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

Dear Madam or Sir:

We appreciate the opportunity to provide input to the referenced consultation paper. Our association represents most foreign banks and various foreign asset-managers and financial service providers in Germany who operate either as subsidiary, EU or Third Country branch. Amongst them are the largest European certificate issuers as well as significant issuers from Australia, Asia and the USA. Hence, the addressed issues are highly important particularly for our members who either issue certificates in the German and the European market or advise corporate clients at issuing equity or debt.

Generally speaking, we welcome ESMA's approach to improving the current prospectus regime with regard to clarity, comparability and also legal certainty for issuers. As an industry representative in Europe's largest market for certificates, we hope for standards guaranteeing that the efficiency of the combination of base prospectus and final terms will be maintained, since it is beneficial for both investors and issuers. However, we acknowledge ESMA's goal to enhance the value of the base prospectus in the light of the fact that only the prospectus but not the final terms require supervisory approval.

With regard to the purpose of information we would like to emphasise that it is one of the major aspects of the current PRIPs discussions that retail investors in particular shall be provided with a – to a large degree – standardised and short information sheet as the primary source of information on the respective products. This is because the European

Commission, too, has come to the conclusion that prospectuses – due to their size – are rarely used as a source of information by retail investors. Even though the discussions are still in progress, we expect this aspect to remain a dominant factor. Besides, on 1 July 2011 Germany for example already introduced a similar requirement to provide a two or three page information sheet. In summary, it is necessary to keep in mind that especially retail investors are already or will in the near future be provided with concise and standardised product information, based on other laws. Bearing this in mind, future prospectus legislation should maintain sufficient flexibility for issuers.

Finally, we would like to highlight that, in our opinion, the purpose of the Prospectus Directive is *not* product regulation. This will however be the result if the prospectus requirements will on level 2 be designed in a way that the issuing of certain products will not or only with considerable impediments be possible in the future. For such product regulation, the Prospectus Directive does not provide sufficient substance.

We hope that our remarks and statements are helpful to ESMA when finalising the technical advice.

Yours sincerely,

Dr Oliver Wagner Dr Martin Schulte

Position Paper

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

Format of the final terms to the base prospectus (Article 5(5))

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 consider the list **complete**, since it stipulates minimum requirements: Providing any further information should be left to the discretion of the issuer. If, however, further information was required under this section, it should be part of CAT C, since Annex B does already list what is essential here. Any further information, as for example on specific tax mechanisms of a certain jurisdiction that would not fit into the general description of the tax situation, would overload the base prospectus, due to the potential multitude of provisions and complexity of tax law.*

*An important issue which we like to highlight is that the proposed CAT system seems to exclude the possibility to include the (consolidated) **terms and conditions** for acquiring the respective security in the final terms (see No. 30, p. 10; "conditions to which the offer is subject" is however a CAT C item, see p. 95, which seems to indicate that such information can indeed be part of the final terms). Such option should by all means be maintained: It is not only beneficial that the investor is provided with a comprehensive document that contains all the key information of the issue but also that the issuer can fulfil the **obligation** to appropriately provide access to the terms and conditions as stipulated in the respective general rules under Civil law. Eventually, such practice is an established market standard in various jurisdictions in the EU.*

Future legislation should thus allow replicating information from the base prospectus with regard to consolidated terms and conditions, in particular for the benefit of retail investors.

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.

The list of details to be specified in the final terms regarding CAT B seems to be complete, considering the coherence of the CAT system as introduced in the consultation paper.

- *However, what is classified as CAT A, B or C item should be scrutinised with due care. Generally speaking, the more information is classified as CAT A or B, the more details of the different options must be explained in the base prospectus, which will make the document less accessible or comprehensible to investors. Taking that into account, it seems essential that some of the classifications in Annex A and B are* ***reconsidered****. Please see our suggestions in the attachment.*

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?

As a general rule, the supplement should maintain its original function to add information that became relevant due to unexpected circumstances. This is why we consider it necessary to level out carefully which type of information should be a compulsory element of the base prospectus in order to ***prevent*** *the supplement from becoming a regularly used tool to add information that can only be determined at the time of the issue.*

- *If some of the current CAT A items were shifted to* ***CAT C****, the number of supplements would most likely not increase substantially. If not, a large amount of information that is currently part of the final terms – probably in* ***up to 15*** *per cent of the issues – might be shifted to the supplement.*

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

We expect an increase of costs first of all because the new rules will require setting up more or detailed base prospectuses to a substantial degree, which includes legal and administrative expenses. Moreover, with regard to the proposed summary requirements, costs for translation will be incurred.

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.

*We **welcome** ESMA's approach of an issue-specific summary, which includes the use of placeholders and options. The concept of replicating only those options from the base prospectus, which are relevant to the specific issue and are thus also referred to in the final terms, is beneficial for both issuers and investors.*

- *For this system to be efficient it is however necessary to reconsider the categorisation of information, otherwise the benefits from an issue-specific summary, as outlined on p. 20/21 of the CP, will not be realised due to too **static** requirements regarding the mandatory content of the base prospectus (CAT A) which will potentially overload the summary.*

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

An increase of costs will particularly be triggered by supplementary translation requirements with regard to the final terms and the annexed summary. Usual prices for qualified legal translations start from € 100 per page.

Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5))

Q8: Do you agree with our modular approach?

The positive aspect of the modular approach is that it provides for a uniform and easily comparable format. It seems however rather difficult in practice to follow the modular approach and, at the same time, to take the principle stipulated in No. 101 into account, according to which the summary should be written in the style of a letter from the management.

- *The requirement not to copy text from the main body of the prospectus doesn't seem necessary and appears to be too **strict** in this respect, as long as it is ensured that the readability will not suffer from too extensive copying. Especially if the issue-specific summary was to replicate the order of the summary of the base prospectus – a solution which we do not support – it seems difficult not to copy the base prospectus summary to a substantial degree.*

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

Not every aspect in the five sections is necessarily "key information" that would need to be labelled "mandatory". This does sometimes follow from the wording of the instructions in each section but there is still a certain degree of ***uncertainty*** *about what needs to be implied by all means and what is clearly depending on the specific issue (and could thus be omitted according to No. 4 of the guide to using the tables on p. 34).*

- *Since the issuer shall take a "fresh approach" when drafting the summary, it must be left to its* ***discretion*** *what forms a meaningful part of the summary. Future legislation should thus make clear that the issuer may decide to a certain degree or from a certain range which of the elements from the five sections should be included in the summary.*

Since there is no doubt about the legal objectives of the summary that must be achieved, the respective discretion will ***not*** *affect the investor's interests but rather make sure that the issue-specific summary is a useful complement to the final terms.*

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?

It is essential that applying the modular approach does not ***inflate*** *the summary and – to provide sufficient flexibility – it must be perfectly clear that only those aspects in the modules will apply which are relevant to the respective issue of securities.*

- *Hence, the issuer must be explicitly provided with the necessary* ***discretion*** *to apply only those modules that are compatible with the specific character of the securities and the issuer. Such discretion must extend to the* ***order*** *of the points in the modules in order to guarantee that A) the peculiarities of the issue can be reflected adequately and B) the user-friendly style, as proposed in No. 101, can be maintained. We are aware that in many cases, the most efficient way to draft the issue-specific summary will be to replicate the order of the relevant aspects from the summary from the base prospectus. This may in some cases however not be the most favourable solution. Future legislation should thus* ***allow*** *changing the order if that is required in order to enhance readability and does better reflect the issue-specific aspects.*

The UCITS KIID as role model for the issue-specific summary

We would like to draw ESMA's attention to the possibility of applying similar principles to the issue-specific summary as were developed for the UCITS KIID, which is in essence a summary of the fund prospectus with the objective to highlight the risk attached to the investment. The benefit of such approach is that this would contribute to more ***comparability*** *in the market. Besides, the principles of the UCITS KIID seem appropriate especially with regard to the fact that there is no pre-given order of information and that the aim is to provide general rather than very detailed information. This perfectly fits to the basic principle in No. 101. Besides, this could also enhance conformity with regard to the PRIPS KIID, as discussed in No. 86.*

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

We particularly welcome that the summary is not limited by a certain number of words, since that would cause difficulties in practice. For an adequate limit of the length of summaries it is essential that – as outlined above – issuers are provided with the necessary flexibility in terms of what is chosen from the five sections and in which order the information shall be presented. Generally speaking and with special regard to the issue-specific summary, the more formalities must be considered, the harder it is for the issuer to draft a concise summary that is investor-friendly and to the point.

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

We don't think that the issuers' and the investors' point of view substantially differ in that respect. Strictly following the five sections will make at least the issue-specific summary most likely too long for both parties.

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

Considering the strict formalities as outlined in the five sections, such limit would be inappropriate.

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

The prohibition to provide information outside the five sections appears to be too strict. Besides, it should be carefully considered, whether the same ***formal*** *standards for the summary must apply regarding the base prospectus and also the final terms. As we have argued above, in the latter case there are constellations where a similar formal regime*

would not be beneficial. Nevertheless, this doesn't mean that the content of the issue-specific summary should be arbitrary. As long as the rules state with sufficient precision what must be contained materially, there is no danger of disadvantages for the investor. It seems thus appropriate if the strict formal comparability was limited to the summary of the base prospectus.

Example:

It is not enhancing clarity to require a strict order with regard to the description of debt and derivative securities where the relation between the value of the investment and the value of the underlying (C. 16) is closely connected to the rights attached to the securities (C. 5). Moreover, information on interest rates (C. 10) and on the underlying (C. 21) may also well be described together to enhance coherence.

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?

- *The "competitive position" of the issuer (B. 15) is not always meaningful information and sometimes difficult to assess. Outlining the underlying parameters, i.e. "the basis for any statements in the registration document made by the issuer regarding its competitive position" seems sufficient.*

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

Producing issue-specific summaries will require additional qualified staff and perhaps external legal advice. Besides, translation requirements will increase costs, too, probably by a couple of hundred Euros per issue.

Attachment

CAT classifications that should be reconsidered

I) Risk factors and market or settlement disruptions that affect the underlying

- *Risk factors (p. 88) and market or settlement disruptions that affect the underlying (p. 89) should not be subject to CAT A or B but to **CAT C** because both types of information are not or not sufficiently "known at the time of drawing up the prospectus" according to Recital 17 of the PD.*

*The specific types of risk that an underlying might be exposed to can **hardly** be anticipated at the time the base prospectus is drafted. Consequently, the base prospectus would have to list nearly anything that can happen when investing in certain types of assets. Such lengthy descriptions of all potential risk factors would hardly produce extra value for investors. Risk factors are only meaningful if the specific market environment of the underlying is analysed. For example, if raw materials or shares from emerging markets were a potential underlying for a structured security, under CAT A, anything that could happen in South America, Africa or maybe even China would need to be described in the base prospectus, although the risks significantly differ in nature, depending on the market of the underlying. More difficulties arise from the fact that there are different definitions of what is to be considered as an emerging market. For the investor, however, it might make a crucial difference whether s/he is exposed to political risks or the danger of natural disasters. Listing all these risks in detail would dilute the description of the risks that are specifically relevant. Consequently, the risk that is particularly important to the security should be explained in the final terms because only at the time when they are drafted – and the relevant underlying is determined – , the issuer will be able to provide the information that is really relevant for the investor. However, if the base prospectus contained general information and an **explicit hint** that the relevant underlying could quickly lose value due to political or environmental developments, the crucial information is provided. The final terms will then state in greater detail the nature of – following the example – political or environmental risk.*

II) Time limit on the validity of claims to interest and repayment of principal

- *The time limit on the validity of claims to interest and repayment of principal (p. 98) should not be subject to CAT A but to **CAT B**. These figures are usually fixed at the time of the issue and seem a typical match for CAT B which allows specifications regarding **time periods** in the final terms.*

III) Adjustment rules with relation to events concerning the underlying

- *The adjustment rules with relation to events concerning the underlying (p. 89) should be shifted from CAT B to **CAT C** because, from a technical point of view, the element does not seem to fit into CAT B. Such events relevant to the underlying and thus the respective adjustment rules can occur in many different ways which cannot simply be specified by means of the CAT B system.*

IV) Representation of debt security holders including an identification of the organisation representing the investors and provisions applying to such representation. Indication of where the public may have access to the contracts relating to these forms of representation.

- *Item 4.10 (p. 90) should be shifted from CAT A to **CAT C**. There seems to be no reason to require that such information is conclusively described in the base prospectus. The situation is comparable to the nomination of the calculation agent (4.7) which is rightfully subject to CAT C. The determination of for example bondholder trustees is typical information that is specified at the time of the issue.*

V) 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:

- **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**

- *Item 4.14 (p. 90) should be shifted from CAT A to **CAT C**, because in many cases, such information can typically be obtained only at the time of the relevant issue, especially where the issuer decides in consideration of the market conditions at the time of the issue where to seek admission to trading. Leaving such information in CAT A, a supplement would often be necessary, which is not a favourable solution.*

VI) The various categories of potential investors to which the securities are offered

- *Item 5.2.1 (p. 91) should be shifted from CAT A to **CAT C**, since describing all potential categories upfront does not seem necessary in terms of investor protection. If the security was designed for a specific group of investors, this will most likely be determined at the time the final terms are drafted.*

VII) The method of determining the price and the process for its disclosure

- *Item 5.3.1 (ii) (p. 91) should be shifted from CAT B to **CAT C**. In this case, too, the item doesn't seem to fit into CAT B because a method cannot be specified according to the CAT B system. CAT A however seems inappropriate because price determination often depends on quickly changing market conditions which can only be assessed at the time of the issue.*

VIII) A description of the Index if it is composed by the issuer

- *Item 4.2.2 (ii), first bullet point (p. 95) should be shifted from CAT B to **CAT C** because indices should be treated alike, irrespective of whether they are composed by the issuer or a third party. This is necessary to avoid that changes to an issuer-composed index, which are likely to be made do to market developments will need to be explained in the supplement. For the investor it doesn't make a difference whether the index is composed by the issuer or a third party.*