ABI Associazione Bancaria Italiana

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

15 July 2011

General remarks

The Italian Banking Association (ABI) is grateful for having been given the opportunity to participate in the consultation on the ESMA's technical advice on possible delegated acts concerning the Prospectus Directive no. 2003/71/EC ("Prospectus Directive"), as amended by Directive no. 2010/73/EU ("Amending Directive").

ABI has a strong interest in the outcome of this consultation because of the importance of the base prospectus rules for the market participants represented by ABI, and because ABI feels it paramount to achieving a harmonized approach at pan-European level with respect to the content of final terms.

Having said that, ABI would like to express its concern for certain proposals (e.g. the mechanism of combining the summary with the final terms) and changes to the existing practices (such as the prohibited description of proprietary indices) which are likely to prejudice flexibility and cost-effectiveness, as better described below.

We also believe that the consequences that more burdensome requirements for issuers, in terms of offer documentation, will have on the range of products and payouts offered to investors are a matter for concern. The likely outcome of the new provisions proposed by the ESMA, in fact, is that issuers will issue fewer products and use a more restricted range of payouts. From the investors' perspective this means less choice of products/payouts and therefore less protection/benefits.

We would also like to point out that the short consultation period causes difficulties for ABI members in accurately analysing the proposal. Given the importance of these implementing measures for issuers and intermediaries, we believe a longer consultation period would have been preferable.

In the following section, we address our considerations regarding a number of specific questions put forward by the ESMA, respecting the order of questions as they appear in the consultation paper.

Specific remarks on the ESMA's questions

Part. 3.II – Format of final terms

We believe that in the case of debt securities offered to wholesale investors - for which a prospectus is approved by a competent authority for admission to trading – the "CAT A" information to be provided should be less onerous than "CAT A" information for offers to retail investors. In fact, wholesale

investors need less detailed information than retail investors (this is the case for a prospectus containing the information required in Annexes IX and XIII of the Prospectus Regulation 809/2004/EC).

This approach would reduce the number of supplements to be prepared for wholesale securities, with the following advantages:

1) reduction of the time necessary to obtain approval from the competent authority;

2) more market opportunities for issuers and investors;

3) issuers will produce supplements relating to significant information considered material to relevant investors only. Investors to whom wholesale securities are offered are presumed to have a higher level of expertise and a deeper knowledge of the market than retail investors. For instance, such investors can be immediately informed of the issuer rating and its changes through the usual sources (i.e. the info providers) and do not need to be given such information in the base prospectus or a supplement; they are more likely to be concerned about the information relating to the securities they subscribe.

Considering the above, we suggest the following information should not be included in the base prospectus relating to wholesale securities:

1) the pricing method and the process for disclosure (investors in the wholesale market already know the pricing method);

2) credit ratings assigned to the issuer.

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.

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

From a general point of view, we would like clarification of the scope and application of the three different categories (CATs A, B and C) with respect to the additional information proposed in Annex B. A categorisation of information under CAT A, B, and C seems to frustrate the substantive decision criteria set out in the Prospectus Directive.

Moreover, it seems incoherent to classify a "CAT A" as additional information in the final terms, due to the fact that CAT A refers to information to be included in the base prospectus only.

On the contrary, we suggest considering the above information as "CAT B", in order to allow issuers to include all the general principles of such items in the base prospectus and merely placeholders for details not known at the time of approval of the relevant prospectus.

We therefore suggest clarifying the definition of the three categories in general terms and also with respect to the additional information in Annex B.

This issue is highly important due to the fact that the following specific items contained in the list of additional information labelled as "CAT A":

- name of the offeror;

- country(ies) where the offer(s) to the public take(s) place;

- country(ies) where admission to trading on regulated market(s) is being sought

are often provided only in the final terms, in accordance with best practices adopted at European level.

On this point, we disagree with inclusion of:

a) the names of the issuer and offeror, since they are usually already determined by the time of each issue and are stated in the final terms;

b) the country(ies) where the offer to the public takes place and the country(ies) where application has been made for admission to trading, since this information could not be known at the time the prospectus was approved by the authority: in fact, in the case of cross-border offers, any "passporting" decision on the prospectus could take place at any time after the prospectus' approval, depending on the market conditions at the time of issue.

Thus, taking into account the classification categories described in the consultation paper, we believe that the above-mentioned information should be labelled at least as "CAT B", or even better as "CAT C" (i.e. the category of information which is unknown at the time of approval of the base prospectus and which is therefore only given a placeholder in the prospectus pending completion in the final terms).

Among "additional information" in "CAT C", we propose to include information regarding the tax position of investors, especially in view of the

different regimes adopted by Member States for particular financial instruments.

On the other hand, we propose that the following information, for which inclusion is already required in Italian documents, could also be added to the Additional Information list:

- Publication of notices to investors (CAT A);

- Selling restrictions (CAT C).

Regarding the specific item "additional provisions, not required by the relevant securities note, relating to the underlying", ABI believes that the final terms should not be excessively detailed, in order to avoid issuers having to face burdensome regulation that could create difficulties for their own funding activity.

Lastly, in order to limit the length of the final terms, it could be envisaged that the final terms provide only the risk factors - already given in the base prospectus - considered relevant to that individual issue (e.g., instruments with negative spread at issuance).

Part. 3.III – Instructions in relation to the requirements of the securities notes and the building block(s)

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.

ABI believes that including any type of algebraic payout formulas in the base prospectus (see point 49 of the consultation document) could create difficulties for issuers if, for an individual issue, a change of such formulas is needed under the base prospectus because of market demands. In fact, in this case the issuer is expected to produce a new supplement/prospectus for approval by the competent authority.

Simple variations to the product described in the base prospectus, as a result of markets demands not expected at the time the base prospectus was drafted, should be allowed provided they do not change the key features of the security to the extent that, in effect, it would become a different product.

In this regard, when the ESMA called for evidence, ABI proposed to expressly state that the "payout" of the security offered should only be shown in the final terms and not in the securities note to the prospectus.

Moreover, we would like to point out that most of the information categorized as CAT C (in particular the manner in which the securities are offered) is already known when the base prospectus is approved.

In addition, item 5.2.1(i) (Annex A, Schedule V) has been identified as CAT A information. Considering that:

> i) this item should provide information relating to the category of potential target investors (retail investors, qualified investors, etc.) and;
>
> ii) this kind of information is to be disclosed in the relevant final terms

we believe it should be categorized as CAT B.

With reference to paragraph 53 of the consultation paper, we ask for clarification on the meaning of "index composed by the issuer". If this provision aims to limit the use of indices sponsored by the issuer, it would create unjustified discrimination against the issuer, also because third party indices may be equally complex and it would likely not achieve its goal due to the fact that such a rule could easily be bypassed.

Lastly, we believe that inclusion of the ""index composed by the issuer" in the Base Prospectus would not be useful for investors, and that such information should be included in the Final Terms.

Part 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 believe that the rigid instructions in the consultation paper could lead to a strong increase in the number of supplements to be approved by the competent supervisory authorities, taking into account that – during the validity period of the base prospectus - issuers could decide to issue instruments with payouts not described in the base prospectus itself, as a result of changes in the market scenarios.

Moreover, issuers could achieve this goal by producing a stand-alone prospectus for the specific new instrument or payout. Thus, the situation described above could also increase the number of prospectuses and the costs for the issuers themselves, with general negative effects on the issuance process.

However, at this stage we are not in a position to provide an estimate.

Regarding this topic, we also ask for clarification about the scope of application of the withdrawal right with respect to other public offers (not affected by modifications to payout formulas) opened on publication of a new supplement.

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

We believe that the instructions given in the consultation paper could significantly increase the relevant cost for issuers and supervisory authorities, though at this stage it is difficult to assess the real impact.

Part 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.

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

Paragraph 65 of the consultation paper states that, in order to ensure comparability between summaries, a summary of each individual issue should also be drawn up, fully completed and annexed to the relevant final terms.

Even if, in the light of Recital 17 of the Amending Directive, the summary is to be combined with relevant parts of the final terms, we consider the proposal of requiring a summary for each individual issue under the same base prospectus to be a critical point.

In particular, it will lead to duplication of the information and documents provided to investors for the same issue, considerably increasing costs for the issuers that would not be balanced by a return in terms of investors' comprehension of the product characteristics.

Moreover, we would like to point out that some of this information is already included in the set of information on financial instruments that investment firms are expected to provide to investors as part of investment services (where the approved services include placing financial instruments) in accordance with the MiFID Directives (see second indent of article 19(3) of Directive no. 2004/39/EC and article 31 of Commission Directive 2007/73/EC). We believe that providing too much information is not the right way to give investors the opportunity to make an informed decision.

Thus, ABI does not agree with the proposal that a specific summary for each individual issue under a single base prospectus should be combined with the relevant final terms.

As an alternative we suggest that the summary relating to each issue in a programme should be considered a combination of: a) the final terms and b) key information not included in the Final Terms but already contained in the base prospectus.

Regarding the proposal of combining the summary document with the final terms, please note that we strongly disagree with this mechanism for the following reasons:

1) the ESMA proposal is focused on highlights of the security and the offer which are summarised in a separate document from the base prospectus, thereby decreasing its disclosure value. As a result, investors might be discouraged from reading the base prospectus;

2) under the ESMA proposal issuers have no discretion in selecting the information to be included in the summary. Therefore issuers will be more concerned about their ability to comply with the obligation of ensuring that the summary is not misleading if read in conjunction with the prospectus. As a result, however, there could be frequent inconsistencies between the base prospectus disclosure and that of the summary in the final terms;

3) there will be a great deal of duplicate information and it is unclear how the summary will be articulated in relation to other parts of the Final Terms, in particular the "Risk Factors" section and that regarding "Performance of underlying/Formula/Other variables/Explanation of the Effect on the value of the Investment and associated Risks and other information concerning the Underlying";

4) under the ESMA proposal issuers must not merely repeat information already contained in the base prospectus, but are instead expected to paraphrase that information. As a result issuers are required to expend considerable effort in stating something in any case already disclosed in the base prospectus, and are potentially exposed to an inconsistency risk regarding duplication of the same information in two different documents and related compliance/legal liability. Moreover, we believe that repeating the same information disclosed in the Base Prospectus, but in a different manner, in a Summary to be appended to the Final Terms could confuse investors;

5) the request for additional documents (such as a summary for each single issue) will create a more cumbersome process and lengthen the time needed to produce the required documents for each single

offer, even in cases where prior authorisation from the competent authority is not necessary;

6) combination of the Summary and Final Terms will trigger additional costs as the Summary will need to be translated in the countries where the offer is launched.

Parts 4.II (Discussion), 4.III (General principles), 4.IV (Final terms and summaries), 4.V (Format and content of summaries),

Q8: Do you agree with our modular approach? *Q9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?* *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?* *Q11a: Do you agree that our approach adequately limits the length of summaries?* *Q11b: What is "short" for a summary for: (i) an issuer; & (ii) an investor?* *Q11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?*

From a general point of view, we see the modular approach for the contents of a prospectus summary as positive.

Nevertheless we have noticed that the mandatory key information included in the five sections is almost the same as that included in individual items of the annexes. Therefore the risk for issuers is the obligation to produce a document that substantially replicates information included in the summary to the base prospectus and in the final terms.

For the reasons mentioned above: i) issuers seem to have no discretion in selecting information to be included in the summary, ii) given the quantity of information to be included in the summary, such a document could not be considered "short". As a matter of fact it would be difficult to reach the goal stated in the Mandate to "facilitate comparability among summaries of similar products". Therefore, the content of the summary should be aligned with the outcome of relevant work on the PRIPs KIID.

Regarding the length of the summary note that, in theory and from the issuer point of view, the length should depend on the comprehensiveness of

the base prospectus. From an investor perspective, "short" could have different meanings for retail investors or wholesale investors.

In our opinion, a short summary should give a brief overview of the contents of the Base Prospectus and Final Terms without duplicating the information already disclosed in either of these documents.

We see a real risk of summaries being too long and the competent authorities adopting different approaches.

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

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?

As stated above, we believe that the proposal of a summary for each issue under a single base prospectus (to be combined with the final terms) conflicts with the concept of a short summary, even considering the extent of the schedule presented in part 4.V of the consultation document.

We are instead in favour of the proposal of a short summary containing only the key information that investors need.

We would also like to comment on paragraph 99 of the consultation paper. It states that "*A summary should be a fresh assessment by the issuer of the key information in the prospectus. It should not simply be a copy-out of text that appears in the main body of the prospectus*".

In this regard, we would be grateful if the ESMA could clarify what it is meant by "*fresh assessment*". If at the time of drafting a summary certain information contained in the relevant base prospectus proves to be no updated we ask the ESMA whether the issuer would be allowed to update such information in the summaries. or it has to replicate the same information contained in the base prospectus.

Having said that, though we are more in favour of a short summary, we should emphasise that issuers could face difficulties in the attempt to summarize significant information, such as balance sheets, without losing a certain degree of completeness and comprehensibility of that information when summarized.

As a consequence, issuers need to carefully assess any re-elaboration of information already included in the base prospectus in order to avoid misleading information being provided to investors.

This approach could increase the responsibility of issuers, also considering the length of the summary suggested by the ESMA. Therefore we strongly suggest that only an abstract of information taken from the base prospectus (rather than a complete re-elaboration) should be included in the summary, referring only to information on the specific instrument and not to the issuer, whose relevant information is already disclosed in the registration document and, if need be, could be recalled by the incorporation by reference mechanism (e.g., profit forecasts should not be included in the summary).

With reference to the content of the schedule presented in Part 4.V of the consultation paper, we believe that no additional information should be included in the summary.

Furthermore, as far as item B.7 (to which item B.12 refers) is concerned, interim financial information should be included in the summary only if such information is contained in the base prospectus. Pursuant to paragraph 11.5 Annex XI of Regulation 809/EC, interim financial information is to be included in the base prospectus only in the following circumstances:

- where the issuer published such financial information before approval of the base prospectus; or

- where the base prospectus is dated more than 9 months after the year-end financial results.

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 disagree with the proposal to include profit forecasts in the Summary since this additional disclosure adds no value in terms of investor protection.

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

We ask for a clarification of the proposal for amending Article 3, 3rd paragraph of the Prospectus Regulation. In particular, we ask ESMA whether the proposal aims to grant the supervisory authority powers to request integration of the information provided in such summaries (as described in the consultation paper).

In this case we disagree with the amending proposal, due to the fact that such an amendment could lead to additional costs and could be time-consuming for issuers.

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

As partially stated previously (see Q4), even if it is difficult to readily estimate the change in costs, we believe that the issuance process will be significantly longer due to the fact that not all possible products can be described at the time the base prospectus is drafted.

This situation will likely involve a substantial increase in direct and indirect costs (including legal fees and translation fees) and in the time required for approval of a large number of prospectuses (that also require constant updating).

Part 5.II – Proportionate disclosure regime regarding rights issues

From a general point of view, ABI believes that, in the near future, the obligation of a prospectus in the case of rights issues by listed companies could be removed, taking into account the extensive amount of information already disclosed to investors by the aforementioned companies.

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?

Though there could be several difficulties in considering "near identical rights" as having the same characteristics as pre-emption rights, we agree with the position stated in the consultation paper.

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?

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 position stated in the consultation paper. Nevertheless, we would like to point out that in the final version of the document the disclosure regime should relate more clearly only to the issuers of listed shares and not to the issuers of bonds admitted to trading on MTFs.

This is extremely important because in certain Member States (for example, Italy) the competent financial regulator has laid down that credit institutions should trade own-issue bonds at least on MTFs in order to guarantee their liquidity for investors. If the ESMA proposal were to be extended to bonds, it could discourage the trading of bonds on MTFs and compromise the above-mentioned guarantee.

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

According to the Italian Consolidated Law on Finance (Legislative Decree No. 58 of 24 February 1998, Article 154-ter on Financial reporting), a half-yearly financial report has to be published by listed issuers declaring Italy as their home member state "within sixty days of the end of the first half-year".

ABI believes that, provided it is compatible with local requirements applicable to non-Italian issuers, this deadline could be introduced at European level.

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?

We agree with the position stated in the consultation paper.

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, we agree with the proposed deletion of items from Annex I and Annex III of the Prospectus Regulation.

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

We agree with this proposal, even if we believe that existing shareholders should already be aware of the issuer's activities, markets and historical financial information.

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?

We believe the mechanism of incorporation by reference could be a good solution to reducing the administrative burden.

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

See point 29.

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

See point 29.

Q33: Do you agree with the proposal to redraft certain items of Annexes 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 ESMA proposal on this point.

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

We agree with the schedule for rights issues presented in Annex 2.

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

Q37: Do you agree that a full prospectus should always be required for an IPO and for initial admission to a regulated market (as described in paragraph 141 above)?

Q38: Do you agree with the proposal summarized in the table in paragraph 141?

We agree with the proposals of paragraph 141.

Q39: Do you agree that there should be only one schedule for a proportionate prospectus for both unlisted and listed SMEs and Small Caps or do you believe that further consideration should be given to having a separate regime for unlisted companies, dealt with under the proposed revision to MiFID?

We believe that a separate regime for unlisted companies should be provided due to the fact that listed SMEs are already obliged to disclose a large quantity of information to investors.

Q41: Do you consider that the three items identified in paragraph 147 (the OFR and the requirements to include a statement of changes in equity and a cash flow statement when the audited financial statements are prepared according to national accounting standards and to produce interim financial statements when the registration document is dated more than nine months after the end of the last audited financial year) could be omitted without lowering investor protection?

No, we believe that omission of the three items of paragraph 147 could negatively affect the degree of investor protection.

Q42: Do you agree with the items ESMA proposes to delete and to redraft listed in Annex 4 and the proportionate schedule for the share registration document presented in Annex 5?

We agree with the proposal.

Q44: Taking into account the items which ESMA proposes to delete or redraft as per Annex 4, do you consider the proportionate disclosure regime for SMEs/Small Caps could strike the right balance between investor protection, the amount of information already disclosed to the markets and the size of the issuers?

We agree with the proposal stated in the ESMA consultation paper.

Q45: Given the number and nature of the items ESMA proposes to delete and to redraft listed in Annex 4, do you consider the proposal would suppose a significant reduction of the costs to access financial markets for SMEs and Small Caps? Can you estimate the costs that the proposed proportionate prospectus will allow SMEs and Small Caps to save?

We believe that the ESMA proposal would not imply a significant reduction in costs for SMEs and Small Caps, even if at this stage it would be difficult to provide an accurate cost estimate.