



THE FINNISH STRUCTURED PRODUCTS REGISTERED ASSOCIATION

Helsinki, 5 January 2012

THE FINNISH STRUCTURED PRODUCTS REGISTERED ASSOCIATION'S COMMENTS ON CONSULTATION PAPER INCLUDING ESMA'S TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE PROSPECTUS DIRECTIVE AS AMENDED BY THE DIRECTIVE 2010/73/EU

The Finnish Structured Products Registered Association (FSPA) welcomes the opportunity to give its comments on Consultation Paper including ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU. FSPA has given these comments specifically in respect of issues of the structured products.

The Finnish Structured Products Association is a registered non-profit organisation founded in 2005 to promote the Finnish financial investments and especially to support Finnish offering of structured investment products and the operating environment. For achieving its mission the FSPA is developing common practices for its members and their companies and recognizing / answering compliance and regulatory challenges to the business. FSPA also offers education, research, information and publications. More information on www.sjoitustuotteet.fi.

CONCEPT OF RETAIL CASCADES UNDER THE AMENDED DIRECTIVE

Q1: In practice, for what types of securities are retail cascades used? In ESMA FAQ No. 56 it was assumed that retail cascades are only used for distribution of debt securities. However, the regulation introduced by the Amending Directive in Article 3.2 Prospectus Directive does not differentiate between equity securities and debt securities in this regard but applies to all kind of securities.

Retail cascades are widely used in Finland when offered structured products. These structured products can be in a form of debt securities but can also have another form.

Q2: Please describe situations in which a retail cascade is normally used, how a retail cascade may be structured and the modalities of such retail cascade. What different models of retail cascades are used in practice?

A retail cascade is normally used in situations where an issuer does not have its own distribution channels or where an issuer in addition to its own distribution channels would like to distribute the securities also through intermediaries to reach another customer base. Retail cascade is also important channel to the intermediaries to offer structured securities to their customers. The issuer and the intermediary usually enter into a master agreement under which the parties are able to agree to issue and distribute several issues if so specifically agreed in respect of each offer.



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Q3: Do you agree with ESMA's understanding of retail cascades and in particular that the terms and conditions of the offer by the intermediaries may not differ from the terms and conditions in the prospectus or final terms? If not, please specify which terms and conditions may differ from those stated in the prospectus or final terms and who would be responsible and liable for such information.

FSPA is of the opinion that the costs in relation to the distribution or placing of financial instruments should be able to differ from the terms and conditions in the prospectus or final terms. It is also possible that these costs are not included in the prospectus or final terms and in such a case it should be possible for the intermediary to inform these costs to the customers in the marketing material. Such costs are f.ex subscription fee and structuring fee which is typically disclosed in Finland. If such information is not included in the prospectus or in the final terms the intermediary should be responsible and liable for such information. If this information is included in the prospectus or final terms the issuer should be responsible and liable for such information.

Intermediaries agree also in some cases to provide secondary market to the securities in question and include these terms in the marketing material. Therefore it is possible that this secondary market provision is not in the prospectus or in the final terms as it is not the issuer who provides the secondary market for the customers.

The marketing material can also include issue specific tax information which complements the tax information in the prospectus. Furthermore the marketing material regarding public offerings can include a risk classification which is part of the Finnish financial market's self-regulation.

The above information should not be considered to be in conflict with the terms and conditions described in the prospectus or final terms especially when the relationship has issuers consent in a form of an agreement.

Q4: Can you provide examples of scenarios whereby the price would differ from that set out in the prospectus? Would you deem this to be a change of the terms and conditions?

The price can differ from that set out in the prospectus in the secondary market transactions. This should not be deemed a change of the terms and conditions if the pricing is based on the terms and conditions included in the prospectus and or final terms.

Q5: What information required according to the Prospectus Regulation cannot be provided in a prospectus or base prospectus/final terms in case of retail cascades but is only provided by the intermediary at the time of the sub-offer? How and when is such information communicated to the investor? Please specify and explain.

The costs in relation to the distribution or placing of financial instruments are usually not included in the final terms and the intermediary should be able to inform these costs to the customers in the marketing material. Such costs are f.ex subscription fee and structuring fee which is typically disclosed in Finland. The marketing material can also include information regarding taxation and secondary market which are not included in the prospectus or final terms. Please see our response in Q3.



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Q6: Do you consider it necessary to clarify in the prospectus who is responsible for information that is provided by the intermediary to the investor?

Yes on a general level. It is important that it is clear to the investor who is responsible of the information provided by the issuer and the intermediary. FSPA agrees to the principles presented by ESMA.

VALIDITY OF A PROSPECTUS AND RESPONSIBILITY OF THE ISSUER OR THE PERSON RESPONSIBLE FOR THE PROSPECTUS. DURATION OF CONSENT

Q7: Do you agree that the period for which consent to use a prospectus may be granted cannot extend beyond the validity of the prospectus and the period in which a supplement is possible according to Article 16 Prospectus Directive? If not, please specify how in particular a standalone prospectus can be kept valid once the period according to which a supplement is possible has lapsed.

Yes. FSPA agrees with ESMA's opinion on the validity period of the consent.

Q8: In relation to a standalone prospectus, do you agree that once the offer which is the subject matter of the initial prospectus has been closed, financial intermediaries subsequently offering the securities in a retail cascade should prepare a new prospectus which could incorporate by reference the issuer's initial prospectus?

Yes. FSPA agrees with ESMA's opinion.

PRINCIPLES REGARDING DISCLOSURE REQUIREMENTS IN RELATION TO RETAIL CASCADES IN A PROSPECTUS

Q9: Is it the case that the identities of the financial intermediaries, the conditions attaching to the consent and the duration of the consent are generally known at the time of the approval of the prospectus or at the time of filing the final terms? At which stage do you generally determine the precise way of distribution including the decision of which financial intermediaries to use for a specific offer?

In case base prospectus is used the identities of the financial intermediaries, the conditions attaching to the consent and the duration of the consent are **not** generally known at the time of the approval of the prospectus. This information is generally known at the time of filing the final terms.

The precise way of distribution is usually determined as the decision on the offer is made. This is especially true in cases where the intermediary is the party taking the initiative in the offering. Therefore in these cases it is not possible to know the precise moment beforehand f.ex at the time of approval of the base prospectus.

Q10: Is it common practice for agreements with financial intermediaries to be finalized following the approval of the prospectus or the filing of final terms? Can you estimate how often this would happen?

In case base prospectus is used the agreement on specific issue is usually finalized after the approval of the prospectus but before the filing of final terms. To be able to prevent unnecessary



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administrative and procedural burdens the information regarding intermediaries should be able to include in the final terms.

Q11: Given the fact that in a retail cascade the responsibility of the issuer for the content of the prospectus is subject to its consent to use the prospectus such consent is crucial for the whole prospectus responsibility regime. Therefore ESMA believes that the consent to use the prospectus needs to be public, and furthermore, that it should be stated in the prospectus as is also the case for the general responsibility statement. Do you agree with ESMA's approach to include such consent in the prospectus or base prospectus/final terms?

FSPA shares ESMA's opinion that the content of the written agreement between the issuer and intermediary should not be disclosed. FSPA agrees with ESMA that it is very important from the investor point of view to be able to notice from the documentation that the intermediary has issued consent to distribute the security and use the prospectus. On FSPA opinion the consent should be included in the standalone prospectus and in case of base prospectus in the final terms. In the base prospectus just indication where the information is found should be considered sufficient.

Q12: If the above elements are known at the time of approval of the prospectus or the time of filing the final terms, what are the disadvantages (if any) for including this information within the prospectus or final terms?

As it is not possible to know beforehand if and which intermediaries are used at the time of approval of the base prospectus it would be confusing just to include f.ex one intermediary which would be known at that time. The practice should be uniform and therefore the information regarding the intermediaries should be included in the final terms and just the indication where the information is found if intermediaries are used should be sufficient to be included in the base prospectus.

Q13: ESMA believes that the means of publication to be used in relation to the existence of a consent and any conditions attached to it should allow investors and competent authorities to clearly determine the responsibilities of the persons involved. Instead of including the above elements within the prospectus do you believe that there are any other methods of publication for this information that would also provide sufficient transparency and legal certainty? If yes, please specify.

With reference to Q11 and Q12 the information referred should be included in the final terms.

PRINCIPLES REGARDING DISCLOSURE OF INFORMATION ON RETAIL CASCADES WHEN UNKNOWN AT THE TIME OF APPROVAL OF THE PROSPECTUS OR FILING OF FINAL TERMS

Q14: Do you consider a supplement necessary in relation to information on retail cascades? Please explain and justify your position, also taking into account different typical situations of retail cascades and any effect such retail cascade related information may have on the assessment of the securities.



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From the perspective of the issuer and the intermediary the supplement should absolutely not be required in case of base prospectus as the information needed is possible to include in the final terms. The supplement in these cases would create unnecessary administrative and procedural burdens for the issuers and the authorities.

INDEX COMPOSED BY THE ISSUER

Q6: Do you agree with ESMA's observation that it is not a common market practice to issue, under prospectuses prepared for the purpose of the Prospectus Directive, derivative securities linked to an index composed by another issuer? If not, please provide specific examples.

No FSPA does not share ESMA's opinion. For example Morgan Stanley operates as an issuer and widely used MSCI indices are composed by a corporate belonging to its group.

Q7: Do you agree to keep the current requirement of the Prospectus Regulation to disclose the description of an index composed by the issuer in the prospectus?

No FSPA does not agree with ESMA's opinion.

If not, please provide the reasoning behind your position.

FSPA is of the opinion that if all the information regarding the index composed by the issuer is available in the issuer's Internet-site there is not any additional value to the investors to include this information also to the prospectus.

Some issuers have several indices composed by them which may be used in many different types of issues. For example ETN's have been issued based on them and the indices are daily published in the issuers' Internet-site together with complete index rules. They may also have been licensed to external counterparties. Thus indices are published like any public index.

General index providers like STOXX Ltd provide tailor-made indices or special purpose indices to issuers. These indices are not generally known to the public, have no history and may have complex set of rules but don't contain issuer "conflict of interest". It would not be fair and reasonable if these indices would have different status and treatment as the above mentioned indices.

FSPA feels that if the information of the indices is publicly available at all times in the issuers Internet site there is no need to disclose this information also in the issuer prospectus. Only the indication in the prospectus where the information about the index is to be obtained should be sufficient.

FSPA is of the opinion that there is no reason to add length to the prospectus by adding descriptions of the indices in to it although the descriptions could be annexed. That would not serve the interest of the investors. The matter has been discussed in point 8 of section 4.III on page 23 of the Consultation paper. FSPA cannot agree that for example 59 indices times in average of 10 page rules would not affect the usability of the base prospectus.

Q8: Do you agree that Item 4.2.2. of Annex XII needs to be revised to the extent that an index description should also be required for an index composed by any entity belonging to the same group as the issuer, or by an entity acting in association with, or on behalf of, the issuer?



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The indices having the same status should be handled similarly.

If not, please provide your reasons.

FSPA feels that issuers as Morgan Stanley should not have to include MSCI-index rules to their base prospectus as those who have licensed them but not belong to their group nor act in association with it would not have to do so either.