

European Securities and Markets Authority, ESMA
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France

– Submitted online via ESMA's website –

15 July 2011

Comments of the EAPB on the ESMA technical advice 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 15 June 2011 (ESMA 2011/141) concerning the amended Prospectus Directive and preparing the technical advice of the European Securities and Markets Authority (ESMA) to the European Commission on, among others, the content of the summary of prospectuses and the final terms of base prospectuses. The EAPB members decided to submit a general observation on the given topics rather than answering the specific questions. We nonetheless are convinced that the following comments are helpful.

– Final terms regime / Consolidated terms and conditions for the issuance of securities:

The proposed principle whereby only the information contained in an exhaustive list ("CAT A", "CAT B" and "CAT C") may be included in the final terms in future is inappropriate. The proposed procedure is extremely rigid and will unnecessarily cause issuers to completely abandon the present established issuing procedure, as a new prospectus will probably almost always be necessary for new products and product variations. It should be noted that supervisors find no fault with the present issuing procedure. Because of the detailed product description required in the prospectus under the proposals, issuers will no longer be able to respond flexibly and promptly to market developments themselves.

By categorizing information on securities ("A", "B" and "C") and their treatment in the base prospectus and the final terms, the consultation paper excludes the possibility to include consolidated terms and conditions for a specific securities issue in the final terms. Consolidated terms and conditions for a specific issue together with the specific national provisions and the securitized right form the legal basis between the issuer and the respective creditor. The consolidated terms and conditions allow issuers to meet the –

usually on national level legally determined – transparency requirements, especially in the retail business. A transparent reading version of the terms and conditions of the individual issue in form of a uniform document should be maintained. The interdiction to reproduce items in the final terms as stated in paragraph 30 of the consultation paper should not have any effect in this case. The consolidated terms and conditions cannot be replaced by an "issue specific summary". Consolidated terms and conditions and their regulatory content for a specific securities issue are derived from the general terms and conditions of issue as laid down in the base prospectus. General terms and conditions of issue are valid for all types of securities that can be issued under a base prospectus. The omission of the possibility to use consolidated terms and conditions contradicts the postulate of the amended Prospectus Directive to improve investor protection. The possibility to include consolidated terms and conditions in the final terms should therefore be included as subitem to the list of "Additional Information" (Annex B).

– **Increase of securities issues:**

As a further consequence of the categorization of information on securities ("A", "B" and "C") the ESMA consultation paper recommends that increases of securities issues are not possible during the maturity. This cannot be the intention and should be corrected and clarified. Particularly in the case of bonds/notes it is custom that increases of issues and thus an increase of the respective aggregate principal amount take place during the maturity of the bonds/notes. So far, the increase of an issue in 2011, which originally was issued under a base prospectus valid in 2009, was possible via a "bridge clause" in the final terms of the base prospectus of 2011. The "bridge clause" in the final terms incorporated those terms and conditions relevant for the increase, which necessarily must be identical with the original terms and conditions of 2009, in the valid base prospectus of 2011. Such an approach does not signify any disadvantages for the investor since all information in the actual base prospectus must be valid for the respective increase. Also, an "issue specific summary" must be elaborated for the increase. "Bridge clauses" that should facilitate the increases of securities issues should be included as subitem in the list of "additional information" (Annex B).

– **Payout formula for securities:**

According to paragraphs 45, 49 and 51 of the consultation paper, specific payout formulas should already be included in the base prospectus. The factors of such a payout formula can be determined by the final terms. In the case that for a specific issue a factor is 0 or 1 and the respective component of the formula is not used for the calculation of the payout, there should be the possibility to render the formula in the final terms without the unapplied component. Paragraphs 45, 49 and 51 of the consultation paper should contain a respective clarification.

- **Combination of summary and final terms:**

The combination of summary and final terms for every issue signifies significant additional expenditures for the issuer. The issue of a security will necessitate more time.

- **Language regime for "issue specific summary":**

Paragraph 69 of the consultation paper proposes that the "issue specific summary" that must be added to the final terms should underlie the same translation requirements as the summary of the base prospectus. This approach misjudges that the "issue specific summary" is integral part of the final terms and underlies the same language regime as the base prospectus. The requirements of paragraph 69 of the consultation paper therefore contradict Article 19 (3) of the Prospectus Directive. Such provisions that go beyond the wording of the Prospectus Directive cannot be set on level 2. An implementation of this ESMA recommendation would be a serious contradiction to the postulate of the amended Prospectus Directive, particularly to recitals 1 and 4, without being necessitated for investor protection reasons. Paragraph 69 of the consultation paper should therefore be formulated compliant with the Prospectus Directive. There should not be a translation requirement for the "issue specific summary". It should also be clarified that the final terms must only be deposited in those Member States where a public offering of the individual tranche takes place, independent of the possible preceding notification of the base prospectus.

- **General principles of the summary:**

Paragraphs 99 and 101 of the consultation paper suggest that the summary should not contain wording that is already used in other parts of the prospectus. Because of the required consistency and the liability regime of Article 6 (2) of the Prospectus Directive this proposal is not implementable and should be dropped. It should be also noted that the wording in paragraph 101 ("a letter from the chair") is not appropriate. The prospectus is the basis for the liability of the issuer and not comparable to a letter.

Paragraph 100 stating that there should not be a numeric limit is to be welcomed.

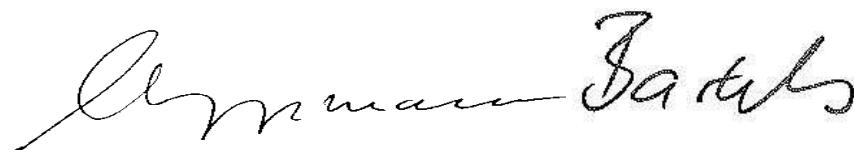
With regard to paragraph 105 it should be noted that it is present custom to list the headings of risk factors in the summary bearing in mind that those are usually multiline headings already providing a certain overview. Including a selection of risk factors in the summary would be problematic with respect to liability since it would mean to make a further and extended assessment.

- **Taxation (4.11 of Annex III, 27.11 and 28.11 of Annex X and 4.1.14 of Annex XII of the Prospectus Regulation):**

The consultation paper does not indicate that the annexes of the Prospectus Regulation will contain a change with respect to taxation provisions. The review of the Prospectus Regulation should abolish the discrepancy between the Prospectus Regulation and the "Frequently Asked Questions"/Prospectuses: common positions agreed by CESR/ESMA Members" by implementing paragraph 45 of the FAQ and create legal certainty for the issuer.

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

Kind regards,

Two handwritten signatures in black ink. The signature on the left is 'Henning Schoppmann' and the signature on the right is 'Boris 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%.