authorities:  
In terms of market supervision, competent authorities shall be able to check whether a public offer is made on the basis of an approved prospectus or not.

126. Taking all this into account, ESMA came to the conclusion that the consent to use a prospectus needs to be public and shall be included in the prospectus or base prospectus/final terms.

127. ESMA considers it essential for investors and competent authorities to know whether a financial intermediary can rely on a prospectus previously approved when publicly offering the issuer's securities. Any investor seeking recourse in respect of loss suffered following publication of a misleading prospectus should know in advance whether it is able to take recourse against the issuer or person responsible for drawing up the prospectus or against the intermediary.

128. 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 in a retail cascade, 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 may rely on the issuer's prospectus is placed upon the investor is not considered appropriate.

129. 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 when such prospectus is used in respect of offers by intermediaries, it is consistent that such information shall also be given in the prospectus, thereby guaranteeing a maximum level of transparency and legal certainty for all relevant parties.

#### General Consent Approach

130. ESMA acknowledges that the issuer's ability (or the ability of the person responsible for drawing up the prospectus) to identify all financial intermediaries in the prospectus or final terms might be limited, taking into consideration current market practices. Nevertheless an issuer may want to allow financial intermediaries to rely on its initial prospectus because it assumes that it will benefit indirectly from subsequent offers by intermediaries.

131. ESMA therefore proposes to allow a 'general consent' to use the prospectus to be included in the prospectus, addressed to any financial intermediary it may concern.

132. ESMA considers such general consent in the prospectus as consent by written agreement within the meaning of Article 3.2.3 of the Amended Directive, whereby the issuer consents to the use of the prospectus in writing and offers any financial intermediary the possibility to rely on the issuer's prospectus, and any financial intermediary using the prospectus accepts this offer, thereby closing the agreement with the intermediary.

133. However, in terms of market transparency and investor protection, ESMA considers it necessary that any financial intermediary relying on a prospectus previously approved on the basis of a general consent shall make public on its own website that it relies for its offer on the prospectus with the consent of the issuer or the person responsible for drawing up the prospectus. ESMA deems it appropriate to require publishing such information in a manner provided for in Article 14.2 c) Prospectus Directive, and would furthermore expect that such information is provided in the context of information required according to Article 15.2 Prospectus Directive. That means that the financial intermediary when indicating that a prospectus has been published and where investors are able to obtain it, shall also inform that it relies on the prospectus for its offer with the consent of the issuer or person responsible for drawing up the prospectus.

134. For the general consent approach to be a workable solution which provides sufficient legal certainty, transparency and investor protection, ESMA established the following principles which need to be respected by issuers or persons responsible for drawing up the prospectus, and financial intermediaries:

- The general consent and any conditions attached thereto need to be in the prospectus and must be clear, objective and easily accessible.
- The period for which the general consent is granted (which corresponds to or covers the specified offer period upon which public offers or sub-offers by financial intermediaries in a retail cascade may take place) needs to be clearly determined in the prospectus.
- The offer period upon which public offers or sub-offers by financial intermediaries in a retail cascade can be made needs to be stated in the prospectus.
- Any Member State in which the prospectus may be used by financial intermediaries for public offers needs to be stated in the prospectus.
- Any intermediary relying on the prospectus needs to comply with the conditions attached to the consent.
- Any intermediary relying on the prospectus based on the general consent of the issuer or person responsible for drawing up the prospectus needs to make this fact public in a manner provided for in Article 14.2 c) Prospectus Directive; ESMA would expect that such information is provided in the context of information required according to Article 15.2 Prospectus Directive.

If necessary, ESMA will provide further guidance in this regard at a further stage.

135. Provided such general consent and any conditions attached to it comply with the above principles, are clear and objective and allow any interested party to easily determine whether a financial intermediary may rely on the prospectus for its offer, ESMA considers such approach to be in accordance with the principles listed above.

136. In ESMA's view this interpretation allows a wide use of retail cascades for the benefit of the European financial market, avoids burdensome and costly bureaucracy, while the protection of issuers, intermediaries and investors is safeguarded at the same time.

#### Individual Consent Approach

137. ESMA notes that different models of retail cascades are used in practice. In the event that financial intermediaries are acting in association with the issuer on the basis of an individual written agreement, issuers may not want to grant general consent to use the prospectus but would prefer to restrict their consent to specific financial intermediaries.

138. In such case an issuer or a person responsible for drawing up a prospectus is required to include in the prospectus the consent to use the prospectus together with the identity of the financial intermediaries and any conditions attached to the consent that are relevant for the use of the prospectus and making an informed investment decision. In the case of a base prospectus, information on the identity of financial intermediaries and any conditions attached to the consent (other than duration of consent and information on the Member States in which the prospectus may be used) can be included in final terms, if not known at the time of approval of the prospectus. In respect of new information regarding financial intermediaries that is unknown at the time of the approval of the prospectus/base prospectus or the filing of

final terms, as the case may be, the prospectus or base prospectus needs to indicate how such information will be published and where it can be found, as further described below.

139. However, the underlying written agreement itself does not need to be disclosed, as it contains provisions which are pertinent only to the parties involved in the agreement.

140. The principles above established for the general consent would also need to be respected in case of an individual consent to use the prospectus, with the exception that the financial intermediary would not be required to publish the fact that it relies on the initial prospectus with the consent of the issuer or person responsible for drawing up the prospectus. As the identity of any financial intermediary who has been granted consent to use the prospectus was already disclosed by the issuer, a further publication by the intermediary is in case of an individual consent not necessary.

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

141. 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 transparency, legal certainty, investor protection and the regulatory needs of competent authorities as regards market supervision, the following information items would need to be disclosed:

#### **Advice:**

#### **142. The prospectus should disclose**

- **that the issuer or person responsible for drawing up the prospectus consents to the use of the prospectus for public offers by financial intermediaries**
- **that the issuer or person responsible for drawing up the prospectus accepts responsibility for the content of the prospectus also with respect to public offers by any financial intermediary which was granted consent to use the prospectus**
- **the period for which consent to use the prospectus for public offers by financial intermediaries is granted (which corresponds to or covers the specified offer period upon which public offers or sub-offers by financial intermediaries in a retail cascade may take place)**
- **the offer period upon which public offers or sub-offers by financial intermediaries in a retail cascade can be made**
- **the Member States in which financial intermediaries may use the prospectus for public offers**
- **a bold notice informing investors that information on the terms and conditions of the offer by any financial intermediary will be provided at the time of any such offer by the financial intermediary**

#### **In addition in case of the individual consent approach:**

- **the identity of the financial intermediaries (name and address) that are allowed to rely on the prospectus,**



- **any other conditions attached to the consent which are relevant for the use of the prospectus;**
- **an indication how any new information on retail cascades with respect to individual financial intermediaries will be published and where it can be found**

**In addition in case of the general consent approach:**

- **that a general consent addressed to any financial intermediary it may concern is granted, together with the requirement that any financial intermediary relying on the prospectus shall make this fact public in electronic form on the financial intermediary's website**
- **any other conditions attached to the general consent; all such conditions must be clear and objective**

**143. ESMA therefore proposes that the Commission amends the Prospectus Regulation to include the above listed information.**

144. In case of base prospectuses, ESMA takes the position that the issuer or person responsible for drawing up the prospectus should be required to include the consent in the base prospectus, together with the information that it accepts responsibility for the content of the prospectus also with respect of the offers by the intermediaries. The same should apply for information on the period for which consent to use the prospectus is granted, the list of Member States in which financial intermediaries are allowed to use the prospectus, and the notice informing investors that information on the terms and conditions of the offer by financial intermediaries will be provided at the time of any such offer by the financial intermediary. Information on the offer period upon which public offers or sub-offers by financial intermediaries in a retail cascade can be made, may be disclosed in the final terms if not known at the time of approval of the base prospectus. However, the issuer or the person responsible for drawing up the prospectus should ensure that such period corresponds to or is covered by the period it granted consent to use the prospectus.

145. In addition in case of the individual consent approach, information on how new information on retail cascades with respect to individual financial intermediaries will be published and where it can be found, needs to be provided in the base prospectus. The identity of the financial intermediaries and any further conditions attached to the consent which are relevant for the use of the prospectus may be disclosed in the final terms, if not known at the time of approval of the base prospectus.

146. In the case of the general consent approach, the base prospectus needs to disclose that a general consent is granted, together with the requirement, that any financial intermediary relying on the prospectus shall make this fact public in electronic form on the financial intermediary's website. The same applies for any other condition attached to the general consent; all such conditions must be clear and objective. In the general consent approach, as there is no separate underlying individual written agreement between the parties involved (as would be the case for the individual consent), ESMA is of the view that it is necessary to include any information on retail cascades, including any conditions attached to the consent, within the base prospectus itself. ESMA considers it in terms of legal certainty as essential that in case of a general consent the competent authority is able to review such consent and any conditions attached to it, to ensure that any condition is clear and objective. ESMA therefore understands that the possibility to scrutinise such information is a pre-requisite for the general consent approach.

**Advice:**

**147. In view of the system of categories proposed by ESMA in its technical advice<sup>8</sup> 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 is proposed for the information required in case of retail cascades:**

- **Information that the issuer or person responsible for drawing up the prospectus consents to the use of the prospectus for public offers by 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)**
- **Information that the issuer or person responsible for drawing up the prospectus accepts responsibility for the content of the prospectus also with respect to public offers by any financial intermediary which was granted consent to use the prospectus: CAT. A**
- **Information on the period for which consent to use the prospectus for public offers by financial intermediaries is granted: CAT. A**
- **Information on the offer period upon which public offers or sub-offers by financial intermediaries in a retail cascade can be made: 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)**
- **Information on the Member States in which financial intermediaries may use the prospectus for public offers: CAT. A**
- **A bold notice informing investors that information on the terms and conditions of the offer by any financial intermediary will be provided at the time of any such offer by the financial intermediary: CAT. A**

**In addition in case of the individual consent approach:**

- **Information on the identity of the financial intermediaries (name and address): CAT. C**
- **Any other conditions attached to the consent which are relevant for the use of the prospectus: CAT. C.**
- **Indication how any new information on retail cascades with respect to individual financial intermediaries will be published and where it can be found: CAT. A**

**In addition in case of the general consent approach:**

- **Information that a general consent to use the prospectus is granted, addressed to any financial intermediary it may concern, together with the requirement that any financial intermediary relying on the prospectus shall make this fact public in electronic form on**

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<sup>8</sup> Final report - ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU (Ref. ESMA/2011/323 4 October 2011) regarding Part I of the Mandate

**the financial intermediary's website: CAT. A**

- **Any other conditions attached to the general consent; all such conditions must be clear and objective: CAT. A**

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

148. ESMA discussed how information on retail cascades which was not known at the time of approval of the prospectus or filing of final terms should be disclosed.

149. With respect to the general consent approach, ESMA is of the view that all information regarding the retail cascade would be known at the time of the approval of the prospectus (with the exception that final terms may disclose the offer period upon which public offers or sub-offers by financial intermediaries can be made in a retail cascade if not known at the time of approval of the prospectus) and that therefore it should be not necessary for the issuer or person responsible for the prospectus, to disclose further information in this regard at a later stage. ESMA considers it necessary to point out that in case of the general consent approach all information on retail cascades needs to be disclosed in the prospectus or base prospectus itself (or in final terms if it relates to the period upon which public offers or sub-offers by financial intermediaries in a retail cascade can be made, if not known at the time of approval of the prospectus) and cannot be amended e.g. by way of public announcements, as such announcements would not meet the requirements of Article 3.2 of the Amended Directive, stipulating that the consent needs to be given in written form.

150. As regards the individual consent approach, ESMA took into consideration that in many cases information regarding retail cascades, in particular information regarding the identity of financial intermediaries, might only be known at a time after the prospectus has been approved or final terms have been filed. ESMA therefore sought to ensure a sufficient level of transparency and legal certainty for all market participants with regard to such information, while at the same time any disproportionate administrative burden and costs should be avoided.

151. As a result ESMA is of the view that it is in principle necessary but also sufficient in case of the individual consent approach to publish new information in relation to individual financial intermediaries in a manner provided for in Article 14.2 c) Prospectus Directive (if not known at the time of approval of the prospectus or base prospectus or as the case may be the publication of the final terms in case of a base prospectus). In addition, the prospectus should indicate how such information on retail cascades will be published and where it can be found. However, in case such information constitutes a new factor, material mistake or inaccuracy relating to information in the prospectus which is capable of affecting the assessment of the securities, a supplement would be necessary in accordance with Article 16 of the Prospectus Directive. ESMA points out that it is within the responsibility of the issuer or person responsible for drawing up the prospectus to assess the significance or materiality of a new factor, mistake or inaccuracy, without prejudice to the powers of the competent authority. ESMA shall develop, at a further stage, draft regulatory technical standards to specify situations when a supplement or a prospectus is needed.

152. This approach applies to any new information with respect to individual financial intermediaries which the issuer or the person responsible for drawing up the prospectus is required to disclose under the principles laid down for retail cascades, irrespective of whether a standalone prospectus has been prepared

or a base prospectus with final terms, thus providing a uniform level of transparency for both forms of prospectuses.

## **V. Feedback Statement on the Review of the Provisions of the Prospectus Regulation**

### **V.I General Observations**

153. The following Feedback Statement addresses the major comments received from stakeholders on the consultation provided that they directly relate to the issues referred to in the Mandate. The feedback statement does not intend to be an exhaustive account of every point made by stakeholders and refrains from repeating arguments from the consultation paper where reasonably possible.

154. ESMA received 17 responses on part 4 of its Consultation Paper "Review of the provisions of the Prospectus Regulation".

155. Eight respondents commented on the section "Information on Taxes withheld at source". Almost all of them did not concur with ESMA's view to keep the current requirement of the Prospectus Regulation on tax information.

156. Seven respondents provided feedback on the section "Index Composed by the Issuer". Almost all of them did not agree with ESMA's proposal to continue to require a description of an index composed by the issuer in the prospectus.

157. Thirteen respondents commented on the section "Profit forecast and estimate". The views among respondents were divided as to whether the Prospectus Regulation should continue to require a report prepared by independent accountants or auditors for profit forecasts and estimates.

158. Twelve respondents provided feedback on the section "Audited historical financial information". The majority of the respondents were not in favour of keeping the current requirement of the Prospectus Regulation to produce audited financial information covering the latest three financial years for issuers whose securities are already admitted to trading on a regulated market.

### **V.II Responses to Questions**

#### **V.II.I. 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*

159. Some respondents indicated that, where taxes on the income of the securities have been withheld in a country where the issuer is not acting nor has appointed a paying agent (e.g. by a custodian or through a

clearing system), then such withholding tax is by definition “downstream” and not “at source”. The expression “at source” only refers to taxation within the sphere of the issuer and not the investor.

160. More generally, some respondents were of the opinion that ESMA’s FAQ No 45 rightly limits the disclosure of withholding tax information on any amount withheld at source by the issuer or any agent appointed by it as this is the scope of information available to the issuer.

**ESMA’s response:**

161. Based on the argument given in the Consultation Paper, ESMA does not agree with the narrow interpretation made by the respondents in relation to withholding tax information, and prefers to keep the current scope of the requirement of the Prospectus Regulation. However, ESMA would like to remind that, pursuant to its FAQ No 45, no full disclosure of the tax regime is required in the prospectus.

*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*

162. Some respondents stated that they are not aware of any such cases. However, consultation responses conveyed that including all tax regimes in the prospectus is very costly for issuers and can even confuse investors to the extent that it might become unclear which tax rate is applicable to them.

**ESMA’s response:**

163. With regard to the argument that an investor may have doubts regarding the applicable tax regime, ESMA would like to remind that its FAQ No 45 strongly recommends to incorporate in the prospectus a statement which invites investors to seek appropriate advice on their specific situation.

*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.*

164. The few respondents that answered this question indicated that they are not aware of any such cases.

*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?*

165. The respondents argued that the net amount may depend on circumstances specific to individual investors and is therefore not knowable by the issuer (e.g. chain of custody, fees payable by the custodian). Accordingly, issuers must be able to rely on investors taking their own advice to ascertain the ultimate “net” amount which will be received by them.

**ESMA’s response:**

166. ESMA shares the view of market participants that it does not seem reasonable or practical to require issuers to provide extensive disclosure of individual tax treatment in relation to each investor and will therefore consider to revise its FAQ No 45 with regard to the net amount.

*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?*

167. The respondents were of the opinion that double tax treaty information should not be addressed in the Prospectus Regulation as such a requirement would be disproportionately burdensome.

**ESMA's response:**

168. Given that the respondents expressed no support for this suggestion, ESMA will not propose to amend the Prospectus Regulation with regard to double taxation.

**V.II.II. 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.*

169. Participants in the consultation were split about this question. While some market participants agreed with ESMA's observation, others indicated that a number of issuers/indices follow this route. There were not many illustrative examples provided by market participants in this respect.

**ESMA's response:**

170. ESMA would like to re-acknowledge that there is a difference in the treatment under the Prospectus Regulation in the sense that an issuer which composes its own index is required to provide a description of that index in the prospectus, whereas a third party which issues securities linked to that same index is simply required to indicate in the prospectus where information about this index can be found. However, ESMA considers that this difference does not provide sufficient justification to omit a description of proprietary indices from the prospectus.

*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.*

171. The vast majority of respondents were not in favour of setting out a proprietary index description in the prospectus. With regard to ESMA's key differences between proprietary and third party indices, the following comments were issued:

- except for conflicts of interest, ESMA's key differences are not specific to proprietary indices but common to all indices;
- disclosure regarding conflicts of interest is required in the prospectus;
- the management of conflicts of interest is regulated under MIFID and banking regulations.

172. A few market participants raised concerns that the requirement to produce an index description in the base prospectus would involve the following practical issues:

- under a base prospectus, issuers would be obliged to prepare one supplement per issue which would increase their costs and the delay to launch new products. This obligation derives from the fact that proprietary indices are oftentimes created on demand of investors, reflecting an answer to their financial needs and market expectations. As a consequence, it is not possible to include an extensive list of proprietary indices in the base prospectus at the time of its approval;
- in case a proprietary index shall be added to the base prospectus following its approval, issuers should be allowed to draw up a supplement and not be obliged to prepare a new (base) prospectus. Alternatively, competent authorities could, under a separate index review process, check and accept index descriptions for the purposes of a particular program or for wider Prospectus Directive use;
- the length and comprehensibility of the base prospectus would be negatively affected as index rules represent approximately 15 pages of documentation per index.

173. Some participants in the consultation argued that the prospectus should not have to include an index description under the following two conditions:

- when the calculation agent of the index is not part of the same group as the issuer;
- when the index, together with its complete set of rules, is publicly available at all times on the issuer's website.

174. Some respondents argued that the prospectus should focus on a general description of the index along with an indication where its complete set of rules is available. Issuers should not have to provide a detailed technical description as the mechanics and component selection behind any index are complex and likely to be more confusing than helpful to investors. Moreover, the conversion of the detailed technical description into a language suitable for an inclusion in the prospectus leads to additional legal costs and documentation discrepancies for the issuer.

***ESMA's response:***

175. ESMA is of the view that, among all indices, conflicts of interests are most prevalent in the case of proprietary indices. As for the other key differences mentioned in its Consultation Paper, ESMA is of the opinion that they occur much more frequently for proprietary indices than third party indices.

176. ESMA agrees that disclosure on conflicts of interest is required in the prospectus in accordance with item 3.19 of Annex XII. Even though MIFID generally regulates conflicts of interests, a description of the index in the prospectus would provide additional transparency on conflicts of interest.

177. ESMA recognizes the burden placed upon issuers to disclose an index description in the base prospectus but believes that its Consultation Paper provides valid reasons for such a requirement. Furthermore, ESMA shall develop, at a further stage, draft regulatory technical standards to specify situations when a supplement or a prospectus is needed.

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<sup>9</sup> A description of any interest, including conflicting ones that is material to the issue/offer, detailing the persons involved and the nature of the interest.

178. ESMA considers that conflicts of interest may relate to the governing rules of the index in general and not only to its calculation. The publication of the complete set of rules of the index on the issuer's website only resolves the issue that information about proprietary indices may not be easily accessible, but does not allow competent authorities to scrutinize proprietary index descriptions.

179. Due to the fact that the term "index description" is open to interpretation, ESMA acknowledges that prospectus disclosure diverge between a complete set of rules of the index and a more general, non-technical, description. Therefore, ESMA will issue, at a further stage, guidance on the relevant term, if necessary.

180. In light of these considerations, ESMA has decided to proceed as proposed in its Consultation Paper and therewith to keep the requirement of the Prospectus Regulation to disclose the description of an index composed by the issuer in the prospectus.

*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*

181. While a minority of the respondents disagreed to extend the relevant requirement to any entity belonging to the same group, most respondents strongly disagreed with ESMA's proposal to extend the relevant requirement of Item 4.2.2. of Annex XII to an entity acting in association with or on behalf of the issuer.

182. One respondent felt that such a proposal is in contradiction with the aim of the Amending Prospectus Directive to reduce administrative burdens for issuers.

183. A lot of respondents held the view that the reference to "entities acting in association with" or "on behalf of" the issuer is too broad as it may capture the relationship issuers have with most classical index providers to which licence fees are paid for the use of the index. In fact, issuers may sign exclusivity agreements with these index sponsors for indices that have been prepared independently by the index sponsor alone. Moreover, it is important to note that, as an independent legal person, the index sponsor assumes its own responsibility.

184. One respondent indicated that the reference to "entities acting in association with" is similar to the definition of "acting in concert" that is contained in the Takeover Bids Directive. The term "acting on behalf of" is a broadly legal term in civil law that can be adopted in this case.

***ESMA's response:***

185. ESMA acknowledges that a requirement to produce an index description in the prospectus when an entity that is acting in association with, or on behalf of the issuer, composes the index, would significantly increase administrative and cost burdens for issuers given that such a practice does not seem to be uncommon. Therefore, ESMA considers necessary to revise its initial proposal to the effect that a description of an index composed by an entity acting in association with, or on behalf of, the issuer is not required in the prospectus if the latter includes statements to the following effect:

- the complete set of rules of the index and information on the performance of the index are freely accessible on the issuer's or on the index provider's website;
- and



- the governing rules (including methodology of the index for the selection and the re-balancing of the components of the index, description of market disruption events and adjustment rules) should be based on predetermined and objective criteria (i.e. they cannot be changed at the discretion of the issuer).

There is a clear presumption that such a situation constitutes a conflict of interest and that such conflict of interest needs to be described in the prospectus pursuant to item 3.1. of Annex XII of the Prospectus Regulation.

186. If practical issues arise in the future with regard to the reference “acting in association with”, ESMA will issue further guidance on the term.

187. Also, it should be noted that a conflict of interest exists for an issuer, which does not itself compose the index, if it enters into derivatives transactions with an index provider, or a member of its group. Although such a situation would not be caught by item 4.2.2, ESMA would expect disclosure in the prospectus that the issuer may enter into derivative transactions with the index provider, or a member of its group. This is because item 3.1 of Annex XII requires disclosure in the prospectus of any interest, including conflicting ones that is material to the issue/offer, detailing the persons involved and the nature of the interest.

### **V.II.III. 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.*

188. Participants in the consultation were split about this question. Those respondents in favour of keeping the current requirement of the Prospectus Regulation to produce a report on profit forecasts and estimates mainly put forward that these reports provide a form of valuable assurance to investors, by ensuring the credibility and proper preparation of profit forecasts and estimates.

189. Some respondents considered that the reports are not of high relevance because the auditor or independent accountant is not in position to confirm the probability of the forecast in a way that gives assurance to investors.

190. A number of respondents criticized that the requirement to produce a report constrains the willingness of issuers to disclose forward-looking financial information in the prospectus. The fact that the Prospectus Regulation defines the term “profit forecast” in a very broad manner has led to substantive interpretive difficulties in determining whether or not information qualifies as a profit forecast.

191. Accordingly, one respondent felt that the definition of profit forecasts should be revised as to exclude statements in general terms which do not involve actual figures. In most cases, such statements are too vague for auditors or independent accountants to undertake any form of meaningful review but may still represent valuable information for investors. Moreover, in line with US transactions under the jurisdiction of the SEC, the prospectus could identify both the nature of forward-looking statements and important factors that could cause actual results to differ materially from forward-looking statements.

192. Pursuant to ESMA's Recommendations No 43, there is a presumption that an outstanding profit forecast made other than in a previous prospectus (e.g. in a regulatory announcement) will be material in case of share issues. Accordingly, one respondent indicated that many issuers limit their on-going communication of forward-looking information in order to avoid a report on such information in subsequent prospectuses or may even withdraw such information and risk negative marketing reactions.

193. One respondent believed that the report may cause prospective investors to attribute undue certainty to profit forecasts. In this regard, the report on profit forecasts is of a fundamentally different character than the auditor's report on historical financial statements given that, in most cases, the relevant documentation auditors or independent accountants can use for the basis of their assessment on profit forecasts does not exist.

194. Some respondents noted that the requirement to produce the relevant report adds an unnecessary formal step to the prospectus process, increases the costs of issuers and hinders the use of time critical issuance windows. In this regard, the point was raised that for securities in the US markets, any published forecast to be included in the prospectus would be without a report to be prepared by auditors. Any such discrepancies between the European and U.S. markets would cause additional transactions costs.

195. A few respondents argued that reports on profit forecasts and estimates should only be required for:

- an IPO where companies and their accounting standards are not very well known;
- companies which are not required to comply with certain regulatory disclosure requirements. The main argument put forward was that, for companies already complying with such regulatory disclosure requirements, the profit forecast to be included in the prospectus has already been shared with investors and that issuers are already required to update such forecasts whenever circumstances change.

***ESMA's response:***

196. ESMA considers that the relevant report represents an added value to investors for the following two reasons:

- the report ensures that the forecast or estimate has been properly prepared on the basis of the underlying assumptions and is consistent with the accounting policies of the issuer;
- independent accountants and auditors tend to play, in practice, a more active role which provides additional credibility to the forecast or estimate.

197. ESMA agrees that disclosure of forward-looking information in the prospectus is, in general, restricted due to the requirement to produce a report but believes that the prospectus should only include forward-looking information of a certain quality which is, in its view, ensured by the report prepared by an independent person.

198. Regarding the market's request to revise the definition of a profit forecast to exclude statements in general terms which do not involve actual figures, ESMA considers that its Recommendation No 49 already provides useful guidance by stating that a general discussion about the future or prospects of the issuer under trend information will not normally constitute a profit forecast or estimate. ESMA does not believe that further clarification is needed and considers a proposed change of the definition of profit forecast to be outside the scope of the Mandate.

199. ESMA acknowledges that the Prospectus Regulation requirement to produce a report can have an impact on the issuers' policies to communicate forward-looking information.

200. ESMA disagrees that the report may lead investors to believe that the results of the forecast will actually be achieved, as such reports have to clearly determine the scope of work made by auditors or independent accountants.

201. While there are pros and cons, ESMA did not receive any arguments it considers to be convincing as to why the report should not be required for issuers listed on the regulated market. Moreover, respondents did not provide evidence that disclosures made under the requirements for regulatory announcements contain equivalent information to the reports of the profit forecast and estimate requested under the Prospectus Regulation. More specifically, ESMA does not consider the argument that the profit forecast or estimate has already been shared with investors to be particularly strong as it is not unusual that information of the prospectus is subject to higher standards than information available to the public in general.

202. In light of these considerations, ESMA has decided to proceed as proposed in its Consultation Paper and therewith to keep the current requirement of the Prospectus Regulation to produce a report for profit forecasts and profit estimates.

*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*

203. While there was widespread support to exclude preliminary statements from the scope of article 2.11. relating to "profit estimate", most of the respondents did not agree with the following criteria based on the arguments listed below:

- preliminary statements have to be agreed by the statutory auditor: auditors are generally only willing to grant an agreement on the final accounts due to liability reasons and accordingly, the requirement that preliminary statements must be agreed, would severely constrain issuers to prepare preliminary statements. In addition, it may be worth to note that preliminary statements announced to the market following a listing do not need to be agreed by the statutory auditor. If ESMA would elect to keep this condition, it would have to provide additional guidance on the term "agreed" and clarify whether the prospectus has to include a statement to this effect or a form of responsibility statement;
- preliminary statements cannot be based on underlying assumptions: even final audited statements are subject to certain assumptions;
- Preliminary statements must be approved by the person responsible for such statements; such an approval would not hold additional legal liability above the liability arising generally in respect of the entire prospectus. Furthermore, such statements are, in practice, always approved by the issuer before publication. Finally, it is unclear whether the prospectus has to include a statement to this effect or a form of responsibility statement.

204. Moreover, the following, more general points were raised in relation to preliminary statements:

- the definition of preliminary statements should also relate to interim and not only annual financial information in order to maintain consistency and encourage flexibility all year long;
- preliminary statements give rise to significant liability risks under some national laws. Such liability risks are heightened in times of economic volatility, given the increased risks that preliminary figures will have to be adjusted before being made final;
- it is questionable if ESMA's proposed definition of "preliminary statements" takes into account all market practices across the EU in relation to annual performance statements. The term "preliminary statement" might not be a term generally understood across all national accounting/auditing environments and this should be confirmed and if necessary addressed. For example, the practice in Sweden and Poland is to issue, some weeks in advance of the completion of the annual report and its audit, a "fourth quarter" announcement which is quite comprehensive while in the UK, a "preliminary announcement" has to be "agreed by the auditors" and is, in practice, often based on a completed audit.

***ESMA's response:***

205. Following comments made by some market participants, ESMA deems it necessary that the Prospectus Regulation includes a clarification of the term "agreed". ESMA has revised its initial text to reflect that the Prospectus Regulation should define the relevant term in a way that the statutory auditor must obtain confidence that the preliminary statements are substantially consistent with the final figures. For the sake of clarification, the prospectus only needs to disclose a statement to the fact, that the statutory auditor obtained confidence that the preliminary statements will be substantially consistent with the final figures. It is not expected that the auditors accept formally responsibility in relation to this "agreement" granted by auditors.

206. In line with the arguments provided by most respondents, ESMA has decided to revise its text to delete the condition that preliminary statements cannot be based on underlying assumptions.

207. In light of the comments received, ESMA finds it necessary to amend its proposal that preliminary statements must only be approved by the person responsible for such statements if such person differs from the one which assumes liability for the prospectus in general. For the sake of clarification, the prospectus only needs to include a statement and not a form of responsibility in relation to such approval.

208. Participants in the consultation did not argue that issuing financial figures in advance of interim accounts is a current market practice. Extending the definition of preliminary statements to interim financial information, for consistency purposes only, does therefore not seem to be necessary.

209. ESMA believes that the requirement for the preliminary statements to be prepared in a way that the statutory auditor must obtain confidence that the preliminary statements are substantially consistent with the final figures should significantly reduce the risk that preliminary figures will have to be adjusted before being made final.

210. Moreover, ESMA opposes to widen the scope of the definition of preliminary statements to accommodate all the different market practices in order to maintain a clear distinction between preliminary statements and profit estimates.

211. Taking into account that there are different market practices, ESMA has decided to remove the term “preliminary statements” from its initial proposal and to refer instead, more generally, to financial information which does not trigger the requirement to produce a report when complying with the criteria defined by ESMA.

#### **V.II.IV. 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.*

212. The majority of respondents were not in favour of keeping the current requirement of the Prospectus Regulation for issuers whose securities are already admitted to trading on a regulated market.

213. Stakeholders, who were in favour of keeping the current requirement of the Prospectus Regulation, mainly advanced the argument that financial information typically constitutes the most critical information provided to investors in a prospectus and that standards should not fall below those set by IOSCO.

214. Market participants, who were in favour of relaxing financial disclosure for equity securities, responded that the financial information is already available to the public in accordance with the Transparency Directive requirements and consequently its inclusion in the prospectus is of very little use for investors. ESMA should adopt the same reasoning than in its technical advice on the proportionate disclosure regime regarding rights issues where it was stated that “the rationale behind adapting prospectuses for rights issues is that because the issuer is listed, a certain amount of information will already be available to shareholders and the public in general”.

215. Most respondents believed that investor protection would not be hindered as the requirement of producing 3 years of financial information would be kept in case of an IPO.

216. One respondent questioned if publicly available financial information which is older than 2 years has an influence on an investor’s decision to buy shares.

#### ***ESMA’s response:***

217. As pre-emptive offers of equity securities are primarily addressed to existing shareholders who have already invested in the issuer and are privy to information of the issuer, ESMA has looked for reasons to adopt a proportionate disclosure regime for this type of securities. It then noted that a possible rationale behind adapting prospectuses for rights issues is that “because the issuer is listed, a certain amount of information will already be available to shareholders and the public in general”.

218. However, equity securities that are not offered through pre-emptive offers, are primarily addressed to the public in general and not to existing shareholders. Due to this fact, it does not seem appropriate to place the burden upon investors of having to collect such information from public sources, in particular if such information is as critical to investors as financial information.

219. ESMA believes that the third year of financial information can have an influence on the investment decision as it is, especially, in the current economic context, important to know how the issuer has reacted under the turbulent market conditions over these recent years.

220. In light of these considerations, ESMA has decided to proceed as proposed in its Consultation Paper and therefore to keep the current requirement of the Prospectus Regulation to produce audited financial information covering the latest three financial years.

## **VI. Technical Advice on the review of the provisions of the Prospectus Regulation**

### **VI.I Introduction**

221. 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.

### **VI.II Information on Taxes withheld at source**

Extract of the Mandate – Section 4:

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?

222. The European Commission has invited ESMA to consider reflecting the rationale of ESMA's FAQ No 45<sup>10</sup> in the Prospectus Regulation.

223. 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

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<sup>10</sup> 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)

securities would be provided in the prospectus pursuant to ESMA's FAQ No 45, in case that the issuer is not acting as nor has appointed a paying agent in a Member State where the issuer intends to make a public offering but nevertheless a withholding tax has been levied. Accordingly, in these cases investors could be deprived of required information on taxes on the income from the securities withheld at source.

## Advice

**224. Following the above, ESMA considers it to be inappropriate to reflect the rationale of ESMA's FAQ No 45 in the Prospectus Regulation. Accordingly, ESMA is in favour of keeping the current requirement of the Prospectus Regulation on tax information.**

225. In addition, ESMA deems it necessary to revise its FAQ No 45 in due course.

## VI.III Index Composed by the Issuer

Extract of the Mandate – Section 4:

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?

226. 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 general 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 have experienced that proprietary indices are frequently governed by complex set of rules and may therefore not be easily understood, in particular, by 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.

227. 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.

228. Some respondents 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.

229. A few respondents argued that the current requirement of the Prospectus Regulation to disclose descriptions of proprietary indices in the prospectus affects the readability of the prospectus documenta-



tion. 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.

230. A lot of respondents 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.

#### **Advice**

**231. 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.**

232. This situation constitutes a clear conflict of interest and it is mandatory to describe such conflict of interest in the prospectus pursuant to item 3.1. of Annex XII of the Prospectus Regulation.

233. 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.

#### **Advice**

**234. 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.**

235. This situation constitutes a clear conflict of interest and it is mandatory to describe such conflict of interest in the prospectus pursuant to item 3.1. of Annex XII of the Prospectus Regulation.

#### **Advice**

**236. The same index description would be required in the prospectus, if the index is composed by an entity acting in association with, or on behalf of, the issuer, unless the prospectus contains the following statements:**

- **the complete set of rules of the index and information on the performance of the index are freely accessible on the issuer’s or on the index provider’s website;**
- and**
- **the governing rules (including methodology of the index for the selection and the rebalancing of the components of the index, description of market disruption events and adjustment rules) should be based on predetermined and objective criteria (i.e. they cannot be changed at the discretion of the issuer).**

237. There is a clear presumption that this situation constitutes a conflict of interest and that such conflict of interest needs to be described in the prospectus pursuant to item 3.1. of Annex XII of the Prospectus Regulation.

Extract of the Mandate – Section 4:

Would such a solution be applicable also in Item 2.10<sup>11</sup> of Annex XV?

238. 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”.

#### Advice

**239. 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.**

#### VI.IV Profit Forecast and Estimate

Extract of the Mandate – Section 4:

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.

240. ESMA believes that reports prepared by independent accountants or auditors provide investors with confidence that the basis of accounting used for the profit forecast<sup>12</sup> or estimate<sup>13</sup> 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.

241. 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.

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<sup>11</sup> 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.”

<sup>12</sup> “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.

<sup>13</sup> “profit estimate” means a profit forecast for a financial period which has expired and for which results have not yet been published.

242. In practice, independent accountants and auditors tend to play an active role by advising the issuer on the assumptions which 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.

## Advice

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

**244. However, ESMA considers that a report is not required for financial information which:**

- 1. contains (i) non-misleading figures to be published in the next annual audited financial statements in relation to the previous financial year that has expired and (ii) any significant explanatory information necessary to assess such figures;***
- 2. states the fact that the information has not been audited (or the prospectus must include such statement);***
- 3. has been approved by the person(s) responsible for such information if such person(s) differ(s) from the one which assumes liability for the prospectus in general;***  
***and***
- 4. has been agreed by the statutory auditor (which means that the statutory auditor must obtain confidence that the figures are substantially consistent with the final figures).***

**The Prospectus Regulation should be amended accordingly.**

**245. With a view to ensure investor protection and efficient supervision by competent authorities, ESMA considers appropriate to amend the Prospectus Regulation that the prospectus must include a prominent statement in relation to the criteria (3) and (4) of paragraph 244 above.**

246. For the sake of clarification, ESMA would like to point out that financial information complying with the criteria of paragraph 240, should not be considered as historical financial information and does therefore not need to comply with 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 will issue, at a later stage, further guidance on financial information which complies with the criteria of paragraph 244, if necessary.

## VI.V Audited Historical Financial Information

Extract of the Mandate – Section 4:

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.

247. 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).

248. 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.

249. 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 depository 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 depository receipts over shares as they may be entitled to dividends which may vary according to the prosperity of the issuer.

250. 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 Amended Directive)

251. 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 depository receipts over shares, given that those entities shall also only disclose audited financial information covering the latest 2 financial years.

252. On a more general level, lowering disclosure requirements of audited historical financial information for shares and depository 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.

253. 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.

254. 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).

2550. Responses to the consultation 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.

## **Advice**

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

## Annex I

### European Commission's request for ESMA technical advice on possible delegated acts concerning the prospectus Directive as amended by the Directive 2010/73/EU

#### 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 prejudice 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**"),<sup>14</sup> the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**"),<sup>15</sup> and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").<sup>16</sup>

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

The formal mandate consists of three separate parts:

#### **Part I**

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

- The Commission is under the obligation to adopt delegated acts by (18 months after the entry into force of the Amending Directive) 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 and to reduce administrative burdens for companies when raising capital in the securities markets in the Union, the second part of the formal mandate covers possible additional delegated acts reviewing some existing Level 2 measures. The legal bases are Articles 7, 24a, 24b and 24c of the Amended Directive.

#### **Part III**

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<sup>14</sup> Communication of 9.12.2009. COM(2009) 673 final.

<sup>15</sup> TBP

<sup>16</sup> OJ L304/47, 20.11.2010, p. 47-62.

CESR/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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When CESR will be replaced by the newly created European Securities and Markets Authority (ESMA), this formal request should be considered to be addressed to ESMA.

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

After the delivery of the technical advice by CESR/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, and in accordance with the established practice within the European Securities Committee,<sup>17</sup> 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. Publication in the Official Journal was 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 (3) 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 (18 months after the entry into force of the Amending Directive) 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 institu-

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<sup>17</sup> Commission's Decision of 6.6.2001 establishing the European Securities Committee, OJ L191, 17.7.2001, p.45-46.

tions (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 and to reduce administrative burdens for companies when raising capital in the securities markets in the Union, the second part of the mandate covers possible additional delegated acts reviewing some existing Level 2 measures.

Part III of the mandate invites CESR/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 CESR/ESMA should take into account.**

On the working approach, CESR/ESMA 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.
- CESR/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, CESR/ESMA should seek coherence within the regulatory framework of the Union.
- In accordance with the ESMA Regulation, CESR/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.
- CESR/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 CESR/ESMA.



- In accordance with the ESMA Regulation and the Commission's Decision establishing CESR, CESR/ESMA is invited to widely consult market participants (practitioners, consumers and end-users) in an open and transparent manner. CESR/ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. CESR/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.
- CESR/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 CESR/ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.
- CESR/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 CESR/ESMA to the Commission should not take the form of a legal text. However, CESR/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.
- CESR/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 CESR/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. Moreover, according to Article 6(1)(gc) of the ESMA Regulation, ESMA shall take over, as appropriate, all existing and ongoing tasks from CESR. Therefore, when CESR will be replaced by the newly created ESMA, this formal request should be considered to be addressed to ESMA.

Article 12 of the Commission Decision establishing CESR<sup>18</sup> provides that "before transmitting its opinion to the Commission, the Committee shall, at an early stage, consult market participants, consumers and end-users extensively and in an open and transparent manner."

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 prejudice 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 CESR/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.

- CESR/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.

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<sup>18</sup> Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators, OJ L 25, 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, CESR/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.

CESR/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.

CESR/ESMA is invited to advise the Commission on possible schedules and building blocks of the summary document. It should develop common formats and templates 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, CESR/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**").<sup>19</sup>
- 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.

CESR/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.

CESR/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.<sup>20</sup> In particular, in relation to PRIPs within the scope of the Prospectus Directive, the summary should include 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).**

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<sup>19</sup> Commission Regulation (EC) 809/2004 of 29 April 2004, OJ L 215, 16.6.2004, p.3.

<sup>20</sup> 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.

- CESR/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, CESR/ESMA should identify and select the disclosure requirements, as currently specified in the Regulation (EC) 809/2004 (the "Prospectus Regulation"),<sup>21</sup> 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. CESR/ESMA should develop specific draft annexes in this respect.
- In relation to preemptive offers of equity securities, CESR/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, CESR/ESMA should advise the Commission on what information could be omitted from annexes XI and V of the Prospectus Regulation. CESR/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, CESR/ESMA is invited to advise 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 rec-

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<sup>21</sup> Commission Regulation (EC) 809/2004 of 29 April 2004, OJ L 215, 16.6.2004, p.3.

ord, CESR/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,<sup>22</sup> from Title III of the MiFID,<sup>23</sup> and from the Transparency Directive,<sup>24</sup> 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.

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<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> 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.

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 country, 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.

CESR/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 CESR/ESMA should be in place.

CESR/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 (Article 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.



- CESR/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 and of reducing administrative burdens for companies when raising capital in the securities markets of the Union, the Commission takes the opportunity of this mandate to CESR/ESMA to consider some technical adjustment to the requirements of the Prospectus Regulation.

CESR/ESMA is invited to reflect and advise the Commission on the possible technical clarification and adaptation 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 CESR/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. CESR/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. CESR/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, CESR/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.

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

## 6. Indicative timetable.

This mandate takes into consideration that CESR/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 (18 months after the entry into force of the Amending Directive) 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 CESR/ESMA to deliver the technical advice is **15 July 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. In case the entry into force of the amending Directive was delayed due to late publication in the Official Journal of the European Union, deadlines could be further extended if appropriately justified.

| <b>Deadline</b> | <b>Action</b>  |
|-----------------|--|
| 1 January 2011  | Entry into force of the Amending Directive (20 days after publication in the Official Journal of the European Union – 11 December 2010). |
| 5 January 2010  | Submission by the Commission of the formal mandate to ESMA.  |

|                           |   |
|---------------------------|---|
| 15 July 2011              | ESMA provides its technical advice.   |
| September – December 2011 | <p><i>Preparation of the delegated acts:</i> In the preparation of the delegated acts, the Commission will consult with experts appointed by the Member States within the European Securities Committee.</p> <p>The Commission will provide the European Parliament with full information and documentation on those meetings. If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.</p> |
| End of December 2011      | <i>Adoption of the delegated acts:</i> 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 II

### 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

Contact:

Emiliano TORNESE, Telephone: +32-2-29 85400, [emiliano.tornese@ec.europa.eu](mailto:emiliano.tornese@ec.europa.eu)

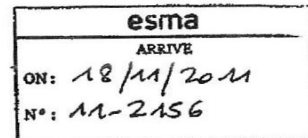
## Annex III

### 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



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 Advice on the remaining part of the mandate. At the initial stage, the second part of the formal mandate was expected to cover the following:

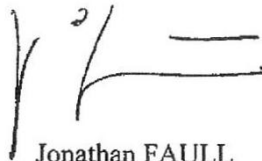
- (1) a possible format and form of a consent to use a prospectus in a retail cascade;
- (2) a review of other provisions of the Prospectus Regulation including possible additional delegated acts for technical adjustment and clarification of some existing Level 2 measures;
- (3) the criteria to be applied 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.

Considering the proposals adopted on 20 October 2011 by the Commission on the review of the Markets and Financial Instruments Directive (MiFID)<sup>1</sup> and Market Abuse Directive (MAD)<sup>2</sup> 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,

A handwritten signature in black ink, appearing to be 'Jonathan FAULL', with a stylized flourish at the end.

Jonathan FAULL

Contact: Stephane Fekir, Tel. (32-2)2989331, [stephane.fekir@ec.europa.eu](mailto:stephane.fekir@ec.europa.eu)

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<sup>1</sup> 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)

<sup>2</sup> 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)