

Comments of the German Insurance Association

**ESMA Consultation paper as of 13 December 2011
on the technical advice on possible delegated acts concerning
the Prospectus Directive as amended by the Directive
2010/73/EU**

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Summary

The German insurance industry welcomes the opportunity to participate in ESMA's consultation regarding the amendment of the Prospectus Directive. Due to the tight time schedule, we commented only on certain parts of the consultation paper and answered to some but not all questions raised by ESMA.

In the following, we would like to highlight the most important points:

- With respect to retail cascades, we assume that ESMA based its proposals upon the assumption that all financial intermediaries distributing securities to retail investors have a contractual relationship to the issuer. Such an assumption would not be correct.
- We agree with ESMA's view that the period for which consent to use a prospectus has been granted cannot be extended beyond the validity of the prospectus.
- With respect to disclosure of the consent to use the prospectus, we take the view that such disclosure is not necessary in the prospectus. In particular, relevant changes of the consent may trigger a right to withdrawal which is not desired by ESMA as well.
- We do not agree with ESMA's proposal to keep the current requirement to produce a report for profit forecasts. With a view to the secondary market, such reports are not necessary.
- Moreover, we strongly oppose to keep the current requirement to produce audited financial information covering the last three years. Such information is already in the market.

1. Introduction

The German insurance industry takes the views on the discussed topics as stated below. We have divided our comments into several sections. Sections 2. and 3. below contain general comments on certain points. The other sections contain specific answers to questions 1 to 10 of the ESMA consultation paper (see below under sections 4., 5. and 6.). Due to the short consultation period of just about three weeks including Christmas holidays, it was not possible for us to deliver further comments in this regard. However, when it is dealt with sections 3.4 and 5 of ESMA's mandate at a later stage, the missing points could be addressed by ESMA again.

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

2.1. Concept of retail cascades

ESMA seems to base its proposal regarding retail cascades upon the assumption, that all financial intermediaries distributing securities to retail investors have a contractual relationship to the issuer. Such an assumption would be incorrect. The distribution of straight debt securities are often made via more than one layer of financial institution. While the sale of the securities to the banks underwriting the debt issuance can be made without a prospectus as these banks are all institutional investors, the prospectus is usually provided for the listing on a stock exchange and the further distribution, possibly through additional financial intermediaries, to retail investors being a public offering which requires a prospectus. In the current market practice for debt securities, the issuer is not necessarily aware of all financial intermediaries and does not have a contractual relationship with all possible intermediaries distributing its securities to retail investors.

Please see our answers to questions 1 to 10 below for more details.

2.2. Requirement to include consent to use the prospectus in the prospectus

We agree with ESMA that the written agreement to use the prospectus does not need to be disclosed to the public. In addition, we are of the opinion that it is sufficient to disclose the consent in a form as required by Art. 14 (2) of the Prospectus Directive, e.g. on the homepage of the issuer. ESMA should consider the alternative that the prospectus should only

contain a section on how information about the consent (if any) is disclosed.

Please note that there are serious issues regarding the requirement to disclose the consent in the prospectus. Certain relevant changes to such consent may require a supplement and could therefore trigger a right to withdrawal which ESMA does not consider to be appropriate (see # 44 of the Consultation paper). In case of a base prospectus, the financial intermediaries are not known to the issuer at the time when the base prospectus is approved. Please note that there are issuance programs which do not provide a dealer panel.

Please be aware furthermore that the issuer can only fix the initial offer price on which the securities are sold to the underwriting banks. The terms of the further distribution, especially the price for which securities are sold by the initial investor, cannot be provided by the issuer and do not concern the terms and conditions of the securities. Securities for which a secondary market has developed, e.g. due to a listing on a stock exchange, will of course have a fluctuating price. When ESMA is concerned about investor protection in the context of the price for which the securities are sold, these concerns should be dealt with by the MIFID requirements.

As mentioned above, financial intermediaries are not always known to the issuer and can therefore hardly be included in a prospectus.

The additional requirements proposed by ESMA are likely to influence issuers to withdraw from the retail market. This would cause retail investors to lose investment opportunities and the loss of investors may increase issuer's costs for the raising of debt capital.

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

3.1 Profit Forecast and Estimate

We do not agree with ESMA's proposal to keep the current requirement to produce a report for profit forecasts. Transparency requirements in the secondary market do not require such a report. So the withdrawal of a profit forecast by an ad-hoc announcement will not require such a report. Also interim financial statement may confirm forecasts without a report. The issuer has a high interest in the proper preparation of a profit forecast in a prospectus because of its prospectus liability. Because of a possible

liability on the side of the auditors the required report is burdensome and time consuming and can therefore hinder the use of time critical issuance windows.

We agree with ESMA's proposal to exclude "preliminary statements" from the requirement to produce a report. However, an agreement from the auditors to the disclosure should not be necessary. Due to a possible liability of the auditors such an agreement may become an obstacle similar to the required report.

3.2 Audited Historical Financial Information

We strongly oppose to keep the current requirement of the Prospectus Regulation to produce audited financial information covering the last three financial years. Such historical financial information is already available to the public in accordance with transparency requirements. In other words, the information is already in the market and its inclusion in the prospectus can be of very little use (if any) for investors. Especially for shares it is questionable how publicly available financial information which is older than 2 years may have an influence on an investor's decision to buy a security.

4. Answers to questions 1 to 6 of the consultation paper: The consent to use a prospectus in a retail cascade (Articles 3 and 7) – concept of retail cascades under the Amended Directive (Section 3.5)

4.1 Question 1

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.

Answer: From the perspective of the insurance industry we struggle with the concept of retail cascades ESMA has in mind. The insurance industry issues securities for financing purposes. In order to reduce market risk the issuance process has to be as short as possible and will last even for retail trades not more than a few days (if any). Also for retail trades there will be a book building process and the price for the entire transaction will be

fixed at the end and will be identical for all initial investors. Immediately thereafter the secondary trading starts. When the issuer has received the funds (at settlement) any obligation of the issuer to update the prospectus has to lapse. However, ongoing publication requirements may apply from the stock exchange where the securities are listed.

4.2 Question 2

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?

Answer: See answer under 4.1 above.

4.3 Question 3

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.

Answer: No, we do not agree with this general statement. Economic terms of the securities (like the coupon) are usually fixed after the book building period. While the prospectus can contain the first issuance price, paid by the initial investors, the price for which intermediaries sell the securities in the secondary market is unknown and varies according to market conditions and can therefore not be described in the prospectus.

4.4 Question 4

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?

Answer: This is not to be deemed a change of the terms and conditions of the securities.

4.5 Question 5

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.

Answer: See answers above, in particular under 4.3.

4.6 Question 6

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?

Answer: No, it is not necessary to clarify, as the issuer will generally not be responsible for the content of information outside of the prospectus.

5. **Answers to questions 7 and 8 of the consultation paper: Validity of a prospectus and responsibility of the issuer or the person responsible for the prospectus; duration of consent (Section 3.5)**

5.1 Question 7

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.

Answer: We agree.

5.2 Question 8

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?

Answer: No, we disagree, please see above under 4.1.

**6. Answers to questions 9 and 10 of the consultation paper:
Principles regarding disclosure requirements in relation to
retail cascades in a prospectus (Section 3.5)**

6.1 Question 9

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?

Answer: The issuer will know the initial investors (banks), purchasing the securities, these banks are determined before the bookbuilding. However, financial intermediaries selling in the secondary market are not necessarily known to the issuer.

6.2 Question 10

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?

Answer: The agreements with the initial investors (banks) will be finalised only after the approval of the (base) prospectus at the filing of the final terms.

Berlin, 6 January 2012