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BY ELECTRONIC MAIL

Brussels, 25 February 2011

Dear Mr Tavares,

Response to ESMA's Request for technical advice on possible delegated acts concerning the Prospectus Directive (as amended by the Directive 2010/73/EU – Call for Evidence – (Ref: ESMA/2011/35)

Please find enclosed the formal response of the European Structured Investment Products Association (eusipa) to the Call for evidence on the request for technical advice on possible delegated acts concerning the Prospectus Directive (2003/71/EC) as amended by the Directive 2010/73/EU published on the 25 January 2011.

We remain at your disposal to provide additional material on these issues and look forward to discussing these matters further in the near future.

Yours sincerely

Dr. Nikolaus Dominik Neundörfer
Chair of the eusipa Legal Committee

A. Introduction

The EUROPEAN STRUCTURED INVESTMENT PRODUCTS ASSOCIATION (eusipa) is the voice of the structured investment products industry in Europe. eusipa today represents the major financial institutions active in the sector across Europe organised through its national member or affiliated organisations in Austria, France, Germany, Italy, Sweden, Switzerland and the UK. Members of eusipa have a close interest that the revised Prospectus Directive, together with all relevant implementing measures, achieves its core objectives of ensuring investor protection and market efficiency in the public offer and listing of securities in the EU. Members rely on the proper functioning of the Directive for the issuance of retail structured products on a pan-European basis. In particular, they make strong use of the base prospectus regime, which allows them to adapt to the continuously evolving market conditions.

eusipa strongly welcomes ESMA`s Call for Evidence. Given the importance of some of the rules within the Prospectus Directive, such as those dealing with final terms to base prospectuses and prospectus summaries for the industry represented by eusipa, its members have a strong interest in the provision of legal certainty on a pan-European basis. However, certain statements made in the mandate letter raise the concern that future level 2 legislation might use a too formalistic approach that could substantially devalue base prospectuses as a tool enabling issuers to react to the continuously changing market conditions for which they have been introduced. Whilst we agree that it makes sense to provide clarity on what constitutes "final terms", as opposed to information requiring a supplement, we would like to stress the importance of preserving the flexibility of the base prospectus regime. Further, we query the need for a specific mechanism and procedure for combining the summary with the relevant parts of the final terms. With regard to the summary, we are concerned that an approach that would try to capture the essential characteristics of each individual relevant information item, as seems to be suggested by the text of the mandate letter, would make the summary too long and impede conformity with the Key Investor Information Document under the PRIPs initiative ("KIID"). Particular care should be taken to align the summary with the KIID to the greatest extent possible.

B. Issues to be addressed by level 2 legislation

I. Format of the final terms to the base prospectus (Article 5(5) of the Prospectus Directive (2003/71/EC) as amended by Directive 2010/73/EU (the "Amended Prospectus Directive")

1. Content and format of final terms

It is not without reason that the first and second clause of Recital 17 of the Amended Prospectus Directive – i.e., "information […] specific to the issue and which can be determined only at the time of the individual issue"; "terms not known at the time of drawing up the prospectus" – reflect the material content of Article 22(2) of Regulation (EC) 809/2004, i.e., that "information items which are not known when the base prospectus is approved and which can only be determined at the time of the individual issue" may be included in the final terms. Recital 17 and clause two of the third subparagraph of Article 5(4) of the Amended Prospectus Directive merely enact former CESR's correct and well-established interpretation of this delineation between the base prospectus (and any supplements thereto) on the one hand and the final terms on the other – i.e., "the flexible system provided for in the Regulation should not be abused by using the final terms as a mean of circumventing the obligation to publish a supplement when the prerequisites as set forth in Article 16 Directive are met" – into full force of level 1 legislation. That such zooming-up from level 3 interpretation guidance to level 1 legislation was intended to leave the delineation as such unchanged clearly results from the fact that Recital 10a of the initial proposal was not included in the presidency compromise.

Taking the level 1 legislator's approach seriously requires that the delineation between a "new factor, material mistake or inaccuracy relating to information included in the prospectus" (Article 16(1) clause 1 of the Amended Prospectus Directive) and "terms not known at the time of drawing up the prospectus" is not blurred. It clearly results from the first and second clause of Recital 17 of the Amended Prospectus Directive that any items that have been intentionally left open so as to be completed in the of the market environment at the issue date are not "new" within the ambit of Article 16(1) clause 1 of the Amended Prospectus

Directive, but "not known at the time of drawing up the prospectus" (clause two of the third subparagraph of Article 5(4) as interpreted in light of Recital 17 the Amended Prospectus Directive).

As a consequence of the legislator's approach, the views expressed by former CESR in its answer to Question 57 of the FAQs remain a true and correct interpretation of Article 5(4) of the Amended Prospectus Directive: There is no need for future level 2 legislation to give up the flexible approach incorporated in Article 22(2),(4) of Regulation (EC) 809/2004, and any attempt to draw up an exhaustive list of details of information items that should be allowed in final terms would be contrary to the words and spirit of the relevant level 1 legislation. Further, we do not even see a realistic possibility for introducing meaningful general requirements regarding the format of the final terms. As correctly seen by Article 22(4) of Regulation (EC) 809/2004, the content and format of final terms are a mere function of the content and structure of the underlying base prospectus, which vary substantially in practice due to diverging content and order of the information items within base prospectuses as well as differences in the relevant terms and conditions. The principle-based approach that is behind the current wording of Article 22(4) of Regulation (EC) 809/2004 – i.e. "[t]he final terms attached to a base prospectus shall only contain the information items from the various securities note schedules according to which the base prospectus is drawn up" – combines legalistic precision with flexibility while perfectly respecting the interdependency between the content and format of final terms and the content and structure of the underlying base prospectus. In light of the foregoing, it would be fully sufficient if future level 2 legislation were to follow the lines of former CESR's answer to Question 57 of the FAQs.

Accordingly, we see no necessity for specific schedules or building blocks for the final terms. An attempt to list exhaustively any items that are allowed to be included in final terms would not only be contrary to the words and spirit of the Amended Prospectus Directive (as set out above), but also necessarily miss the reality of the structured products universe. The payout formulas and underlyings that will be appropriate and marketable in future market environments are "specific to the issue and […] can be determined only at the time of the individual issue" and "not known a

the time of drawing up the prospectus (Recital 17 of the Amended Prospectus Directive and Article 22(2) of Regulation (EC) 809/2004). An attempt to require that specific payout formulas and underlyings (as, e.g., (proprietary) indices, funds, commodities, currencies, or shares) be introduced by way of a supplement to the base prospectus (and not by the final terms) would run contrary to former CESR's correct interpretation that "the Directive is intended to regulate disclosure of information rather than to regulate products that are appropriate to be offered to the public" and that "[t]hus, there is usually no need to require information specific to a certain underlying or redemption structure to be vetted by the competent authorities." Completing the specific payout formulas, underlyings and similar information as well as the relevant additional risk factors by way of final terms has no negative impact on the investors as the economic appropriateness of a specific payout formula and underlying would not be the object of specific analysis by the competent authority anyway (even if they were included by way of a supplement) and is fully compliant with the aim of achieving a high level of transparency and investor protection.

Therefore, if one were trying to develop specific schedules or building blocks for the final terms, it would at least have to be clarified that the payout formula relevant for the securities in question can still be made by way of final terms; the same applies with regard to the specific (proprietary) indices, funds, commodities, currencies, or shares that will serve as the underlying, the name of the issuer (in the case of multi issuer programmes), the calculation agent and paying agent, and any risk factors that are specific to the completed items. All of these are "other terms not known at the time of drawing up the prospectus" within the ambit of clause 2 of Recital 17 of the Amended Prospectus Directive, as they are for structured products what the "coupon" and "redemption price" are for straight debt; that they are not expressly mentioned is clearly due to the fact that the legislator's approach was focused on straight debt products as, e.g., MTN programmes. The necessity to hardwire specific structures and pay-off profiles within the base prospectus would make this document too unwieldy, with a very long list of options and numerous blanks, and would not increase the transparency and comprehensibility of the base prospectus – quite to the contrary.

Further, an attempt to exhaustively list any items that are allowed to be included in the final terms would almost necessarily lead to a pricing/election schedule type format of final terms, where the final terms only refer to the applicable sections of the base prospectus and do not reproduce the applicable texts. However, such schedule type format of final terms (as proposed in ICMA's IPMA Handbook for straight debt products) are all too often difficult to read and understand (and thus questionable under transparency aspects) for retail investors in the context of structured products. Therefore, continental market practice in the context of retail structured products envisages the use of integrated conditions where the final terms information is physically inserted in the terms and conditions (which sometimes in the base prospectus still contained blanks), and the form of continental retail final terms will usually extract (and thus repeat) certain information from the base prospectus, including the risk factors, to make them easily accessible to investors. Making an end to this market practice by adopting at EU level the schedule type format of final terms would run contrary to the aim of further increasing transparency and comprehensibility, and would therefore clearly not be in the interest of retail investors.

2. Final terms and summary

Even before its revision, the Prospectus Directive allowed the "amendment" of the summary to take account of the specific details of the individual issue, and issuers have made use of this possibility. To our knowledge, this has never raised any material issues. Therefore, we query whether it is at all helpful to provide for a specific mechanism and procedure for combining the summary with the relevant parts of the final terms. In any case, it will be important not to introduce prescriptive requirements in this regard that do not reflect the high divergence in format and content of final terms (due to the differences in format and structure of the underlying base prospectuses).

II. Summary

1. Alignment with PRIPs initiative

The relationship between the KIID and the summary under the Amended Prospectus Directive requires clarification. Our view here is that there is a very high degree of overlap between the KIID and the summary, and thus the requirement should be for one or the other, but not both. The content of the summary should be made either fully or, if not possible due to differences in the prescribed information (particularly regarding the description of the issuer), at least partly identical to the content of a KIID, so that a completed KIID could be used to provide the summary as well, either unchanged or with the addition of certain further information items.

2. Information items

We agree with the statement made in the mandate letter that, according to the Amended Prospectus Directive, the summary should provide, in conjunction with the prospectus, appropriate information about the essential characteristics and the risks of the issuer, the guarantor and the securities in question. However, we are concerned that an approach that would try to capture the essential characteristics of each individual relevant information item would make the summary too long and impede conformity with the KIID. Instead of trying to deduct the content and format of the summary from the Annexes to Regulation (EC) 809/2004 ("bottom up" approach), it should rather be discussed "top down", by way of firstly deciding about the information items that are so relevant for investors that they should appear in the summary. The proposals made by Deutscher Derivate Verband e.V. for schedules for KIIDs for different types of retail structured products – which we attach for you information – might well serve as an illustration of how such approach could look like.

3. Schedules

The mandate letter specifically mentions the possibility of different schedules and building blocks for the summary. If they were introduced, it would make sense to distinguish between equity and non-equity securities. Otherwise, there would be a

danger that the summaries may not reflect the substantial differences in content and length of the full prospectuses in both cases.

III. Retail cascade

Recital 10 of the Amended Prospectus Directive and the new subparagraph added at the end of Article 3(2) of the Amended Prospectus Directive require only that the consent to the use of a prospectus shall be laid down in a written agreement which enables the relevant parties to assess their compliance with such agreement. There is no requirement to disclose the agreement within or outside of the prospectus to the public, the investors or the competent authority. As the Amended Prospectus Directive does not provide a definition of "the relevant parties" referred to in Recital 10, such term is subject to interpretation. According to the context in Recital 10, "the relevant parties" are those which engage in the resale or final placement of the securities offered under a prospectus. The decision as to who may use a prospectus for these purposes is clearly reserved to the issuer or the person responsible for drawing up the prospectus, as their written agreement to such use is required by the new subparagraph to Article 3(2) of the Amended Prospectus Directive. Therefore these parties should also have the right to decide to whom such agreement is disclosed. With respect to their legitimate interest in keeping the details of their placement and resale strategies away from the competition, they may therefore determine either within the written agreement itself or in another document they deem appropriate how and to whom their agreement shall be disclosed, as well as under what circumstances and conditions and for what duration their agreement to use the prospectus shall be valid. A financial intermediary being part of a retail cascade authorised by the issuer or the person responsible for drawing up the prospectus will accordingly be provided therewith. By contrast, unauthorised third parties will not, and they will be required to draw up an additional prospectus if they wish to offer such securities. In other words, it does not seem appropriate to define any format or modalities for the written agreement as all decisions with regard thereto should be deemed to be the sole responsibility and discretion of the issuer or the person responsible for drawing up the prospectus.

The issuer or the person responsible for drawing up the prospectus would be entitled to opt for including his or her agreement with financial intermediaries in the prospectus; however, he or she should not be obliged to do so. Also, it should be clarified that an agreement in text form shall be considered a written agreement according to the Amended Prospectus Directive in order to allow for an appropriate electronic format.

As the written agreement generates no additional liability, there exists no public interest or need to inform the public thereof for reasons of investor protection.

The Amended Prospectus Directive has not created an additional power for the competent authority to require a copy of such agreement. However, if ESMA sees a need for the competent authority to oversee the compliance with the new subparagraph to Article 3(2) of the Amended Prospectus Directive, it may clarify that such power may well be considered to exist under Article 21(3) of the Amended Prospectus Directive. With regard thereto, no additional requirement to actively file a copy of the agreement with the competent authority shall be required.

IV. CESR FAQs

The CESR FAQs have been a tremendous help to the industry in assessing the relevance and content of certain provisions of the Prospectus Directive. It should therefore be considered to clarify to what extent they represent the opinion of ESMA, and to what extent they still represent the opinion of the competent authorities as stated therein in light of the changes brought on by the Amended Prospectus Directive. It might be desirable to incorporate these in the level 2 legislation.

- In terms of the underlying legal concept, the KIID has to be made either part of the prospectus rules (with a view, however, to avoid duplication of information), or of the sales rules. In the latter case, the rules will have to be inserted into MiFID and the IMD. However, format and content of the KIID could still be dealt with by a common legal act on level 2 that would apply to the whole product universe.

- A KIID cannot have the same disclosure standard as a full prospectus (all information needed by investors to make an informed investment decision).

Instead, the added value of KIIDs should be seen in giving comprehensible information on the economic characteristics of the product, i.e. mainly credit risk and market risks and opportunities to which investors in the product are exposed.

- In terms of scope of the initiative, it is preferable to use "retail investment products" as a basis, and then exempt such products from the KIID requirement for which this is not appropriate - particularly where not needed by retail investors (shares and plain vanilla bonds).

- Responsibility for the production of the KIID should be with producers if defined as a prospectus, and with intermediaries if made part of the sales rules (MiFID and IMD).

- Regarding risk disclosure, we agree that a system allowing easy comparability between different product classes would be very helpful for investors. However, developing a common approach for the whole product universe covered will not be an easy task, and further work directed to this may show that it is not possible to work with one approach for all products. In any case, it would be inappropriate to simply take over the risk classification rules developed for UCITS for the whole product universe, as this would not reflect different investment horizons, and put many products merely reflecting the performance of major stock markets into the highest risk class, thereby disregarding additional riskiness following from the product structure (particularly leverage). We would suggest conducting a research study dedicated to the development of a risk classification system.

- In terms of cost disclosure within the KIID, a "value for money" approach should not be followed, as this is too vague to define disclosure requirements (e. g. for funds, this could require the disclosure of all transactions costs).

Attachement

Product Information

As at: 09 September 2010

Call warrant on Z AG shares

This document provides an overview of key product characteristics – particularly the product structure and the investment risks involved. We recommend that you read this leaflet carefully.

1. Product name / WKN / ISIN

Call warrant on Z AG shares / XYN34R / DE000XYN34R4

2. Issuer

Any Bank

3. Product description

- **Product type**

Warrant – bearer bond

- **Market view at the time of issuance *(optional)***

A call warrant is suitable for investors expecting the price of the underlying share to rise. **Given the increased risk of potential losses, this product is only suitable for experienced investors with a high propensity to accept risk.**

- **General description of product mechanics**

Key parameters Please refer to www.derivateverband.de for explanations of key terms.	
Underlying (WKN / ISIN)	Z AG shares (123456/DE0001234561)
Settlement Currency	EUR
Reference Currency	EUR
Issue Date	23 April 2009
Initial Issue Price	EUR 1.18
Strike	EUR 25.00
Underlying price at the time of issuance	EUR 24.90
Warrant Type	Call
Type of Exercise	American
Exercise Period	27 April 2009 – 17 December 2010
Reference Price	Closing price of Z shares (Xetra) on the Valuation date
Valuation Date	Exercise Date
Maturity Date	Three bank business days after the Valuation date
Multiplier	1.0
Minimum Trading Unit	1 warrant
Minimum Exercise Quantity	1,000 warrants
Listing	Stuttgart (EUWAX), Frankfurt (Scoach Premium)
Last exchange Trading Day	15 December 2010

This call warrant allows investors to leverage their participation in the positive performance of the underlying share price.

At the same time, however, investors are also exposed to a leveraged risk in the event of a negative development of the underlying price. Moreover, they are exposed to the risk of the warrant expiring worthless if the *Reference Price* is at or below the *Strike*.

On the *Maturity Date*, the payout to investors is equivalent to the amount by which the *Reference Price* exceeds the *Strike*, times the *Multiplier*. If the *Reference Price* is at or below the *Strike*, there is no payout – the warrant will expire worthless.

Investors will not receive any current income (such as interest or dividends) during the term of the certificate.

- **Availability/tradability**

Factors determining the market price during the term

Availability/tradability

After the issue date, the warrant can generally be bought or sold on the exchange or in the over-the-counter market.

Assuming normal market conditions, the Issuer will continuously quote indicative bid and ask quotes (market-making), without being legally obliged to do so. In extraordinary market situations, or in the event of technical disruptions, it may be temporarily difficult or impossible to buy or sell the warrant.

Factors determining the market price during the term

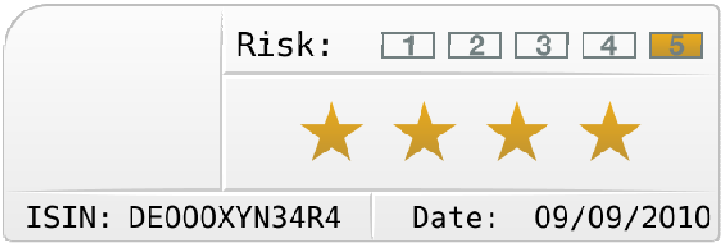
The market price of the warrant is primarily linked to the performance of the underlying share price – however, it will usually not track the underlying share price exactly.

The following factors in particular may additionally influence the market price of the warrant (some of them significantly):

- changes in the intensity of fluctuations in the share price (volatility);
- the warrant's remaining lifetime;
- general changes in interest rates;
- developments regarding dividends distributed on the underlying share.

Whilst individual market factors may have an isolated effect, the effects of several factors may neutralise or amplify each other.

- **Product rating** ***(optional)***



Star rating: each product receives a specific rating regarding each risk parameter.

This product rating relates to the respective risk parameter indicated. Please refer to section 5 for more details.

More information regarding the product rating is available at www.derivateverband.de.

4. Potential returns / Scenario Analyses at maturity

The following examples are not indicative of actual call warrant performance data.

Reference Price	Payout to investors, per warrant:
EUR 35	*EUR 10.00*
EUR 30	*EUR 5.00*
EUR 26.18	EUR 1.18
EUR 25	**EUR 0**
EUR 24.00	**EUR 0**
EUR 10.00	**EUR 0**

Assuming the investor buys the call warrant at the issue price:

Development is positive for the investor

Development is neutral for the investor

Development is negative for the investor

5. Risks

General risk parameter - DDV *(optional)*

1	2	3	4	5
				X

Meaning of the risk parameter / investor profile

1 safety-oriented
2 limited risk tolerance
3 normal risk tolerance
4 higher risk tolerance
5 speculative

The risk parameter is an indicator for the potential performance of the warrant, and for the risk that the invested capital is exposed to. The risk profile is determined, using historical data, on the basis of the probability of falling warrant prices (losses) for the warrant. The rating figure depicted above was calculated by an independent institution, based on the prevailing market conditions prior to the issue of the warrant. Note that the risk category of the warrant is subject to change. Investors are advised to check on www.sampleURL.de whether the risk parameter has changed.

More information regarding the risk parameter is available on www.derivateverband.de.

Risks at maturity

If the Reference Price is higher than the Strike, investors will incur a loss if the payout is less than the purchase price paid for the call warrant. If the Reference Price is at or below the Strike, the **investment will be lost completely.**

Market price risk during the term of the warrant

The value of the call warrant during its term may be negatively influenced by the factors influencing market prices (as described in section 3 above) in particular, the value may be significantly lower than the purchase price.

Issuer risk / credit risk *(adjust to the respective issuer)*

Investors are exposed to the risk of the issuer becoming insolvent – in which case the issuer will no longer be able to meet its obligations. More information regarding the relevant issuer rating is available on www.sampleURL.de. Given its nature as a bearer bond, the warrant is not covered by any deposit protection scheme.

6. Costs / sales commissions

Costs for investors

- Investors may incur transaction costs, exchange fees and custody fees when purchasing, holding or selling warrants.

Sales commissions (paid by the issuer to the selling agent)

- Placement commission: none
- Portfolio-based commission: none

7. Additional information

- **Taxation**

Investors should consult a tax advisor to discuss the tax implications of purchase, ownership and sale (or repayment) of the warrant.

- **Further important points to note / Disclaimer**

The product information provided in this leaflet does not constitute a recommendation to buy or sell the warrant; the information cannot substitute individual advice given by the investor's bank, or other advisors.

This product information leaflet does not include all information that is relevant to the warrant. For full details, particularly regarding the product structure and the risks involved in a warrant investment, potential investors should read the securities prospectus. The prospectus, and the Final Terms and any supplements thereto, are available from XY Bank free of charge, and can be downloaded from www.xy-bank.de.

- **Update**

The information contained in this product information leaflet is accurate as at 09 *September 2010*.