

European Securities and Markets Authority, ESMA
103, rue de Grenelle
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France

– Submitted online via ESMA's website –

6 January 2012

Comments of the EAPB on the on the ESMA consultation paper on possible delegated acts concerning the Prospectus Directive

Dear Madam or Sir,

The European Association of Public Banks, EAPB, welcomes the opportunity to comment on your consultation paper of 13 December 2011 titled “ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU” (ESMA/2011/444) on, among others, the use of a prospectus in a retail cascade. However, our members regret to seeing the need to point out that the consultation period set out by ESMA is inappropriately short, firstly with respect to its whole duration of less than four weeks and secondly with respect to the holidays, where most persons in the institutions qualified to answer are out of the office.

I. Retail Cascade

The description of a retail cascade used in the consultation paper does not cover an important aspect. It assumes that the distributors of securities are generally known to and in direct contact with the issuer. However, this is not the case in the most relevant types of distribution chains. The analysis of all relevant underlying distribution models has to be the starting point for developing appropriate technical rules pertaining to retail cascades.

In the bond distribution scheme, debt securities of an issuer are distributed via many layers of financial intermediaries. In a first step the issuer offers the debt securities via underwriting financial intermediaries to a group of institutional buyers. These investors purchase from the intermediaries and have no contractual relationship with the issuer. Some of these institutional buyers, however, are financial intermediaries themselves and distribute the debt securities in a second step to retail investors. The issuer cannot plan this process in detail. As it is unknown to how many retail investors these debt securities are offered, the issuer prudently produces a prospectus for this distribution. Whilst it is not clear that the

further distributors would be regarded as financial intermediaries in the sense of the retail cascade provision in the amended Prospectus Regulation, there is no legal certainty in so far.

A similar problem arises for certain forms of distribution of structured securities to retail investors. For this, the distribution method substantially differs from the classical bond model in so far as the issuer always manages the distribution of the securities itself.

The decisive question that follows from the described distribution models is how to enable participating distributors, who are not in direct contact with the issuer, to make their offers to retail investors in compliance with the EU prospectus regime:

- A possible solution appears to be for the issuer to include a wide written consent into the prospectus (see our proposal in annex 1). For this to work, it needs to be possible to omit the names of those distributors in the prospectus, because they are and remain unknown to the issuer. In particular, the further distributors described above do not act in association with the issuer, but need to rely on the prospectus prepared by the issuer, due to the fact that they could not or would prudently not dare to produce a prospectus themselves without the cooperation of the issuer.
- In both described distribution models, it is not possible to name the distributors which are not in direct contact with the issuer at the time of issuance of the securities. A second solution could be, to provide the required disclosure regarding intermediaries separately from prospectus and final terms, i. e., on a specific website.

Answers to selected questions

Q1. Retail cascades are mainly relevant for the distribution of debt securities. It is also possible that similar problems arise with the distribution of equity securities. This issue should be examined further.

Q2. Please see our general remarks above.

Q3. ESMA's understanding of retail cascades misses the most crucial part. The terms and conditions of offers by unknown intermediaries cannot and need not be known at the time the prospectus and the final terms are drawn up. Information on the offeror and the price are best delivered by the offeror itself. They are part of the contractual arrangement between the offeror and the retail investor.

Q4. The price fluctuates constantly in accordance with the movement of the markets. This is not a change of the terms and conditions. The prospectus can always only specify the initial offer price at the minute of the pricing. Holding a price steady for any length of time is not customary in this type of offer of debt securities.

Q5. Most important information that cannot be provided in the case of a retail cascade is the price and the name of the financial intermediary. This information does not even need to be communicated to the investor since he is in direct contact and negotiation with the offeror.

Q6. No. The issuer is responsible for the information in the prospectus in accordance with the domestic rules and the offeror for the information/advice given to the investor.

Q8. In case of an offer of debt securities a prospectus is always prepared by the issuer. The offeror simply does not have access to the information needed nor can he rely on the publicly available information to be complete and up to date. Also, the notion that there is one big offer in a retail cascade is a fiction. In fact there is a whole series of offers. The issuer accepts this to be its offer and to produce one prospectus to enable the distribution of its bonds under the EU prospectus regime, specifically the final placement rule of the PD.

Q9. This is the central problem of the retail cascade distribution scheme. Distributors that offer debt securities further down the cascade may need a prospectus, but do not have means to prepare it. The issuer preparing it does not know who the distributors actually are. The consent is not problematic, as long as it can be given in a general form (see annex 1).

Q10. Under the current practice only the contractual distributors, i. e., the initial underwriters, are known at this early stage. Later distributors are not part of an agreement.

Q11. The underlying assumption that the issuer's prospectus liability is subject to its consent only applies to a small part of the EU.

Q12. There are no disadvantages of including information that is known at the time of the filing, as long as this is not used to prohibit uses of the prospectus not described therein. Such uses could not be known at the time of the filing and will in part never be known.

Q14. No. The information of who offers the debt securities at what price is not essential to the public. Any investor will know that information as soon as the offer is made.

II. Information on taxes withheld at source

To create legal certainty for issuers, the requirement to indicate the tax implications of an issue, as referred to in Question 45 of the CESR FAQ (CESR/10-1337), should be included in the Prospectus Regulation, as some member states do not regard the CESR FAQ as binding. Information on taxes withheld at source which are directly incurred by the issuer and which are therefore known to the issuer should be presented in the prospectus instead of a full disclosure of tax regimes (see annex 2).

Answers to selected questions

Q1-3. No.

Q4. With respect to the “net” amount, there is no additional information required.

Q5. Details of double taxation treaties should not be addressed in the Regulation.

Q9. Yes, the Regulation should not be changed.

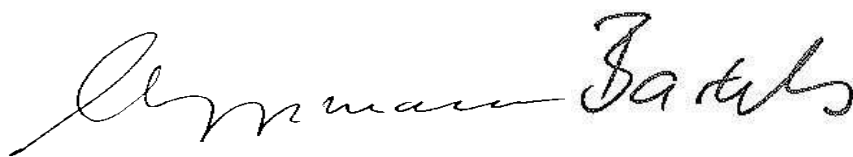
Q10. Yes.

Q11. Although it should be distinguished between preliminary statements and profit forecasts and estimates, the criteria “have to be agreed by the statutory auditor” is problematic, as the meaning of “agreed” is not clear. The “agreement” could be interpreted as second class revision. Preliminary figures will not be included in the prospectus anymore because auditors may resist an agreement due to liability reasons.

Q12. In the case of corporate actions, the reduction of disclosures to the last two full financial years would be useful. The third financial year is not of interest to investors and already disclosed earlier. Waiving the third year would lead to cost savings in terms of reduced costs for auditors.

Should you have additional questions or comments, please do not hesitate to contact us.

Kind regards,

The image shows two handwritten signatures in black ink. The signature on the left is 'Schoppmann' and the one on the right is 'Bartels'.

Henning Schoppmann
EAPB

Boris Bartels
EAPB

The European Association of Public Banks (EAPB) represents the interests of 35 public banks, funding agencies and associations of public banks throughout Europe, which together represent some 100 public financial institutions. The latter have a combined balance sheet total of about EUR 3,500 billion and represent about 190,000 employees, i.e. covering a European market share of approximately 15%.

Annex 1

With respect to Article 3(2) of the Prospectus Directive each dealer and/or financial intermediaries, if any, appointed by such dealer placing or subsequently reselling the notes issued under this programme are entitled to use and rely upon (i) this prospectus as long as this prospectus is valid and duly supplemented in accordance with Articles 9 and 16 of the Prospectus Directive and (ii) the relevant final terms in relation to the relevant tranche of the notes. Such consent by the issuer is subject to each dealer and/or financial intermediaries complying with the terms and conditions described in this prospectus and the relevant final terms as well as any applicable selling restrictions: The distribution of this prospectus, any supplement to this prospectus and the relevant final terms as well as the offering, sale and delivery of notes in certain jurisdictions may be restricted by law. Each dealer and/or each financial intermediary, if any, and/or each person into whose possession this prospectus, any supplement to this prospectus and the relevant final terms come are required to inform themselves about and observe any such restrictions. The issuer reserves the right to withdraw its consent to the use of the prospectus.

No person has been authorised to give any information which is not contained in, or not consistent with, this prospectus or any other document entered into or any other information supplied by the issuer in connection with this programme and, if given or made, such information must not be relied upon as having been authorised by the issuer, the dealers or any of them.

Neither the arranger nor any of the dealers, any financial intermediaries or any other person mentioned in this prospectus, excluding the issuer, is responsible for the information contained in this prospectus or any supplement to this prospectus or any final terms or any other document incorporated herein by reference, and, accordingly and to the extent permitted by the laws of any relevant jurisdictions, none of these persons accepts any responsibility for the accuracy and completeness of the information contained in any of these documents.

Annex 2

Number 4.14. of Annex V of Commission Regulation (EC) No. 809/2004 of 29 April 2004:

“4.14. In respect of the country of registered office of the issuer and the country(ies) where the ~~offer being made or admission to trading is being sought~~ issuer has appointed any paying agent for the purpose of making payments on the securities:

- information on taxes on the income from the securities withheld at source;
- indication as to whether the issuer assumes responsibility for the withholding of taxes at source.”