Irish Stock Exchange Response to the European Securities and Markets Authority Consultation on its Technical Advice on Possible Delegated Acts concerning the Prospectus Directive as amended by the Directive 2010/73/EC

The Irish Stock Exchange (ISE) welcomes the opportunity to comment on the European Securities and Markets Authority consultation on its technical advice on possible delegated acts concerning the Prospectus Directive as amended by Directive 2010/73/EC.

By way of background, the ISE operates the regulated market (Main Securities Market) in Ireland on which equity securities, government bonds, collective investment undertakings and debt securities are admitted. In addition, the ISE operates two multi-lateral trading facilities, the Enterprise Securities Market and the Global Exchange Market. At the end of June 2011, the ISE had 61 quoted equities admitted to trading, over 2,900 funds and sub-funds, as well as almost 22,000 debt securities, some of which originate from non-EU issuers.

General comments

Final terms

We have a concern that the proposals for final terms have the potential to introduce complexity for issuers and make the process of preparing a final terms document unnecessarily burdensome and more costly, without delivering enhanced benefits for investors.

We believe that the approach surrounding the format of final terms is incorrect. Final terms should not be defined by what goes in the final terms. Consideration must first be given to what information is included in the base prospectus and the final terms should then reflect the additional information which would only be available at the time of issuance. We deem that the approach should follow these lines. We think that the adoption of building blocks in relation to final terms would not be helpful and general principles should be applied. Much could be derived from the ICMA standard template and looking at the ISDA Forms of OTC Confirmations for derivatives.

Combination of Summary and Final Terms

We believe that the proposal for attaching a summary to final terms would only serve to make investors believe that they could place undue reliance on the summary plus the final terms as a basis for making their investment decision. This would be misleading for investors and would provide them with false comfort with regard to their failure to read the base prospectus in its entirety.

Summaries

We believe that the proposals regarding summaries are far too prescriptive and will result in extremely long summaries, thereby diminishing their value for investors and resulting in significantly increased costs for issuers.

Proportionate disclosures for Right Issues

We are generally supportive of a proportionate disclosure regime for Rights Issues where the shareholders need less information about the issuer in which they already hold an investment in order to make their investment decision. We believe that it would be appropriate to extend the proportionate disclosure regime to other types of further issues of shares of the same class, such as Open Offers. It should however be borne in mind that situations can arise where it may not be appropriate for a reduced disclosure regime to apply to a Rights Issue, e.g. situations where there are real doubts about the future viability of the issuer and/or the transaction for which the proceeds of the rights issue is intended to be applied. In such situations, the competent authority should have the power to require a full prospectus to be prepared.

Proportional disclosure regime for SMEs and issuers with reduced market capitalisations

We believe that the appropriate prospectus disclosure requirements for SMEs should be examined outside of this consultation and as part of a wider examination of the supports, market infrastructure and regulatory framework required for SMEs in Europe. SMEs by their nature often involve higher amounts of risk for investors than larger more established companies and as a result it is difficult to determine which, if any, disclosure requirements should be omitted or diminished for SMEs. The smaller scale and less complex nature of their operations mean that the relevant prospectus disclosure requirements can often be satisfied by the provision of less detailed information. Overall, we believe that companies joining 'regulated markets' in Europe should be subject to the same disclosure requirements, irrespective of their size.

Please see the Schedule A attached for comments in relation to specific points of the consultation paper.

3. Format of the final terms to the base prospectus

3.II Format of final terms

Q1: Do you consider the list of "Additional Information" in Annex B complete? If not, please indicate what type of information could be classified as "Additional Information" and to what item they would belong to (CAT A, CAT B or CAT C, as defined in Part 3.III). Please add your justifications.

We feel that the overall approach is unnecessarily perspective. The issuer should be able to determine what information is appropriate to insert within the final terms over and above that contained within the base prospectus. It is important to ensure that final terms are not used as a

proxy in respect of information which more suitably should be contained within the base prospectus. This is the core problem which needs to be addressed.
We believe that there should be greater flexibility for the issuer to include additional items in the final terms which do not relate to the securities note but which are important for investors. The list of "Additional Information" in Annex B is not complete and there are many further items which could be added. Witness for example the variety and diversity of forms of OTC confirmation which ISDA have and this is a constantly evolving field. Our view would be that the suggested approach is unduly restrictive and it may be important to include other items depending on the nature of the securities being offered off the base prospectus.

Q2: As for the "additional provisions, not required by the relevant securities note, relating to the underlying", please provide the information which could fall under this item.

A starting point for this would be to look at all of the information and permutations which the variety of ISDA confirmations provide.

3.III Instructions in relation to the requirements of the securities notes and the building blocks

Q3: Under "CAT. B" items, is the list of details which can be filled out in the final terms complete? If not, please indicate with your justifications what elements should be added.

We feel that it is very limited to issuers to impose these categories on them and we do not agree that it is the best approach. However, if this is to happen we feel that the following items should also be CAT. B as they are items for which we believe the base prospectus may contain the general principals for but the specific details may not be known at the time of approval of the base prospectus:

- Annex V – 4.7(vi)/ Annex XIII – 4.2.2/Annex XIII 4.8(vi) - statement setting out the type of the underlying.
- Annex V – 3.1/Annex XII – 3.1/Annex XIII 3.1 - interest of natural and legal persons involved in the issue/offer
- Annex VIII – 1.1- the minimum denomination of an issue
- Annex VIII – 2.4 – where an issuer proposes to issue further securities backed by the same assets, a prominent statement to that effect and unless those further securities are fungible with or are subordinated to those classes of existing debt, a description of how the holders of that class will be informed.
- Annex VIII – 3.7 – the name, address and significant business activities of the administrator, calculation agent or equivalent, together with a summary of the administrator/calculation agents responsibilities, their relationship with the originator or the creator of the assets and a summary of the provisions relating to the termination of the appointment of the administrator/calculation agent and the appointment of an alternative administrator/calculation agent.

- Annex VIII – 3.8(a)(b) – the names and addresses and brief description of : (a) any swap counterparties and any providers of other material forms of credit/liquidity enhancement (b) the banks with which the main accounts relating to the transaction are held.
- Annex XII – 4.2.2(ii) – where the underlying is an index : a description of the index if it is composed by the issuer.

There are also many items which are categorized as CAT C where this information may indeed be known at the time of the base prospectus and in our experience is often seen in the base prospectus rather than in the final terms – for example, Annex V/ Annex XII/Annex XIII – Item 7.1, Annex XIII – Item 5.2, Annex VII – Item 2.4, Annex VIII – Item 4.1. It is not clear from the proposals if ESMA categorizes information as CAT C or indeed CAT B and this information is known at the time the base prospectus is drawn up can it be inserted at this stage instead of being included in the final terms.

3.IV Supplement to the base prospectus

Q4: Based on the instructions given in this document, could you please estimate the increase of the number of supplements to be approved in per cent?

We cannot give an estimate in relation to the increase in the number of supplements. However, we would foresee a marked increase due in the main part to the many items which are now being categorized as CAT A and will therefore have to be included in the base prospectus. This will create significant cost and timing delays for issuers and the markets.

Q5: Based on the instructions given in this document, could you estimate the increase of the relevant costs?

No comment.

3.V Combination of summary and final terms

Q6: Do you agree with the proposed mechanism of combining the summary with the final terms? If not, please provide your reasons and an alternative suggestion.

As per our general comment above to create a construct around the summary plus final terms is to provide investors with unwarranted comfort and act as a disincentive to reading the base prospectus plus final terms. This would increase the complexity of the document and provide additional risks that investors may not read the base prospectus. ESMA should take due care in this regard.

Q7: Please estimate any possible costs that this mechanism would imply for issuers.

No comment

4.II Summary

Q8: Do you agree with our modular approach?

Whilst we agree with the premise of the five sections to summaries we feel that the method of "points" disclosure is too prescriptive and would serve to usurp the function of the prospectus.

Q9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?

To suggest mandatory information for the summary serves to usurp the function of the prospectus and to provide unwarranted comfort to investors.
We feel that the long list of mandatory information will have the effect of causing issuers to include as much of the "points" as possible. At the moment, the onus is on the issuer to determine the most significant information. Now the issuer will have to decide to omit information that ESMA has determined to be mandatory unless it is not applicable. Caution would suggest that issuers will include everything that can be included, rather than deciding whether it is not applicable. This will undoubtedly have the effect of increasing the length of summaries and also goes against the wish to create a short, simple, clear and easy document for targeted investors to understand.

Q10: Do you agree that we have provided sufficient flexibility for issuers and their advisers in drafting summaries – whilst ensuring that summaries are brief and provide the reader with the necessary comparability between prospectuses?

No, we do not believe that there is sufficient flexibility in relation to summaries – please see response to Q8 and Q9 above. A lot of the analysis provided by ESMA is based on the belief that retail investors are often faced with a choice of investment decisions and the best way to help them make that decision is to have summaries that are easily compared with each other by comparing them side by side given their set format. Whilst that may happen more regularly in relation to PRIPS it would be our view that it rarely if ever happens in relation to securities for which prospectuses are produced under the PD and certainly never happens in relation to equities.

Q11a: Do you agree that our approach adequately limits the length of summaries?

No, we do not feel that this approach adequately limits the length of summaries due to the level of detail which is required in the points under the five sections. Please also see response to Q9 above.

Q11b: What is "short" for a summary for: (i) an issuer; & (ii) an investor?

No comment

Q11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?

We feel there should be some form of limit to the length of summaries – either numeric or otherwise and the summary should make it clear that it should only be read in conjunction with the prospectus.

Q12a: Do you agree with our proposed content and format for summaries?

No, we feel that the content will result in extremely long summaries and it serves to provide a level of comfort for investors which is unwarranted. Despite ESMA's contrary statement of intention, we belief that the proposed approach to summaries may encourage investors to ignore the prospectus. Please also see our general comments above.

Q12b: Are there other pieces of information which should appear in summaries? and are there disclosure requirements in our tables which are not needed for summaries?

We feel that the information in the tables is too prescriptive – please see earlier comments above.

Q13: Is there a need to augment Point B.9 with additional disclosure requirements, such as key assumptions, or to state that the forecast is reported on in the main body of the prospectus?

We believe that the summary should state that the forecast is reported on in the main body of the prospectus.

Q14: Do you agree with our proposal for amending Article 3, 3rd paragraph, Prospectus Regulation?

No, as per our above comments we feel that the proposals for summaries are far too prescriptive.

Q15: Could you estimate the change in costs that will arise from the proposals in this document for summaries?

We have no view on cost but we would expect the change in costs to be not inconsequential if the proposals outlined in the document are implemented.

5.II Proportionate disclosure regime regarding rights issues

Q16: Do you agree with the proposal to consider that "near identical rights" should have the same characteristics than pre-emption rights? Do you agree with the definition given in paragraph 117? Are there any other characteristics which should be taken into account?

If a definition of 'near identical rights' is deemed necessary, then it should be aligned as closely as possible to pre-emption rights.

As identified in our general comments, we believe that it would be appropriate to extend the proportionate disclosure regime to other types of the further issues of shares of the same class, such as Open Offers (i.e. an invitation to existing securities holders to subscribe or purchase securities in proportion to their existing holdings, which is not made by means of a renounceable letter (or other negotiable document).

Q17: Do you agree that there should be only one single proportionate regime and not two separate regimes, one for regulated markets and one for MTFs?

In our view, there should be one regime for both regulated markets and public offers.

Q18: Do you agree with the proposal to consider that appropriate disclosures requirements for MTFs would include, as a minimum, obligations to publish:

- annual financial statements and audit reports within 6 months after the end of each financial year,
- half-yearly financial statements within a limited deadline after the end of the first six months of each financial year, and
- inside information?

We agree with the minimum ongoing disclosure obligations outlined above.

Q19: What should be the maximum deadline for publishing half-yearly financial statements?

In our view, a three month deadline for publishing half-yearly financial statements, including unaudited financials, is appropriate.

Q20: For issuers listed on MTFs where there are no disclosure requirements on board practices and remuneration, do you agree that this information should be included in the prospectus?

Yes, however the remuneration details to be included in the prospectus should only be required on an individual basis if this is already a requirement in the issuer's home country.

Q21: Are there any other disclosure requirements not listed above which should be required for MTFs?

The above list would seem to capture the material ongoing requirements that should be considered when determining the appropriate prospectus disclosure requirements.

Q22: Regarding the appropriate rules on market abuse, do you agree that there should be provisions in order to prevent insider trading and market manipulation? Do you consider it necessary to require that the rules of the MTFs fully comply with the provisions of the Market Abuse Directive?

The possible expansion of the Market Abuse Directive (MAD) regime beyond regulated markets to MTFs was outlined in the Commission's recent MAD consultation paper. We believe that this important issue should be specifically considered in the context of possible changes to the Market Abuse Directive, and should not be dealt with in this consultation on Prospectus Directive matters.

Q23: Are there any other EU Directive or Regulation not listed in paragraph 122 which should be taken into account?

The list in paragraph 122 seems comprehensive.

Q24: As regards MTFs with appropriate disclosure requirements and market abuse rules, do you agree that in order to benefit from the proportionate prospectus, issuers should be required to make available their periodic and ongoing disclosures in a way that facilitates access to information by posting them on their websites?

To the extent that ongoing and periodic disclosures are not disseminated using regulatory information services, then publication on the issuer's website seems reasonable.

Q25: Do you agree with the approach proposed in order to determine which items to delete from Annexes I and III of the Prospectus Regulation?

To the extent that the information items identified in paragraphs 127 and 128 have already been made available to investors, then it is appropriate to not require them to be included in a prospectus.

Q26: Do you agree with the proposed items which could be deleted from Annex I (Minimum Disclosure Requirements for the Share Registration Document) and Annex III (Minimum Disclosure Requirements for the Share Securities Note) of the Prospectus Regulation?

Yes, the proposed items for deletion seem appropriate.

Q27: Do you consider that the language regime could be a concern in terms of investor protection in case of passporting? Do you consider that the proportionate disclosure regime

should be conditional upon compliance with the language requirements of Article 19 of the Prospectus Directive?

No comment.

Q28: In case of issuers listed on regulated markets, do you consider that disclosures on remunerations required by item 15 of Annex I of the Prospectus Regulation are redundant with information already made available to shareholders and the public in general and could therefore be deleted from the proportionate prospectus for rights issues?

Yes, as this information is made available in the annual financial statements of issuers with securities admitted to trading on a regulated market.

Q29: Considering the objective to enhance investor protection, do you agree that information regarding the issuer's activities and markets and historical financial information cannot be omitted?

On the basis that issuers are meeting their periodic and on-going disclosure requirements under the Transparency and Market Abuse Directives, it could be argued that there is a basis for not requiring information on the issuer's activities and markets and historical financial information to be included in the reduced disclosure prospectus. However, the new proposed wording for a 'brief description' seems to be a reasonable compromise.

Q30: Do you consider that, in order to reduce administrative burden, incorporation by reference could be a solution? Do you have any suggestions to improve the incorporation mechanism?

Yes, if the documents have been filed with the home competent authority, then they could be incorporated by reference. To improve the incorporation mechanism, issuers could be permitted to file other information with the home competent authority, i.e. information beyond that covered by the Prospectus Directive and Transparency Directive.

Q31: Do you agree with the proposals to require basic and updated information regarding the issuer's principal activities and markets?

Yes, please see the response to Q29.

Q32: Do you agree with the proposal to require only the issuer's historical financial information relating to the last financial year?

Yes, please see the response to Q29.

Q33: Do you agree with the proposal to redraft certain items of Annex I and III of the Prospectus Regulation as proposed in paragraphs 132 to 134? Are there any other items which should be redrafted?

We agree with the proposal as set out in paragraphs 132 to 134.

Q34: Do you agree with the proposal to include a statement in the proportionate prospectus drawing attention to the specific regime and level of disclosure applicable to rights issues?

Yes, it is appropriate that this is specifically brought to the attention of investors given the reduced level of disclosure.

Q35: Do you agree with the schedule for rights issues presented in Annex 2 of this consultation paper?

We have no comments on the schedule for rights issues, other than this could also be applied to open offers.

Q36: What are the costs for drawing up a full prospectus? What are the most burdensome disclosure requirements? Can you provide any data? Can you assess the costs that the proposed proportionate prospectus will allow issuers to save?

The risk factors and the operating and financial review (OFR) tend to be quite burdensome sections for issuers when preparing a prospectus. The removal of the OFR requirement in particular for rights issue prospectuses is likely to contribute to a reduction in administration effort for issuers.

5.III Proportionate disclosure regime regarding SMEs and issuers with reduced capitalisation

Please see our general comments regarding SMEs above.

5.IV Proportionate disclosure regime regarding credit institutions and other issues

Q46: Do you agree with the proposal to require historical financial information covering only the last financial year for credit institutions issuing securities referred to in Article 1(2)(j) of the Prospectus Directive?

Yes, we agree with this proposal.

Q47: “In performing its work on the proportionate disclosure regime, ESMA has sought to identify all possible omissions with regards to content of prospectuses as part of this Consultation

Paper, however do you believe that further omissions are possible particularly with respect to the areas indicated in the request for advice by the Commission?"

Apart from the proportionate disclosure regime for SME's which we have commented on in our general comments, the omissions outlined for a proportionate disclosure regime for rights issues and credit institutions appear satisfactory

SCHEDULE A

- We agree with the concept of the final terms containing an introductory text as discussed in point 36 and we would welcome this.

- In relation to point 41 on the form of presentation of final terms we believe that legal enforceability should not be a function of signature. Reference to signature should be replaced with comment as follows – “final terms should be issued by way of a document which is legally enforceable”.

- With regard to point 49 we would suggest that to have competent authorities try and review formulas etc. is not advisable. Competent authorities would not have the necessary expertise and would be unlikely to be able to acquire such expertise. To have such matters reviewed by a competent authority would render the whole process highly inefficient.

- In relation to the comments on derivative securities and warrants (point 51-54 and point 60), due cognisance should be taken of the ISDA format applied to transaction confirmations which by and large are carried forward into issuance of derivative securities by way of final terms. The standards here should leverage off market practice as determined by ISDA within the derivative markets.

- Regarding the comments on asset backed securities (point 55-60); we feel that for the most part given the non generic nature of ABS transactions they should be documented by way of a prospectus and not by final terms. Only in very limited circumstances should ABS be issued by way of final terms. There needs to be more and clearer thought on this point.

- Point 63 refers to the fact that ESMA is aware that a situation may occur where issuers need to prepare a supplement for information that relates only to a specific issue but not to the content of the base prospectus. We feel this is an area that needs more clarity as certain competent authorities may take the view that it is not possible to supplement a base prospectus for specific issuances and that the spirit of Article 16 is that supplements to a base prospectus should relate to the entire document and not any specific issuances.