



European Securities and
Markets Authority

Consultation Paper

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



Responding to this paper

ESMA invites comments on all matters in this paper and in particular on the specific questions summarised in Annex 1. Comments are most helpful if they:

- respond to the question stated;
- indicate the specific question to which the comment relates;
- contain a clear rationale; and
- describe any alternatives ESMA should consider.

ESMA will consider all comments received by **20 August 2012**.

All contributions should be submitted online at www.esma.europa.eu under the heading 'Your input - Consultations'.

Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly and prominently indicate in your submission any part you do not wish to be publically disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA's rules on access to documents. We may consult you if we receive such a request. Any decision we make not to disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

Data protection

Information on data protection can be found at www.esma.europa.eu under the heading 'Legal Notice'.

Who should read this paper

All stakeholders are invited to comment on this consultation paper, it would primarily be of interest to issuers, offerors or persons asking for admission to trading on a regulated market, investors, as well as to any market participant which is affected by Directive 2003/71/EC of 4 November 2003 (**the PD, the Prospectus Directive as amended by Directive 2010/73/EU**) and its Regulation (Commission Regulation (EC) No 809/2004).

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Acronyms used

Amended Directive/	Amending Directive Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
Commission/EC	The European Commission
CP/Consultation Paper	ESMA's Consultation Paper Reference ESMA/2012/17
Delegated Regulation	Commission Delegated Regulation (EU) No .../.. of XXX amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements adopted by the Commission on the 30 th March 2012 and published in the Official Journal of the European Union on 9 June 2012.
ESMA	European Securities and Markets Authority
Proportionate Disclosure	the Proportionate Disclosure Regime as defined in article 1 (13) of the Delegated Regulation
Prospectus Directive	Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC
Prospectus Regulation/PR	Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements
Second Council Directive	the Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC)
Small Caps	Companies with reduced market capitalization
SMEs	Small and Medium Enterprises as defined in the Prospectus Directive Article 2(1)(f)



the Mandate

The request from the European Commission to ESMA for technical advice on possible delegated acts concerning the Prospectus Directive as amended by Directive 2010/73/EU

the Task Force/TF

ESMA's Prospectus Level 2 Task Force set up under the remit of its Corporate Finance Standing Committee dedicated to the issue of this Consultation Paper

Executive Summary

Reasons for publication

The purpose of this Consultation Paper (CP) from ESMA is to seek comments on the third part of the technical advice that ESMA proposes to submit to the European Commission on a number of possible delegated acts.

On Tuesday 25 January 2011, the European Commission published its request to ESMA for advice on possible delegated acts concerning the Prospectus Directive as amended by Directive 2010/73/EU (the Mandate). The Mandate to ESMA sets out the areas on where the Commission is requesting advice in sections 3, 4 and 5. ESMA has already delivered its advice on sections 3.1, 3.2 and 3.3 on 30 September 2011 and advice on sections 3.4 and 5 on 29 February 2012.

The European Commission extended the scope of the Mandate to include the issue of prospectus disclosure requirements for convertible or exchangeable debt securities, and in particular in the context of the Delegated Regulation on the proportionate disclosure regime (Section 3.3 of the Mandate) and the work on the review of the provisions of the Prospectus Regulation (Section 4 of the Mandate).

Contents

This Consultation Paper sets out ESMA's proposals for clarifications of and amendments to the Prospectus Regulation in order to increase legal clarity and propose application of the proportionate disclosure regime to convertible/exchangeable debt securities.

Section I explains the general background of the Consultation Paper, Section II explains the current legal framework, ESMA's considerations and sets out ESMA's proposals on amendments and revisions of the Prospectus Regulation, Section III sets out ESMA's assessment on the proportionate disclosure regime in relation to convertible/exchangeable debt securities, and Section IV sets out the assessment of the proportionate disclosure regime regarding debt securities convertible or exchangeable into issuer's shares issued by small and medium-sized enterprises (SMEs) and companies with reduced market capitalization (Small Caps).

Next steps

ESMA will consider the feedback it has received in relation to this consultation in the third quarter of 2012 and expects to publish a final report and submission of the technical advice to the European Commission in the fourth quarter of 2012.

ESMA has set up a further dedicated task force currently dealing with section 5 of the Mandate concerning the compilation of a comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive. ESMA expects to submit its final report to the European Commission in the first quarter of 2013.

I. General Introduction

1. The publication of the Directive 2010/73/EU of 24 November 2010 (Amending Directive) amending the Prospectus Directive in the Official Journal of the EU took place on 11th December 2010.
 2. On 20 January the European Securities and Markets Authority (ESMA) received a formal request (the Mandate) from the European Commission (the EC or the Commission) to provide technical advice to the Commission on possible delegated acts concerning the Prospectus Directive as amended by the Amending Directive.
 3. In relation to the issues on which technical advice is requested, the Mandate has the following sections:
 - 3.1 Format of the final terms to the base prospectus (Article 5(5)).
 - 3.2 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)).
 - 3.3 Proportionate disclosure regime (Article 7).
 - 3.4 Equivalence of third-country financial markets (Article 4(1)).
 - 3.5 The consent to use a prospectus in a retail cascade (Articles 3 and 7).
 - 4 Review of the provisions of the Prospectus Regulation (Articles 5 and 7).
 - 5 Comparative table of the liability regimes applied by the Member States in relation to the PD.
 - 6 ESMA received a letter from the Commission extending the scope of the Mandate to also include convertible bonds (Annex III).
4. As stated in the Amending Directive, the Commission is under an obligation to adopt delegated acts by 1 July 2012 in relation to the delegated acts referred to in sections 3 and 4 and that is why ESMA had been given a deadline to provide its advice by 30 September 2011 at the latest in relation to sections 3.1 and 3.2. In addition, ESMA decided to include section 3.3. in the first part of the Mandate (which has been already delivered to the Commission in due time and published on ESMA's website), because of the importance of the areas concerned. The technical advice was submitted on 30 September 2011. The Delegated Regulation pertaining to these issues was published in the Official Journal of the European Union on 9 June 2012 with entry into force on 1 July 2012.
 5. In the second part of the Mandate ESMA decided to prioritise the development of its advice on section 3.5 and 4, in line with discussion with the Commission services having in mind the tight timeframe to develop the rest of its advice and the relative importance of each of the remaining subjects to be developed under the Mandate and leave sections 3.4, 5 and the disclosure requirements for convertible bonds (section 6 above) for a further stage (part III of the Mandate) after delivering the final reports on technical advice on the previous mentioned sections. The Commission confirmed its agreement on this approach in a letter dated 14 November 2011 (see Annex IV). ESMA submitted its advice on the second part of the Mandate concerning sections 3.5 and 4 to the Commission on 29 February 2012.
 6. The present Consultation Paper addresses the technical advice on prospectus disclosure requirements for convertible or exchangeable debt securities, and in particular in the context of

the proportionate disclosure regime (section 3.3 of the Mandate) and the review of the provisions of the prospectus regulation (section 4 of the Mandate), that ESMA, in agreement with the Commission, expects to deliver by the end of 2012. Accordingly, the consultation period has been reduced to two months.

7. To enable it to fulfil the request for advice, ESMA set up under the remit of its Corporate Finance Standing Committee (the CFSC) a Prospectus Level 2 Task Force (the Task Force).
8. ESMA will consider the feedback it has received in relation to this consultation and will aim at providing by end of 2012 its advice to the Commission.
9. In order for ESMA to best reflect on comments received, please indicate any material concerns over the impact of the advice being considered, including if you consider it may lead to unfair or disproportionate financial or administrative burden (making where possible a quantitative assessment of costs in your responses). In addition please also indicate any possible advantages or benefits deriving from the implementation of the advice.

II. Prospectus disclosure requirements for convertible or exchangeable debt securities (Articles 5 and 7)

II.1 Introduction

10. In the year 2010 ESMA performed a fact-finding exercise concerning the application of the annexes of the Regulation No. 809/2004/EC (Prospectus Regulation - PR) by the various EU jurisdictions in cases of prospectuses related to convertible or exchangeable debt securities.
11. The issues under discussion were as follows:

*“To list which annexes each Member State require in each of the following situations:
A listed company (i.e. whose shares are already admitted to trading on a regulated market) issues bonds convertible or exchangeable into issuer’s shares of the same class, whereby:
a. The issuer’s shares to be delivered are existing shares that are not yet admitted to trading.
b. The issuer’s shares to be delivered are existing shares that are already admitted to trading.
c. The issuer’s shares to be delivered are new shares to be issued by the issuer (i.e. share capital raising).”*
12. The information gathered showed that when the issuer’s shares to be delivered are existing shares that are already admitted to trading, a substantially common interpretation among EU countries led to the same application of the annexes of the PR. With regards to the registration document, it was found that Annex IV or Annex IX were applied depending on the denomination per unit of the securities, or Annex XI where the issuer was a bank; for the securities note, Annexes V or XIII were applied depending on the denomination per unit of the securities, plus item 4.2.2 of Annex XII.
13. However, the outcome of the fact finding exercise also showed that when the issuer’s shares to be delivered are not yet admitted to trading on a regulated market, differing approaches are taken among the various EU jurisdictions. In particular, as regards the registration document, the majority of competent authorities applied Annexes I and II (if applicable), while a small, but significant minority applied the registration document schedules for debt and derivatives securities (Annex IV or Annex IX depending on the denomination per unit or Annex XI when the issuer was a bank). Differences emerged also in the application of securities note schedules, as the majority applied Annex V or Annex XIII for debt securities - depending on the denomination per unit of the securities - and Annex XIV for the underlying shares, whilst others applied Annex III.
14. ESMA is of the opinion that these differing practices could jeopardize the aim of reaching maximum harmonization in the field of prospectus disclosure requirements and the proper functioning of the passport procedures regarding prospectuses. Therefore, it was concluded that further clarifications should be included in the Prospectus Regulation so as to ensure a uniform application of disclosure requirements for convertible or exchangeable debt securities.
15. Furthermore, ESMA considered it necessary to carry out an assessment if the new provisions of the Directive 2010/73/EU (the Amending Directive) concerning the proportionate disclosure regime for rights issues could also apply to rights issues of convertible or exchangeable debt securities.
16. ESMA therefore raised the question with the European Commission as to whether the prospectus disclosure requirements for convertible or exchangeable debt securities should be considered within the scope of its mandate provided to ESMA for advice on possible delegated acts concerning the proportionate disclosure regime (Section 3.3) and the review of the provisions of the Prospectus Regulation (Section 4).

17. The European Commission subsequently confirmed that the scope of the mandate should be extended to include also convertible or exchangeable debt securities.

Extract of the letter from the Commission on the extension of the scope of the Mandate to convertible bonds – Sections 3.3 and 4

After careful review of Recital 7, Article 4, and Annex XVIII of the Prospectus Regulation and of the outcome of the above-mentioned fact finding, we consider that also the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities should fall within the scope of the mandate to ESMA for advice on possible delegated acts. Differences regarding disclosure requirements prejudice the proper functioning of the prospectus passport, discourage cross-border offers, and undermine the completion of the Union's securities market.

It is essential to achieve a level playing field, with respect to disclosure requirements for convertible/exchangeable debt securities, for all market participants and ensure a uniform application of Union's legislation on prospectuses.

Therefore, the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities should also be included within the scope of the mandate to ESMA, and in particular in the context of its work on the proportionate disclosure regime (Point 3.3 of the mandate) and the review of the provisions of the Prospectus Regulation (Point 4 of the mandate).

18. On the basis of the above Mandate, in the following paragraphs ESMA has set out its position, the main objectives of which being to maintain investor protection and increase legal clarity as well as efficiency in the prospectus regime.

II.2 Current legal framework and ESMA's considerations

19. During ESMA's assessment of the provisions of the Prospectus Regulation applicable to a public offer and/or an admission to trading on a regulated market of convertible or exchangeable debt securities, and particularly Recitals 7 and 19, Articles 4, 6, 7, 8, 12, 15, 16, 17 and 21, plus Annex XVIII of the Prospectus Regulation, it became evident that a number of the provisions in the latter Regulation would benefit from greater clarity so as to fulfill the objectives referred to above and ensure a level playing field.
20. Pursuant to Article 21.1 of the Prospectus Regulation¹, the combination of schedules and building blocks provided for in the table set out in Annex XVIII shall be mandatory when drawing up prospectuses for the types of securities to which those combinations correspond. However, for securities not covered by those combinations further combinations may be used. The convertible or exchangeable debt securities which are the subject matter of the current Consultation Paper are considered in Annex XVIII. The following analysis is, therefore, based on both the combinations laid out in this annex and those provisions of the Prospectus Regulation from which they have their source.
21. ESMA is of the view that the rationale behind the different disclosure regimes envisaged by the Prospectus Regulation for convertible or exchangeable debt securities does not rely solely on whether they are or are not equity securities pursuant to Article 2.1(b) of the Prospectus

¹ Article 21.1 (Combination of schedules and building blocks) of the Prospectus Regulation: "The use of the combinations provided for in the table set out in Annex XVIII shall be mandatory when drawing up prospectuses for the types of securities to which those combinations correspond according to this table. However, for securities not covered by those combinations further combinations may be used."

Directive² (i.e. when the issuer of the underlying shares is the same issuer of the convertible or exchangeable debt securities or it is an entity belonging to the same group), but also on whether the underlying shares are or are not yet admitted to trading on a regulated market.

22. In this regard, on the one hand it has to be noted that when debt securities are convertible or exchangeable into third party shares they are not equity securities pursuant to Article 2.1(b) of the Prospectus Directive.
23. Consequently, in accordance with Articles 7, 8, 12, 14, 16 and Annex XVIII of the Prospectus Regulation, debt securities convertible or exchangeable into third party shares follow the disclosure regime envisaged for debt securities prospectuses (Annex IV or IX for the registration document, depending on the denomination per unit of the securities or Annex XI if the issuer is a bank; Annex V or XIII for the securities note depending on the denomination per unit of the debt securities).
24. In addition Annex XVIII requires the information envisaged by item 4.2.2 of Annex XII (*Minimum Disclosure Requirements for the Securities Note for Derivative Securities*) when the underlying shares issued by a third party shares are admitted on a regulated market.
25. However, no reference to this requirement can be found in the articles of the Prospectus Regulation. As the articles of the Prospectus Regulation are the legal basis for the combinations set out in Annex XVIII, in ESMA's view, a specific provision needs to be added to the articles of the Prospectus Regulation to support this requirement.

Q.1:

Do you agree that the Prospectus Regulation should be amended in order to create a legal basis for the provision in Annex XVIII according to which only the disclosure requirements in item 4.2.2 of Annex XII are applicable to underlying shares already admitted to trading on a regulated market?
If not, please provide the reasoning behind your position.

26. Instead, when the third party shares are not yet admitted to trading on a regulated market the Prospectus Regulation, including Annex XVIII, does not give any indications as to what information the prospectus should provide for the underlying shares. ESMA acknowledges that prospectuses relating to debt securities convertible or exchangeable into third party shares not admitted to trading on a regulated market are quite rare. However, ESMA believes that in these cases the prospectus should also inform the investors of the essential characteristics and risks associated with the underlying shares.

Q.2:

In your experience, what information is included in prospectuses relating to debt securities convertible or exchangeable into third party shares not admitted to trading on a regulated market with regard to the underlying shares?
Do you believe that in such a case Annex XIV, except item 2, should be applied relating to third party shares not admitted to trading on a regulated market?
If not, please state your reasons.

² Article 2.1 (b) of the Prospectus Directive: "equity securities' means shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer;"

27. On the other hand, with reference to all other types of convertible or exchangeable debt securities mentioned in Annex XVIII³, the required combination of schedules and building blocks can be summarized as following: for debt securities convertible or exchangeable into issuer's shares the share registration document (Annex I and, if applicable, Annex II) plus the securities note for debt securities (Annexes V or XIII depending on the denomination per unit of the securities) and the disclosure requirements in Annex XIV (*Additional information building block on underlying share for some equity securities*) for the securities note shall be applied only when the underlying shares are not yet admitted to trading on a regulated market. Otherwise, the Prospectus Regulation requires the application of debt and derivative securities schedules (Annex IV or Annex IX depending on the denomination per unit of the securities or Annex XI if the issuer is a bank) for the registration document also when convertible or exchangeable debt securities fall under the definition of equity securities according to Article 2.1 (b) of the Prospectus Directive provided that the underlying shares are already admitted to trading on a regulated market. In fact, in this case these types of securities are not in the scope of Article 4 of the Prospectus Regulation.
28. As far as the rationale of the above disclosure regime is concerned, ESMA has taken into account that in the Prospectus Directive regime, shares may be admitted to trading on a regulated market without an obligation to publish a prospectus either in cases where the necessary information is already available to investors (Article 4.2 (c) (d) (e) (f) (h) of the Prospectus Directive), or in cases of non-significant issuances, (b) or for the substitution of shares of the same class already admitted to trading on the same market, or shares of the same class as the shares already admitted to trading resulting from the conversion or exchange of other securities or the exercise of the rights conferred by other securities (Article 4.2(a) (b) (g) of the Prospectus Directive). Consequently, when the underlying shares are already admitted to trading on a regulated market, investors should already have been provided with the necessary information, before the issuance of convertible or exchangeable debt securities.
29. In ESMA's opinion this rationale emerges clearly from the reading of both rows 7 ("*bonds exchangeable or convertible into third party shares or issuers' or group shares which are admitted on a regulated market*") and 8 ("*bonds exchangeable or convertible into the issuer's shares not admitted on a regulated market*") of Annex XVIII.
30. Following the reasoning above, ESMA has noted a lack of clarity in the combinations set out by row 9 ("*bonds exchangeable or convertible into group's shares not admitted on a regulated market*") of the same annex, when read together with provisions of Articles 4 and 17 of the Prospectus Regulation. In fact, pursuant to row 9 the debt securities schedules shall apply, together with Annex XIV for the underlying shares. In addition, according to Item 2 of Annex XIV, when the issuer of the underlying shares is an entity belonging to the same group, the share registration document schedule shall be applied to this issuer consistently with article 17.1 of the Prospectus Regulation. The latter also includes the issuer of the underlying shares which is an entity belonging to the same group of the debt securities issuer amongst the cases to which the share registration document schedule referred to Article 4 shall apply. Notwithstanding this legal framework, in ESMA's understanding, row 9 of Annex XVIII does not envisage that in the case in discussion the share registration document is compulsory for the issuer of the underlying shares not admitted to trading on a regulated market, which is an entity belonging to the same group of the bonds' issuer.

³ Pursuant to Annex XVIII of the Prospectus Regulation: "*bonds exchangeable or convertible into (...) issuers' or group shares which are admitted on a regulated market*" (row 7); "*bonds exchangeable or convertible into the issuer's shares not admitted on a regulated market*" (row 8); "*bonds exchangeable or convertible into groups shares not admitted on a regulated market*" (row 9).

Q.3:

Do you consider it necessary to clarify in Annex XVIII of the Prospectus Regulation the disclosure regime applicable to the issuer of the underlying shares not admitted to trading on a regulated market when it is an entity belonging to the same group of the bonds' issuer?

If not, please indicate your reason.

31. In addition, ESMA concluded that the second sentence of Recital 7 of the Prospectus Regulation may lead to a misinterpretation of the rules as it seems to differentiate the registration document regime applicable to securities giving access to the capital of the issuer by way of conversion or exchange based on whether the underlying shares have already been issued, rather than on whether they are or are not already admitted to trading on a regulated market.

Q.4:

Do you agree that the text of recital 7 should be clarified in order to avoid any confusion as regards the prospectus regime applicable to "*other securities giving access to the capital of the issuer by way of conversion or exchange*"? If not, please provide your reasons.

32. Finally, as regards the type of convertible and exchangeable debt securities to which the share registration document schedules apply (according to row 8 of Annex XVIII) ESMA would like to focus on the items "Working capital statement" and "Capitalization and indebtedness" of the share securities note (3.1 and 3.2 of Annex III) since these require information concerning the issuer, but are not specifically mentioned as such either in the table of combinations mentioned previously or in articles of the Prospectus Regulation. As a result, regarding the aforementioned disclosure requirements ESMA discussed whether or not in their interpretation they should be considered as included in the prospectus relating to the above-mentioned securities.

33. ESMA deems it important to look back at guidance given by the then CESR in one of its Feedback Statements relating to the consultation process for issuing the technical advice to the European Commission on implementing measures of the Prospectus Directive (CESR/03-067b of April 2003)⁴. As pointed out there the reasoning for allocating the aforementioned disclosure requirements relating to the issuer in the securities note schedule is due to the need to ensure that these disclosures are properly updated with reference to the date when a prospectus is approved and used as opposed to the date of the registration document itself, in cases where the prospectus is composed of separate documents

34. The ESMA fact finding exercise revealed that only a few competent authorities required the application of Annex III⁵. In this light ESMA considers that the disclosure requirements in items 3.1 and 3.2 of Annex III should be provided in prospectuses relating to debt securities exchangeable or convertible into issuer's shares or group's shares not admitted on a regulated market only when, on the basis of the conditions established at the moment of the issue, the conversion or exchange can occur within the twelve month period after the date of their issuance. This is because, in ESMA's opinion, when the conversion or exchange may occur only after the period of 12 months has elapsed the investors could not have any additional benefit from information relating to the issuer's working capital, capitalization and indebtedness which by that time would be out of date.

⁴ CESR/03-067b of April 2003; para 111 "*In creating the separate disclosure requirements for RDs and SNs, it was sometimes necessary to allocate different parts of IOSCO disclosure requirements between the RD and the SN. One example of such possible allocation split was IOSCO disclosure V.B.1.a, second sentence, which deals with working capital statement (...); para 115 "As a conclusion, CESR proposes that the statement about working capital is included in the SN Equity for it relates to the position of the company at the time of the issue. The statement about working capital forms part of the discussion concerning liquidity and capital resources that is currently part of the RD. The question has been raised if it should not be more appropriate to make these disclosures part of the SN rather than the RD so that the wider discussion is more closely linked to the working capital statement. CESR is of the opinion of the major part of the respondents who prefers to keep the other disclosures regarding liquidity and capital resources in the RD."*

⁵ See paragraph 4.

Q.5:

Do you agree with ESMA's interpretation of the current legal framework concerning prospectus disclosure requirements for convertible or exchangeable debt securities? If yes, please feel free to provide additional arguments. If not, please explain and justify your interpretation.

Q.6:

Do you agree with ESMA's proposal of limiting the application of items 3.1 and 3.2 of Annex III to debt securities convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belonging to its group which can be converted or exchanged within 12 months since the date of their issuance? If not, please provide the reasoning behind your position.

Q.7:

According to your experience, what are the costs for drawing up the working capital statement and updating information on capitalization and indebtedness, as required by items 3.1 and 3.2 of Annex III? Can you provide any data?

II.3 Amendments to the Prospectus Regulation proposed for increasing legal clarity

35. Having considered the arguments above, ESMA deems it useful to revise the following provisions of the Prospectus Regulation:

35.1.1 Amendments proposed for clarification of the Prospectus Regulation

- a. **recasting Recital 7 so as to clarify that the share registration document schedule should not be used if the underlying shares are already admitted to trading on a regulated market and to avoid any reference to whether or not the underlying shares to be delivered have already been issued**

35.1.2 Amendments proposed for ensuring consistency of the Prospectus Regulation

- b. **in Annex XVIII (rows 2, 3, 7, 8, 9 and 10) substituting the term "bond" with "debt securities" in order to align it with the text of the applicable Articles of the Prospectus Regulation**
- c. **in the heading of the column relating to the building block on pro-forma information, adding "(if applicable)", in order to avoid any misinterpretation of the scope of the building block just mentioned above, in the light of both Article 21 of the Prospectus Regulation according to which "*the combinations provided for in the table set out in Annex XVIII shall be mandatory*" and of the provisions of Item 20.2 of Annex I, according to which Annex II is applicable only in case of a significant gross change in the size of the issuer**

35.1.3 Amendments proposed for clarifying the application of Annex XVIII

- d. **as regards debt securities exchangeable or convertible into third party shares not admitted to trading on a regulated market, adding in Annex XVIII a new provision concerning the disclosure regime applicable to such a type of underlying shares so as to envisage the application of Annex XIV, except for item 2, and accordingly revising Article 17 in order to expand the scope of Annex XIV, except for item 2**

- e. **splitting row 9 of Annex XVIII into two parts so as to specify also the combinations of schedules and building blocks applicable to the issuer of the underlying shares, when the latter is not the debt securities issuer, but is an entity belonging to its group**

35.2 Amendments proposed for creating a legal basis for application of item 4.2.2 of Annex XII

- f. **adding a new paragraph to Article 15 aimed at clarifying that for debt securities exchangeable or convertible into third party shares or issuer' or group's shares which are admitted to trading on a regulated market for the information concerning the underlying shares only item 4.2.2 of Annex XII is applicable**

35.3 Amendments proposed to complete the information when the share registration document is applicable

- g. **adding a new provision aimed at specifying that when debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belonging to its group and can be converted or exchanged within 12 months from the date of their issuance also the information required by items 3.1 and 3.2 of Annex III should be included either in the share registration document if the prospectus has been drawn up as a single document, or in the securities note on underlying shares if the prospectus is composed of separate documents.**

III. ESMA's assessment on the implementation of proportionate disclosure regime regarding rights issues of debt securities convertible or exchangeable into issuer's shares

36. On the basis of the mandate, and taking into consideration Article 1(2), (8) and (13) of the Delegated Regulation, and in particular the new Article 26a) inserted in the Prospectus Regulation implementing Article 7.2 (g) of the Prospectus Directive introduced by the Amending Directive, ESMA discussed the possibility of applying the proportionate disclosure regime for rights issues also to debt securities convertible into issuer's shares or with warrants to acquire the issuer's shares.

37. According to Article 29.6 of the Second Directive⁶ provisions therein relating to pre-emptive offers in case of capital raising by cash are also applicable "*to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares...*".

38. However, in ESMA's opinion, exchangeable debt securities are not necessarily included amongst the type of securities considered by the above mentioned Article 29.6, since they may not be convertible into new shares or may not carry the right to subscribe for new shares.

⁶ Second Council Directive of 13 December 1976 (77/91/EEC) which coordinates, amongst other things, safeguards of principles of equal treatment of shareholders in the same position and of protection of creditors in cases of increase or reduction of capital. Pursuant to article 29.6 "*Paragraphs 1 to 5 shall apply to the issue of all securities which are convertible into shares or which carry the right to subscribe for shares, but not to the conversion of such securities, nor to the exercise of the right to subscribe.*"

Q.8:

Do you agree with ESMA's interpretation of Article 29.6 of the Second Directive, according to which exchangeable debt securities are not necessarily within its scope?

Please provide the reasoning behind your position.

39. ESMA considered that capital raising transactions may also be carried out by means of the issuance of debt securities convertible into issuer's shares. In fact, in this case the capital raising might occur not at the moment of issue, but at a later date when the debt securities are converted into shares.
40. ESMA retains that when the issuer of convertible securities and the underlying shares complies with the conditions set out in Article 7.2(g) of the Prospectus Directive there is no reason why the same proportionate disclosure regime should not apply.
41. ESMA is of the view that debt securities with warrants are outside the scope of the current European Commission mandate. Nevertheless, it deems it important to highlight the strict link between these two types of capital raising.
42. Therefore, ESMA is of the opinion that rights issues of debt securities convertible into issuer's shares should also be able to take advantage of the new provisions relating to the proportionate disclosure regime introduced by the above-mentioned Delegated Regulation, to the extent that conditions provided by Article 7.2(g) of the Prospectus Directive are fulfilled.
43. ESMA believes that in such types of public offer where pre-emption rights refer to debt securities convertible into issuer's shares, this should not prevent them from being considered within the scope of Article 7.2(g) of the Amending Directive and Article 26.a of the Delegated Regulation.
44. Consequently, ESMA is of the view that the Prospectus Regulation should clarify the combinations of schedules and building blocks applicable to rights issues of debt securities convertible into issuer's shares, when the issuer, the offer or and the person asking for admission to trading on a regulated market chooses to draw up a prospectus in accordance with the proportionate schedules set out in Annexes XXIII and XXIV.
45. **ESMA believes that such a clarification could be provided via an amendment to Annex XVIII of the Prospectus Regulation.**

Q.9:

Do you agree with ESMA's view to consider rights issues of debt securities convertible into issuer's shares within the scope of Article 7.2(g) of the Prospectus Directive and by consequence be able to take advantage of the new provisions of the Delegated Regulation relating to the proportionate disclosure regime, provided that conditions envisaged by the above article are fulfilled?

If not, please provide the reasoning behind your position?

IV. Proportionate disclosure regime regarding debt securities convertible or exchangeable into issuer's shares issued by small and medium-sized enterprises (SMEs) and companies with reduced market capitalization (Small Caps)

46. The Delegated Regulation has introduced, in the new Article 26b of the Prospectus Regulation, the proportionate disclosure regime, and corresponding proportionate schedules in Annexes XXV to XXVIII, also when securities issued by SMEs and Small Caps are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.



47. ESMA acknowledges that convertible or exchangeable debt securities issued by SMEs and Small Caps are in the scope of the said proportionate disclosure regime. For this reason the present consultation paper does not present further proposals in this connection.

Annex I

Summary of questions

Q1: Do you agree that the Prospectus Regulation should be amended in order to create a legal basis for the provision in Annex XVIII according to which only the disclosure requirements in item 4.2.2 of Annex XII are applicable to underlying shares already admitted to trading on a regulated market?
If not, please provide the reasoning behind your position.

Q2: In your experience, what information is included in prospectuses relating to debt securities convertible or exchangeable into third party shares not admitted to trading on a regulated market with regard to the underlying shares?

Do you believe that in such a case Annex XIV, except item 2, should be applied relating to third party shares not admitted to trading on a regulated market?

If not, please state your reasons.

Q3: Do you consider it necessary to clarify in the Prospectus Regulation the disclosure regime applicable to the issuer of the underlying shares not admitted to trading on a regulated market when it is an entity belonging to the same group of the bonds' issuer?

If not, please indicate your reason.

Q4: Do you agree that the text of recital 7 should be clarified in order to avoid any confusion as regards the prospectus regime applicable to “other securities giving access to the capital of the issuer by way of conversion or exchange”? If not, please provide your reasons.

Q5: Do you agree with ESMA's interpretation of the current legal framework concerning prospectus disclosure requirements for convertible or exchangeable debt securities? If yes, please feel free to provide additional arguments. If not, please explain and justify your interpretation.

Q6: Do you agree with ESMA's proposal of limiting the application of items 3.1 and 3.2 of Annex III to debt securities convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belonging to its group which can be converted or exchanged within 12 months since the date of their issuance? If not, please provide the reasoning behind your position.

Q7: According to your experience, what are the costs for drawing up the working capital statement and updating information on capitalization and indebtedness, as required by items 3.1 and 3.2 of Annex III? Can you provide any data?

Q8: Do you agree with ESMA's interpretation of Article 29.6 of the Second Directive, according to which exchangeable debt securities are not necessarily within its scope?



Please provide the reasoning behind your position.

Q9: Do you agree with ESMA's view to consider rights issues of debt securities convertible into issuer's shares within the scope of Article 7.2(g) of the Prospectus Directive and by consequence be able to take advantage of the new provisions of the Delegated Regulation relating to the proportionate disclosure regime, provided that conditions envisaged by the above article are fulfilled?

If not, please provide the reasoning behind your position?

Annex II

Commission mandate to provide technical advice

FORMAL REQUEST TO ESMA FOR TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE AMENDED PROSPECTUS DIRECTIVE (2003/71/EC)

With this formal mandate to ESMA, the Commission seeks ESMA's technical advice on possible delegated acts concerning the amended Prospectus Directive (the "**Amended Directive**"). These delegated acts should be adopted in accordance with Article 290 of the Treaty of the Functioning of the European Union (TFEU).

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate should not prejudice the Commission's final policy decision.

The mandate follows the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union (the "**290 Communication**"),⁷ the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**"),⁸ and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").⁹

This request for technical advice will be made available on DG Internal Market's website once it has been sent to ESMA.

The formal mandate consists of three separate parts:

Part I

The formal mandate focuses on technical issues which follow from the Directive 2010/73/EU amending the Prospectus Directive (the "**Amending Directive**").¹⁰

- The Commission is under the obligation to adopt delegated acts by 1 July 2012 in relation to the format of the final terms to a base prospectus, to the format of the summary of the prospectus, and to the detailed content and specific form of the key information to be included in the summary (Article 5(5)).
- This part relates to the proportionate disclosure regime introduced for some preemptive offers of equity securities, offers by SMEs and issuers with reduced market capitalization, and offers of non-equity securities referred to in Article 1(2)(j) by credit institutions (Article 7(1)).
- It also focuses on the criteria to be applied in the assessment of the equivalence of a third country legal and supervisory framework (Articles 4(1)).

The legal bases for the delegated acts are Articles 4(1), 5(5), 7(1), 24a, 24b and 24c of the Amended Directive.

⁷ Communication of 9.12.2009. COM(2009) 673 final.

⁸ Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC. OJ L331/84, 15.12.2010, p.84.

⁹ OJ L304/47, 20.11.2010, p.47.

¹⁰ Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. OJ L327/1, 11.12.2010, p.1.

Part II

Moreover, in order to increase legal clarity and efficiency in the prospectus regime, the second part of the formal mandate covers possible additional delegated acts for technical adjustment and clarification of some existing Level 2 measures. The legal bases are Articles 7, 24a, 24b and 24c of the Amended Directive.

Part III

ESMA is also invited to assist the Commission in the preparation of a comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive.

The European Parliament and the Council have been duly informed about this mandate.

After the delivery of the technical advice by ESMA, in accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, the Commission will continue to consult experts appointed by the Member States in the preparation of possible delegated acts in the financial services area.

In accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The powers of the Commission to adopt delegated acts are subject to Articles 24b and 24c of the Amended Directive. As soon as the Commission adopts a possible delegated act, the Commission will notify it simultaneously to the European Parliament and the Council.

1. Context.

1.1 Scope.

On 23 September 2009, the Commission published its proposal for the revision of the Prospectus Directive. On 17 June 2010 the European Parliament adopted a common approach, which was also endorsed by the Council on 11 October 2010. The Amending Directive was published on 11 December 2010.

The Amending Directive has three main objectives: (i) increasing efficiency in the prospectus regime, (ii) reducing administrative burdens for companies when raising capital in the European securities markets, and (iii) enhancing investor protection.

As for Parts I and II of this formal mandate, these principles taken up by the Amended Directive needs now to be translated into delegated acts:

- Part I: The Commission is under the obligation to adopt delegated acts by 1 July 2012 in relation to the format of the final terms to a base prospectus, to the format of the summary of the prospectus, and to the detailed content and specific form of the key information to be included in the summary (Article 5(5)). This part relates also to the proportionate disclosure regime introduced for some preemptive offers of equity securities, offers by SMEs and issuers with reduced market capitalization, and offers of non-equity securities referred to in Article 1(2)(j) by credit institutions (Article 7(1)). It also focuses on the criteria to be applied in the assessment of the equivalence of a third country legal and supervisory framework (Article 4(1)).
- Part II: In order to increase legal clarity and efficiency in the prospectus regime, the second part of the mandate covers possible additional delegated acts reviewing some existing Level 2 measures.

Part III of the mandate invites ESMA to assist the Commission in the preparation of a comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive.

1.2 Principles that ESMA should take into account.

On the working approach, SMA is invited to take account of the following principles:

- It should take account of the principles set out in the de Larosière Report, the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- The high level of investor protection that is the guiding principle of the Prospectus Directive.
- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the Amended Directive. It should be simple and avoid creating excessive administrative or procedural burdens for issuers, in particular SMEs, and the national competent authorities.
- ESMA should respond efficiently by providing comprehensive advice on all subject matters covered by Parts I and II of the mandate regarding the delegated powers included in the Amended Directive.
- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.
- In accordance with the ESMA Regulation, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness. Moreover, where relevant it may indicate how the delegated acts should relate to technical standards to be developed in areas where empowerments for technical standards are given by the legislative act.¹¹
- ESMA will determine its own working methods, including the roles of ESMA staff or internal committees. Nevertheless, horizontal questions should be dealt with in such a way as to ensure coherence between different standards of work being carried out by ESMA.
- In accordance with the ESMA Regulation, ESMA is invited to widely consult market participants (practitioners, consumers and end-users) in an open and transparent manner. ESMA should provide advice which takes account of different opinions expressed by the market participants during their consultation. ESMA should provide a feed-back statement on the consultation justifying its choices vis-à-vis the main arguments raised during the consultation.
- The technical advice carried out should contain sufficient and detailed explanations for the assessment done, and be presented in an easily understandable language respecting current legal terminology used in the field of securities markets and company law at European level.
- ESMA should provide sufficient factual data backing the analyses and gathered during its assessment. To meet the objectives of this mandate, it is important that the advice produced

¹¹ See Directive 2010/78/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 98/26/EC, 2002/87/EC, 2003/6/EC, 2003/41/EC, 2003/71/EC, 2004/39/EC, 2004/109/EC, 2005/60/EC, 2006/48/EC, 2006/49/EC and 2009/65/EC in respect of the powers of the European Supervisory Authority (European Banking Authority), the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority). OJ L331/120, 15.12.2010, p.120.

by ESMA makes maximum use of the data gathered and enables all stakeholders to understand the overall impact of the possible delegated acts.

- ESMA should provide comprehensive technical analysis on the subject matters described below covered by the delegated powers included in the relevant provision of the Amended Directive, in the corresponding recitals as well as in the relevant Commission's request included in this mandate.
- The technical advice given by ESMA to the Commission should not take the form of a legal text. However, ESMA should provide the Commission with an "articulated" text which means a clear and structured text, accompanied by sufficient and detailed explanations for the advice given, and which is presented in an easily understandable language respecting current terminology used in the field of securities markets in the Union.
- ESMA should address to the Commission any question they might have concerning the clarification on the text of the Amended Directive, which they should consider of relevance to the preparation of its technical advice.

2 Procedure.

The Commission would like to request the technical advice of ESMA on the content of the possible delegated acts to be adopted pursuant to the Amended Directive.

The mandate follows the agreement on implementing the Lamfalussy recommendations reached with the European Parliament on 5 February 2002, the 290 Communication, the ESMA Regulation, and the Framework Agreement.

According to Article 19 of the ESMA Regulation, ESMA should serve as an independent advisory body to the Commission, and may, upon a request from the Commission or on its own initiative provide opinions to the Commission on all issues related to its area of competence. Moreover, according to Article 6(1)(g) of the ESMA Regulation, ESMA shall take over, as appropriate, all existing and ongoing tasks from CESR.¹²

The Commission reserves the right to revise and/or supplement this formal mandate. The technical advice received on the basis of this mandate should not prejudge the Commission's final decision.

In accordance with the Declaration 39 on Article 290 TFEU, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, and in accordance with the established practice, the Commission will continue to consult experts appointed by the Member States in the preparation of the delegated acts relating to the Prospectus Directive.

Moreover, in accordance with point 15 of the Framework Agreement, the Commission will provide full information and documentation on its meetings with national experts within the framework of its work on the preparation and implementation of Union legislation, including soft law and delegated acts. Upon request by the Parliament, the Commission may also invite Parliament's experts to attend those meetings.

The Commission has duly informed the European Parliament and the Council about this mandate. As soon as the Commission adopts possible delegated acts, it will notify them simultaneously to the European Parliament and the Council.

¹² Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators, OJ L25, 29.1.2009, p.18.

3 ESMA is invited to provide technical advice on the following issues:

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

When the final terms of an offer are not included in either the base prospectus or a supplement, Article 5(4) of the Amended Directive clarifies that the final terms must not be used to supplement the base prospectus but they must contain only information relating to the securities note which is specific to the issue and which can be determined only at the time of the individual issue.

Such information should, for example, include the international securities identification number, the currency, the issue price and date, the maturity date, any coupon, the exercise date, the exercise price, the redemption price and other terms not known at the time of drawing up the prospectus. Instead, any new information capable of affecting the assessment of the issuer and the securities must be included in the supplement to the prospectus.

- ESMA is invited to develop the possible format of the final terms as a separated document and provide technical advice on possible schedules and building blocks for the final terms to the base prospectus while at the same time preserving the flexibility of the base prospectus regime.
- It should clarify what new information, capable of affecting the assessment of the issuer and the securities should be included in a supplement to the base prospectus rather than in the final terms.
- It should specify the disclosure requirements of the securities note the final terms should contain and what information can be considered specific to the issue and can be determined only at the time of the individual issue. Such information might, for example, include the international securities identification number, the issue price and date, the date of maturity, any coupon, the exercise date, the exercise price, the redemption price and other terms not known at the time of drawing up the prospectus.
- When the final terms are presented in the form of a separate document containing only the final terms, in order to fulfill the obligation to provide key information in the summary document also under the base prospectus regime, ESMA is also invited to specifically define the mechanism and the procedure according to which issuers should combine the summary of a base prospectus with relevant parts of its final terms in a way that is easily accessible to investors. In such cases no subsequent approval of the summary and the final terms should be required.

3.2 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)).

The co-legislators have clarified in the Amended Directive the fundamental objectives and guiding principles of the summary document and the key information to be provided in the summary of the prospectus. This is an essential part of the Commission's drive to improve the effectiveness of disclosures and to increase investors' confidence in the financial markets.

In the prospectus regime, the summary of the prospectus is a key source of information for retail investors. It is a self-contained part of the prospectus and should be short, simple, clear and easy for targeted investors to understand. For this reason, it should focus on key information that investors need in order to be able to decide which offers and admissions of securities to consider further.

The format and the content of the summary should provide, in conjunction with the prospectus, appropriate information about the essential characteristics and the risks of the issuer, guarantor and the securities that are being offered or admitted to trading on a regulated market. A common format should facilitate comparability among summaries of similar products by ensuring that equivalent information always appears in the same position in the summaries.

ESMA is encouraged to reflect on possible ways to assist the persons responsible for drawing up the summary of the prospectus in practically achieving the fundamental objectives and observing the guiding principles as set by the co-legislators.

ESMA is invited to advise the Commission on possible schedules and building blocks of the summary document. It should develop common formats of the summary document and its key information in order to facilitate comparability among summaries of similar products and to ensure that equivalent information always appears in the same position in the summary document.

In relation to the content of the summary document, ESMA is invited to reflect on a detailed and exhaustive description of the essential and appropriately structured key information to be provided to investors as generally defined in Article 2(1)(s) of the Amended Directive. In particular, the summary document should contain:

- An introduction stating the purpose of the summary document.
- A short description of the essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position. This section should briefly and clearly summarize at least the "Information about the issuer" and the guarantor, the "Business overview," and the "Financial information concerning assets and liabilities, financial position, and profits and losses," as described in the Regulation (EC) 809/2004 (the "**Prospectus Regulation**").¹³
- A short description of the essential characteristics of the security, including any rights attaching to the securities. This section should briefly and clearly summarize at least the "Information concerning the securities," the items of "Terms and the conditions of the offer" relevant to the security, the nature and scope of the guarantee, the "Admission to trading and dealing arrangements," as described in the Prospectus Regulation.
- A short description of the risks involved in investing in the securities such as factors that are specific to the issuer, the guarantor and their industry, which can affect their ability to fulfill their obligations, and factors which are material for the purpose of assessing the inherent and market risks associated with an investment in the securities.
- A short description of the offer. This section should briefly and clearly summarize the relevant items of the "Terms and the conditions of the offer," the "Reasons for the offer and use of proceeds," as described in the Prospectus Regulation, including the estimate of the total expenses of the issue and any selling restrictions.

ESMA may reflect on possible schedules and building blocks to this proposed outline. The disclosure requirements should take into account the typical main features of the different types of issuers, guarantors and securities. They should also be adapted to the characteristics of the base prospectus.

ESMA, when delivering its advice in respect of the possible content and format of the summary including key information, should also take into account the objectives of the Communication on Packaged Retail Investment Products (PRIPs) and the work undertaken under this initiative.¹⁴ In particular, in relation to PRIPs within the scope of the Prospectus Directive, the summary should take into account eventually the "key investor information" as developed under the PRIPs initiative in order to avoid any duplication of disclosure requirements and thus any additional costs and liability for PRIPs' offerors.

¹³ Commission Regulation (EC) 809/2004 of 29 April 2004. OJ L215, 16.6.2004, p.3.

¹⁴ SEC (2009) 1223 of September 23, 2009, p. 4.

3.3 Proportionate disclosure regime (Article 7).

Without prejudice to investor protection, the co-legislators have agreed to introduce in Article 7 of the Amended Directive the principle of a proportionate disclosure regime for the following types of offers:

- Offers of shares by companies whose shares of the same class are admitted to trading on a regulated market or a multilateral trading facility, which are subject to appropriate disclosure requirements and rules on market abuse, provided that the issuer has not disapplied the statutory pre-emption rights;
- Offers by SMEs, by issuers with reduced market capitalization, and by credit institutions issuing non-equity securities referred to in Article 1(2)(j) of the Prospectus Directive within the scope of the Directive.

Such proportionate disclosure regime aims at improving the efficiency of the Union's securities markets and reducing the administrative costs of issuers when raising capital. It should strike a balance between the need to improve investor protection and the amount of information already disclosed to the markets and the size of the issuers.

- ESMA is invited to deliver its advice on the possible adaptation of the specific information requirements of Article 7 of the Prospectus Directive to the above-mentioned types of offers. In particular, ESMA should identify and select the disclosure requirements, as currently specified in the Prospectus Regulation, which are necessary to these types of offers taking into account a high level of investor protection, the amount of information already disclosed to the markets and the size of the issuers. ESMA should develop specific draft annexes in this respect.
- In relation to preemptive offers of equity securities, ESMA is invited to identify items which could possibly be considered redundant in annexes I and III to the Prospectus Regulation considering that shares of the same class are already admitted to trading on a regulated market or a multilateral trading facility (subject to appropriate disclosure requirements and rules on market abuse) and therefore a certain amount of information is already available to the investors and the financial markets.
- In relation to issues by credit institutions issuing non-equity securities referred to in Article 1(2)(j) of the Prospectus Directive which decided to opt into the regime of the Prospectus Directive, ESMA should advise the Commission on what information could be omitted from annexes XI and V of the Prospectus Regulation. ESMA should consider that these issuers are authorized and regulated to operate in the financial markets and that a proper balance should be sought so that the disclosure requirements are not excessively burdensome compared to the amount raised (EUR 75 000 000).
- Concerning SMEs and companies with reduced market capitalisation, ESMA is invited to advise the Commission on a possible annex containing the minimum information to be disclosed in the registration document for SMEs and companies with reduced market capitalisation. Considering their size, the amount raised and, where appropriate, their shorter track record, ESMA is invited to identify the information which could be omitted from the registration document applicable to other issuers.

3.4 Equivalence of third-country financial markets (Article 4(1)).

The Amending Directive extends the exemption in Article 4(1)(e) of the Prospectus Directive to employee share schemes of companies established outside the European Union whose securities are admitted to trading on a third-country market provided that:

- adequate information, including the document containing information on the number and nature of the securities and the reasons for and details of the offer, is available in a language customary in the sphere of international finance; and

- the Commission adopt an equivalence decision stating whether the regulatory (legal and supervisory) framework of that third country ensures that that market is authorized in that third-country, it complies with legally binding requirements which are, for the purpose of the application of this exemption, equivalent to the requirements resulting from the Market Abuse Directive,¹⁵ from Title III of the MiFID,¹⁶ and from the Transparency Directive,¹⁷ and it is subject to effective supervision and enforcement in that third country.

The Commission should adopt such equivalence decision in accordance with the procedure referred to in Article 24(2) of the Prospectus Directive upon assessment and request of the competent authority of a Member State which should indicate why it considers that the legal and supervisory framework of the third country concerned is to be considered equivalent, and should provide relevant information to this end.

Definition of equivalence

The Market Abuse Directive, the Transparency Directive and the MiFID have set up a strict legal and supervisory framework in the Union, which should be preserved by all actors and market participants in order to underpin confidence in the financial markets.

Given the objectives of the Market Abuse Directive, the Transparency Directive and the MiFID, it is appropriate that equivalence should be defined by reference respectively to the ability of a third-country regulatory framework to ensure a similar integrity of its financial markets, to the ability of investors to make similar informed assessment of the financial situation of issuers with securities admitted to trading on those financial markets, and to the ability of that third-country regulatory framework to ensure that those markets are subject to similar authorization, supervision and enforcement on an ongoing basis.

Therefore in the assessment in the request by the competent authority of a Member State whether a third-country financial market comply with legally binding requirements which are equivalent to the requirements resulting from the Market Abuse Directive, the Transparency Directive and the MiFID and whether it are subject to effective supervision and enforcement in that third country, the priority should lie in assuring that investors would benefit from similar protections in terms of market integrity and transparency.

The global and holistic assessment of the third-country regulatory framework should be based on its entirety and carried out from a technical point of view. The regulatory framework of the third country must include mandatory and not voluntary requirements. The assessment should focus on the differences between the regulatory regime established at the EU level and the third-country regulatory framework. It should evaluate the material importance of such differences. In doing so it should focus on technical criteria and not take into account any considerations of political nature.

Elements of the equivalence assessment

The third subparagraph in Article 4(1) of the Amended Directive set the minimum criteria for the assessment of such equivalence. A third-country legal and supervisory framework may be considered equivalent where that framework fulfills at least the following conditions:

¹⁵ Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse). OJ L 96, 12.4.2003, p.16.

¹⁶ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments. OJ L 145, 30.4.2004, p.1.

¹⁷ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. OJ L 390, 31.12.2004, p.38.

- the markets are subject to authorization and to effective supervision and enforcement on an ongoing basis;
- the markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;
- security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and
- market transparency and integrity are ensured by the prevention of market abuse in the form of insider dealing and market manipulation.

The fourth subparagraph in Article 4(1) empowers the Commission to adopt delegated acts in order to specify those criteria or to add further ones to be applied in the assessment of the equivalence.

ESMA is invited to specify the abovementioned criteria and to reflect on the possibility of adding further ones to be applied in the assessment of the equivalence by the requesting competent authority of a Member States.

An indicative description of the regulatory principles, which need to be respected by the to be assessed third-country regulatory framework and which need be considered in the assessment and request by the competent authority of a Member State for an equivalence decision by the Commission, should include the following:

Measures to ensure market integrity

- The third country regulatory regime provides for a prohibition of insider dealing and market manipulation and for an obligation to disclose inside information similar to Articles 2, 3, 4, 5, 6 and 9 of the Market Abuse Directive.

Measure to ensure market transparency and investor protection

- The third-country regulatory regime provides for disclosure requirements for the admission of the securities to trading on that third-country financial market similar to the minimum information of Articles 5 and 7 of the Prospectus Directive.
- The third-country regulatory regime provides for transparency requirements about issuers with securities admitted to trading on that third-country financial market similar to the periodic information requirements of Articles 4, 5 and 6 of the Transparency Directive and to the ongoing information requirements, relating to major holdings and for holders of those securities, of Chapter III of the Transparency Directive.
- The third-country regulatory regime ensures that its markets are subject to authorization and to effective supervision and enforcement on an ongoing basis; and that the markets have clear and transparent rules regarding admission of securities (equity and non-equity) to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable. The requirements of the third-country regulatory regime should be similar to those in Articles 36, 37, 38, 39, 40, 41, 42, 43, 44 and 45 of MiFID.
- The third-country regulatory regime ensures effective supervision and enforcement taking into consideration the legal and institutional setting in which the third-country supervisory authority operates as well as of its supervisory program and operational ability to ensure effective compliance. A cooperation framework between the third-country supervisory authority and the requesting competent authority or ESMA should be in place.

ESMA is also invited to take into consideration and ensure consistency with the ongoing reviews of the Market Abuse Directive, the Transparency Directive, and the MiFID.

3.5 The consent to use a prospectus in a retail cascade (Articles 3 and 7).

According to the Amending Directive, a valid prospectus, drawn up by the issuer or the person responsible for drawing up the prospectus and available to the public at the time of the final placement of securities through financial intermediaries or in any subsequent resale of securities, provides sufficient information for investors to make informed investment decisions. Therefore, financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer or the person responsible for drawing up the prospectus as long as this is valid and duly supplemented in accordance with Articles 9 and 16 of the Prospectus Directive and the issuer or the person responsible for drawing up the prospectus consents to its use.

The issuer or the person responsible for drawing up the prospectus should be able to attach conditions to his or her consent. The consent, including any conditions attached to it, should be given in a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement.

- ESMA is invited to advise the Commission on the possible format and modalities according to which the consent, including the conditions attached thereto, to use the initial prospectus by financial intermediaries placing or subsequently reselling the securities should be disclosed to the relevant parties. The consent, including any conditions attached thereto, should be given in a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement.
- The advice should focus on the duration of the consent, what conditions should be attached, the clarification on the respective liabilities of the issuer or the person responsible for drawing up the initial prospectus consenting to its use and the financial intermediaries placing or subsequently reselling the securities entitled to rely upon the initial prospectus, what resale or final placement of securities can be considered compliant with the written agreement.

4 Review of the provisions of the Prospectus Regulation (Articles 5 and 7).

Six years after the entry into force of the Prospectus Regulation, in consideration of the technical developments on the financial markets in the Union, the amendments to the Prospectus Directive, and the objectives of increasing legal clarity and efficiency in the prospectus regime, the Commission takes the opportunity of this mandate to ESMA to consider some technical adjustment and clarification to a number of requirements of the Prospectus Regulation.

ESMA is invited to reflect and advise the Commission on the possible technical adjustment and clarification of the following disclosure requirements of the Prospectus Regulation:

- Information on taxes on income from securities withheld at source (Items 4.11 of Annex III, 4.14 of Annex V, 27.11 and 28.11 of Annex X, and 4.1.14 of Annex XII). The Prospectus Regulation requires the disclosure in the prospectus of information on taxes from securities withheld at source. Does ESMA consider necessary to clarify that this only refers to information on any amount withheld at source by the issuer or by any agent appointed by it, because otherwise it would be impossible for the issuer to identify those custodians or agents in the payment chain not appointed by it?
- Information relating to an underlying index (Item 4.2.2 of Annex XII). The Prospectus Regulation requires the inclusion in the prospectus of a description of the index if it is composed by the issuer. However, if the index is not composed by the issuer, where information about the index can be obtained. ESMA is invited to consider the effects of allowing both the index owner and the others just to indicate where information on the index can be found? Would such a solution be applicable also in Item 2.10 of Annex XV?

- Profit forecasts or estimates (Items 13.2 of Annexes I and X, 9.2 of Annex IV, and 8.2 of Annex XI) should be currently accompanied by a report prepared by independent accountants or auditors stating that in the opinion of the independent accountants or auditors the forecast or estimate has been properly compiled on the basis stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer. ESMA is invited to consider the effects of repealing such requirement given that market announcements are usually issued in advance of the related financial results being finalized?
- Audited historical financial information (Items 20.1 of Annexes I and XI). In order to avoid any unnecessary costs for the issuers, ESMA is invited assess the effects of a possible reduction to the latest two financial years for the coverage of the audited historical financial information, while keeping the requirement of the latest three financial years only in case of an initial public offer.

5. Comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive.

Given the divergences among the liability regimes of the Member States in the application of the prospectus regime, the co-legislators have asked the Commission to prepare a comparative table in order to identify and monitor the different arrangements in the Member States.

- ESMA is invited to assist the Commission in compiling this comparative table. ESMA is invited to provide a complete and coherent set of information comparing the civil, administrative and government liability, criminal liability and sanctions applied in each Member State.

6. Indicative timetable.

This mandate takes into consideration that ESMA needs enough time to prepare its technical advice and that the Commission needs to adopt the delegated acts according to Article 290 of the TFEU. The powers of the Commission to adopt delegated acts are subject to Articles 24b and 24c of the Amended Directive.

In particular, the Commission is under the obligation to adopt delegated acts by 1 July 2012 in relation to the format of the final terms to a base prospectus, to the format of the summary of the prospectus, and to the detailed content and specific form of the key information to be included in the summary (Article 5(5) of the Amended Directive). Therefore it is of utmost importance to start working on these measures as soon as possible.

The deadline set to ESMA to deliver the technical advice is **30 September 2011** at least with regard to the questions raised in sections 3.1 and 3.2. The establishment of the deadline is based on the following timetable.

Deadline	Action
31 December 2010	Entry into force of the Amending Directive (20 days after publication in the Official Journal of the European Union – 11 December 2010).
January 2010	Submission by the Commission of the formal mandate to ESMA.
30 September 2011	ESMA provides its technical advice.
October – December 2011	<i>Preparation of the delegated acts:</i> In the preparation of the delegated acts, the Commission will consult with experts appointed by the

	<p>Member States within the European Securities Committee.</p> <p>The Commission will provide the European Parliament with full information and documentation on those meetings. If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.</p>
End of December 2011	<i>Adoption of the delegated acts:</i> Formal adoption by the Commission of the delegated acts and notification to the European Parliament and the Council.
March 2012 or June 2012	End of the objection period for the European Parliament and the Council (three months + three months).
1 July 2012	End of the transposition period for the Amending Directive (18 months after the entry into force of the Amending Directive).



Annex III

Letter from the Commission services on the extension of the scope of the Mandate to convertible bonds



EUROPEAN COMMISSION
Directorate General Internal Market and Services

Director General

Brussels,
MARKT/G3/ET/cr Ares (2011)

Mr Steven Maijoor
Chairman
European Securities and Markets Authority
(ESMA)
11-13 avenue de Friedland
F – 75008 Paris

Subject: Prospectus disclosure requirements for convertible/exchangeable debt securities – Reply to a question regarding ESMA Level 2 works for preparing the technical advice on possible European Commission's delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/UE

Dear Steven,

In the context of the Commission's mandate to ESMA for advice on possible delegated acts concerning the Prospectus Directive sent to ESMA on 19 January 2011, the DG MARKT Services thank you for sharing the outcome of the fact finding exercise on the annexes to the Prospectus Regulation No 809/2004/EC applicable in case of an offer/admission to trading of convertible or exchangeable debt securities.

After careful review of Recital 7, Article 4, and Annex XVIII of the Prospectus Regulation and of the outcome of the above-mentioned fact finding, we consider that also the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities should fall within the scope of the mandate to ESMA for advice on possible delegated acts.

Differences regarding disclosure requirements prejudice the proper functioning of the prospectus passport, discourage cross-border offers, and undermine the completion of the Union's securities market.

It is essential to achieve a level playing field, with respect to disclosure requirements for convertible/exchangeable debt securities, for all market participants and ensure a uniform application of Union's legislation on prospectuses.

Therefore, the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities should also be included within the scope of the mandate to ESMA, and in particular in the context of its work on the proportionate disclosure regime (Point 3.3 of the mandate) and the review of the provisions of the Prospectus Regulation (Point 4 of the mandate).

I thank you in advance for your cooperation and I am confident that the ESMA's technical advice and assistance will permit the European Commission to successfully clarify this issue.



Yours sincerely,

Jonathan FAULL

Contact:

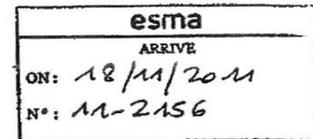
Emiliano TORNESE, Telephone: +32-2-29 85400, emiliano.tornese@ec.europa.eu

Annex IV

Letter from the Commission services on the content and timetable of the part 2 of the requests for ESMA's technical advice



EUROPEAN COMMISSION
Directorate General Internal Market and Services
Director General



Brussels, 14 NOV. 2011 - 1208615
MARKT.G3/SF/jj (2011) 1289648

Mr. Steven Maijoor
The Chairman
ESMA
Rue de Grenelle 103
75007 Paris
France

Subject: Content and timetable of the part 2 of the request for ESMA's Technical Advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU.

Dear Mr. Maijoor,

First of all I would like to thank you for sending us the first part of the ESMA's Technical Advice referred to above and published on 4 October 2011.

We note in your response that you have started working in order to deliver ESMA's Technical Advice on the remaining part of the mandate. At the initial stage, the second part of the formal mandate was expected to cover the following:

- (1) a possible format and form of a consent to use a prospectus in a retail cascade;
- (2) a review of other provisions of the Prospectus Regulation including possible additional delegated acts for technical adjustment and clarification of some existing Level 2 measures;
- (3) the criteria to be applied in assessing the equivalence of a third-country financial market; and finally
- (4) assistance to the Commission in the preparation of a comparative table recording the liability regimes applied by the Member States in relation to the Prospectus Directive.

Considering the proposals adopted on 20 October 2011 by the Commission on the review of the Markets and Financial Instruments Directive (MiFID)¹ and Market Abuse Directive (MAD)² we consider that the issues (3) and (4) could be considered at a later stage.

This will substantially reduce the ESMA's work needed for providing its Technical Advice on the remaining second part of the mandate and as such is likely to speed up your timetable.

I would like to thank again ESMA for this fruitful cooperation.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan FAULL'. The signature is stylized with a large 'J' and 'F'.

Jonathan FAULL

Contact: Stephane Fekir, Tel. (32-2)2989331, stephane.fekir@ec.europa.eu

¹ Proposal for a Directive on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (COM(2011)652)
Proposal for a Regulation on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories (COM(2011)656)

² Proposal for a Directive on criminal sanctions for insider dealing and market manipulation (COM(2011)654)
Proposal for a Regulation on insider dealing and market manipulation (market abuse) (COM(2011)651)

Annex V

Cost-benefit analysis

1. Clarification of the Prospectus Regulation

1.1. Suggestion of clarification of recital

Risk addressed / Policy objective

- Disclosure Regime / Level playing field

Scope issues

- Rules on setting out the application of Annexes

Proposal	Benefits	Costs	Evidence
As proposed in Proposal a. of the consultation paper – suggestion of clarification of Recital 7.	<p>Recital 7 aims to clarify in which situations the share registration document schedule is applicable when dealing with convertible or exchangeable debt securities.</p> <p>The current wording of recital 7 may lead to misinterpretation when read in conjunction with Article 4 and 17 and the wording the recital 7.</p> <p>A clarification of the wording would direct the focus for assessing the application of the schedule on whether the underlying shares are or are not already admitted to trading on a regulated market rather than whether the underlying shares have already been issued.</p>	<p>No cost to the issuers or persons drawing up a prospectus.</p> <p>The Prospectus Regulation to be modified to reflect the clarification when either a change to or a recast of the PR is considered.</p>	Feedback from the consultation.

1.2. Consistent use of terminology

Risk addressed / Policy objective

- Disclosure Regime

Scope issues

- Consistent terminology within the Prospectus Regulation

Proposal	Benefits	Costs	Evidence
As proposed in Proposal b. of the consultation paper – substituting the term “bond” with “debt securities”.	Consistent application of terminology within the same legal text.	No cost to the issuers or persons drawing up a prospectus. The Prospectus Regulation, Annex XVIII would have to be modified to reflect the alignment in terms.	N/A
As proposed in Proposal c. of the consultation paper – heading of column relating to building block on pro-form information.	Adding the words “(if applicable)” to the heading of the column clarifies that when Annex XVIII indicates use of the building block “Pro forma information” then it is only if the mentioned building block is applicable that it be used. The application of Annex II is conditional upon the specific situation.	No cost to the issuers or persons drawing up a prospectus. The Prospectus Regulation, Annex XVIII would have to be modified to reflect the conditional applicability of Annex II.	Feedback from the consultation.

1.3. Clarification of applicable annexes with regard to underlying securities, change to Annex XVIII

Risk addressed / Policy objective

- Disclosure Regime / Level playing field

Scope issues

- Rules on setting out the application of Annexes

Proposal	Benefits	Costs	Evidence
As proposed in Proposal d. of the consultation paper - adding in Annex XVIII a new provision concerning the disclosure regime applicable to such a type of underlying shares so as to envisage the application of Annex XIV, except for item 2, and accordingly revising Article 17 in order to expand the scope of Annex XIV, except for item 2	A further provision in Annex XVIII and an amendment to Art. 17 PR relating to securities note section providing that Annex XIV, except for item 2, is applicable relating to third party shares not admitted to trading on a regulated market would clarify the disclosure regime applicable in this case.	Low costs are expected for the issuers in those EU Countries whose practice does not envisage any information on the underlying shares not admitted to trading on a regulated market issued by a third party.	Feedback from the consultation

As proposed in Proposal e. of the consultation paper – split of row 9.	A split of row 9 in both the section on registration document as well as securities note to include references to the specific annexes applicable for the “debt securities” respectively the “underlying equity securities” provides additional clarity for the reader of Annex XVIII.	No cost to the issuers or persons drawing up a prospectus. The Prospectus Regulation Annex XVIII would have to be modified to reflect the split of row 9.	Feedback from the consultation
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2. Creating a legal basis for application of item 4.2.2 of annex XII

Risk addressed / Policy objective

- Disclosure Regime / Legal clarity

Scope issues

- Rules on application of annexes

Proposal	Benefits	Costs	Evidence
As proposed in Proposal f. of the consultation paper – item 4.2.2. of Annex XII.	The application of item 4.2.2 of Annex XII when dealing with Bonds exchangeable or convertible into third party shares or issuer’s or group shares which are admitted on a regulated market will be specified in an Article of the Prospectus Regulation and not only in Annex XVIII. The reader of the Prospectus Regulation will not be in doubt as to the legal basis for the application of item 4.2.2 of Annex XII in the mentioned scenario.	No cost to the issuer or person drawing up a prospectus as there is no change in practice.	N/A

3. Additional disclosure requirement for debt securities convertible or exchangeable within 12 months

Risk addressed / Policy objective

- Investor protection

Scope issues

- Debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belong to its group within 12 months of the security's issuance.

Proposal	Benefits	Costs	Evidence
As proposed in Proposal g. of the consultation paper.	<p>Where the share registration document is required, potential investors are provided with information pertaining to the underlying securities (shares) which they would normally be provided with when investing in shares directly.</p> <p>This type of investment is similar to an investment in equity as the situation of the issuer and its prospects will form a part of the basis for the investment decision.</p> <p>A limitation to situations where the conversion or exchange occurs within the period of 12 months ensures that issuers do not experience costs to include information that will be of no benefit to the investor or out of date at the time of conversion or exchange.</p>	<p>Issuers and persons drawing up a prospectus must draw up and include a Working capital Statement and a capitalization and indebtedness statement.</p> <p>The costs of these two statements and thereby burdens on the issuers to draw them up await feedback from the market participants.</p> <p>This would produce a modification of the Prospectus Regulation by including a legal basis in a pre-existing article and modifying Annex XVIII with the requirement.</p>	Feedback from the consultation.

4. Proportionate disclosure regime rights issues of debt securities convertible or exchangeable into issuer's shares

Risk addressed / Policy objective

- Investor protection / Level playing field

Scope issues

- All rights issues providing access to issuer's shares benefit from the disclosure regime

Proposal	Benefits	Costs	Evidence
As proposed in paragraph 37 of the consultation paper – application of the proportionate disclosure regime	<p>The proportionate disclosure regime for rights issues in Article 7.2(g) and Article 26a PR covers situations where an investor receives a right (i.e. access) to shares of the issuer.</p> <p>Full consistency between the rules of rights issues for shares and debt</p>	<p>Issuers would benefit from an alleviation of costs in drawing up prospectuses for rights issues of debt securities convertible into issuer's shares.</p> <p>Annex XVIII would have to be modified</p>	Feedback from the consultation.

	securities convertible into issuer's shares provides for application of the rules of rights issues to similar situations with similar end outcome (acquisition of issuer's shares).	to include this combination.	
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Annex VI

Suggested amendments to the Prospectus Regulation proposed for increasing legal clarity

1.1 Amendments proposed for clarification of the Prospectus Regulation

- a. recasting Recital 7 so as to clarify that the share registration document schedule should not be used if the underlying shares are already admitted to trading on a regulated market and to avoid any reference to whether or not the underlying shares to be delivered have already been issued

1.2 Amendments proposed for ensuring consistency of the Prospectus Regulation

- b. in Annex XVIII (rows 2, 3, 7, 8, 9 and 10) substituting the term “bond” with “debt securities” in order to align it with the text of the applicable Articles of the Prospectus Regulation
- c. in the heading of the column relating to the building block on pro-forma information, adding “(if applicable)”, in order to avoid any misinterpretation of the scope of the building block just mentioned above, in the light of both Article 21 of the Prospectus Regulation according to which “*the combinations provided for in the table set out in Annex XVIII shall be mandatory*” and of the provisions of Item 20.2 of Annex I, according to which Annex II is applicable only in case of a significant gross change in the size of the issuer

1.3 Amendments proposed for clarifying the application of Annex XVIII

- d. as regards debt securities exchangeable or convertible into third party shares not admitted to trading on a regulated market, adding in Annex XVIII a new provision concerning the disclosure regime applicable to such a type of underlying shares so as to envisage the application of Annex XIV, except for item 2, and accordingly revising Article 17 in order to expand the scope of Annex XIV, except for item 2
- e. splitting row 9 of Annex XVIII into two *parts so as to specify also the combinations of schedules and building blocks applicable* to the issuer of the underlying shares, when the latter is not the debt securities issuer, but is an entity belonging to its group

2 Amendments proposed for creating a legal basis for application of item 4.2.2 of Annex XII

- f. adding a new paragraph to Article 15 aimed at clarifying that for debt securities exchangeable or convertible into third party shares or issuer’ or group’s shares which are admitted to trading on a regulated market for the information concerning the underlying shares only item 4.2.2 of Annex XII is applicable

3 Amendments proposed to complete the information when the share registration document is applicable

- g. adding a new provision aimed at specifying that when debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belonging to its group and can be converted or exchanged within 12 months from the date of their issuance also the information required by items 3.1 and 3.2 of Annex III should be included either in the share registration document if the prospectus has been drawn up as a single document, or in the securities note on underlying shares if the prospectus is composed of separate documents.**

Annex VII

Text of the relevant legal rules mentioned in the Consultation Paper

Prospectus Directive

“Article 2.1 (b) Definitions

1. For the purposes of this Directive, the following definitions shall apply:

(a) (...)

(b) "equity securities" means shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer;

(...)"

“Article 4 Exemptions from the obligation to publish a prospectus

1. (...)

2. The obligation to publish a prospectus shall not apply to the admission to trading on a regulated market of the following types of securities:

(a) shares representing, over a period of 12 months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market;

(b) shares issued in substitution for shares of the same class already admitted to trading on the same regulated market, if the issuing of such shares does not involve any increase in the issued capital;

(c) securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;

(d) securities offered, allotted or to be allotted in connection with a merger or a division, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community Union legislation;

(e) shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market and that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;

(f) securities offered, allotted or to be allotted to existing or former directors or employees by their employer or an affiliated undertaking, provided that the said securities are of the same class as the securities already admitted to trading on the same regulated market and that a document is made available containing information on the number and nature of the securities and the reasons for and detail of the offer;

(g) shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market;

(h) securities already admitted to trading on another regulated market, on the following conditions:

(i) that these securities, or securities of the same class, have been admitted to trading on that other regulated market for more than 18 months;

(ii) that, for securities first admitted to trading on a regulated market after the date of entry into force of this Directive, the admission to trading on that other regulated market was associated with an approved prospectus made available to the public in conformity with Article 14;

(iii) that, except where (ii) applies, for securities first admitted to listing after 30 June 1983, listing particulars were approved in accordance with the requirements of Directive 80/390/EEC or Directive 2001/34/EC;

- (iv) that the ongoing obligations for trading on that other regulated market have been fulfilled;
 - (v) that the person seeking the admission of a security to trading on a regulated market under this exemption makes a summary document available to the public in a language accepted by the competent authority of the Member State of the regulated market where admission is sought;
 - (vi) that the summary document referred to in (v) is made available to the public in the Member State of the regulated market where admission to trading is sought in the manner set out in Article 14(2); and
 - (vii) that the contents of the summary document shall comply with Article 5(2). Furthermore the document shall state where the most recent prospectus can be obtained and where the financial information published by the issuer pursuant to his ongoing disclosure obligations is available.
- (...)"

“Article 7 Minimum information

1. (...)
2. In particular, for the elaboration of the various models of prospectuses, account shall be taken of the following:
(...)

(g) a proportionate disclosure regime shall apply to offers of shares by companies whose shares of the same class are admitted to trading on a regulated market or a multilateral trading facility as defined in Article 4(1)(15) of Directive 2004/39/EC, which are subject to appropriate ongoing disclosure requirements and rules on market abuse, provided that the issuer has not disapplied the statutory pre-emption rights.”

Prospectus Regulation

Recital 7

“(7) The share registration document schedule should be applicable to shares and other transferable securities equivalent to shares but also to other securities giving access to the capital of the issuer by way of conversion or exchange. In the latter case this schedule should not be used where the underlying shares to be delivered have already been issued before the issuance of the securities giving access to the capital of the issuer; however this schedule should be used where the underlying shares to be delivered have already been issued but are not yet admitted to trading on a regulated market.”

Recital 19

“(19) The additional information «building block» on the underlying share for certain equity securities should be added to the securities note for debt securities or substitute the item referring to «information required in respect of the underlying» of the schedule securities note for derivative securities, depending on the characteristics of the securities being issued.”

“Article 4 Share registration document schedule

- 1 For the share registration document information shall be given in accordance with the schedule set out in Annex I.
- 2 The schedule set out in paragraph 1 shall apply to the following:
 1. shares and other transferable securities equivalent to shares;
 2. other securities which comply with the following conditions:
 - (a) they can be converted or exchanged into shares or other transferable securities equivalent to shares, at the issuer's or at the investor's discretion, or on the basis of the conditions established

a the moment of the issue, or give, in any other way, the possibility to acquire shares or other transferable securities equivalent to shares;

and

(b) provided that these shares or other transferable securities equivalent to shares are or will be issued by the issuer of the security and are not yet traded on a regulated market or an equivalent market outside the Community at the time of the approval of the prospectus covering the securities, and that the underlying shares or other transferable securities equivalent to shares can be delivered with physical settlement.”

“Article 6 Share securities note schedule

1 For the share securities note information is necessary to be given in accordance with the schedule set out in Annex III.

2 The schedule shall apply to shares and other transferable securities equivalent to shares.”

“Article 7 Debt and derivative securities registration document schedule for securities with a denomination per unit of less than EUR 50 000¹⁸

For the debt and derivative securities registration document concerning securities which are not covered in Article 4 with a denomination per unit of less than EUR 50 000 or, where there is no individual denomination, securities that can only be acquired on issue for less than EUR 50 000 per security, information shall be given in accordance with the schedule set out in Annex IV.”

“Article 8 Securities note schedule for debt securities with a denomination per unit of less than EUR 50 000¹⁹

1 For the securities note for debt securities with a denomination per unit of less than EUR 50 000 information shall be given in accordance with the schedule set out in Annex V.

2 The schedule shall apply to debt where the issuer has an obligation arising on issue to pay the investor 100 % of the nominal value in addition to which there may be also an interest payment.”

“Article 12 Debt and derivative securities registration document schedule for securities with a denomination per unit of at least EUR 50 000²⁰

For the debt and derivative securities registration document concerning securities which are not covered in Article 4 with a denomination per unit of at least EUR 50 000 or, where there is no individual denomination, securities that can only be acquired on issue for at least EUR 50 000 per security, information shall be given in accordance with the schedule set out in Annex IX.”

¹⁸ Denomination per unit increased to EUR 100.000 by the Delegated Regulation.

¹⁹ See footnote 18.

²⁰ See footnote 18

**“Article 15
Securities note schedule for derivative securities**

1 For the securities note for derivative securities information shall be given in accordance with the schedule set out in Annex XII.

2 The schedule shall apply to securities which are not in the scope of application of the other securities note schedules referred to in Articles 6, 8 and 16, including certain securities where the payment and/or delivery obligations are linked to an underlying.”

**“Article 16
Securities note schedule for debt securities with a denomination per unit of at least EUR
50 000²¹**

1 For the securities note for debt securities with a denomination per unit of at least EUR 50 000 information shall be given in accordance with the schedule set out in Annex XIII.

2 The schedule shall apply to debt where the issuer has an obligation arising on issue to pay the investor 100 % of the nominal value in addition to which there may be also an interest payment.”

**“Article 17
Additional information building block on the underlying share**

1 For the additional information on the underlying share, the description of the underlying share shall be given in accordance with the building block set out in Annex XIV.

In addition, if the issuer of the underlying share is an entity belonging to the same group, the information required by the schedule referred to in Article 4 shall be given in respect of that issuer.

2 The additional information referred to in the first subparagraph of paragraph 1 shall only apply to those securities which comply with both of the following conditions:

1. they can be converted or exchanged into shares or other transferable securities equivalent to shares, at the issuer's or at the investor's discretion, or on the basis of the conditions established at the moment of the issue or give, in any other way, the possibility to acquire shares or other transferable securities equivalent to shares;

and

2. provided that these shares or other transferable securities equivalent to shares are or will be issued by the issuer of the security or by an entity belonging to the group of that issuer and are not yet traded on a regulated market or an equivalent market outside the Community at the time of the approval of the prospectus covering the securities, and that the underlying shares or other transferable securities equivalent to shares can be delivered with physical settlement.”

²¹ See footnote 18.

**“Article 21
Combination of schedules and building blocks**

1 The use of the combinations provided for in the table set out in Annex XVIII shall be mandatory when drawing up prospectuses for the types of securities to which those combinations correspond according to this table.

However, for securities not covered by those combinations further combinations may be used.

2 The most comprehensive and stringent registration document schedule, i.e. the most demanding schedule in term of number of information items and the extent of the information included in them, may always be used to issue securities for which a less comprehensive and stringent registration document schedule is provided for, according to the following ranking of schedules:

1. share registration document schedule;
2. debt and derivative securities registration document schedule for securities with a denomination per unit of less than EUR 50 000²²;
3. debt and derivative securities registration document schedule for securities with a denomination per unit at least EUR 50 000²³.”

Annexes to the Prospectus Regulation

“ANNEX I Minimum disclosure requirements for the share registration document (schedule)”

ANNEX II Pro forma financial information building block
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ANNEX III
<p style="text-align: center;">Minimum disclosure requirements for the share securities note (schedule)</p> <p>(...)</p> <p>3. KEY INFORMATION</p> <p>3.1. Working capital statement Statement by the issuer that, in its opinion, the working capital is sufficient for the issuer's present requirements or, if not, how it proposes to provide the additional working capital needed.</p> <p>3.2. Capitalisation and indebtedness A statement of capitalisation and indebtedness (distinguishing between guaranteed and unguaranteed, secured and unsecured indebtedness) as of a date no earlier than 90 days prior to the date of the document. Indebtedness also includes indirect and contingent indebtedness.</p> <p>(...)</p>

²² See footnote 18.

²³ See footnote 18.

“ANNEX IV
Minimum disclosure requirements for the debt and derivative securities registration document (schedule) (Debt and derivative securities with a denomination per unit of less than EUR 50 000²⁴)”

ANNEX V
Minimum disclosure requirements for the securities note related to debt securities (schedule) (Debt securities with a denomination per unit of less than EUR 50 000²⁵)

“ANNEX IX
Minimum disclosure requirements for the debt and derivative securities registration document (schedule) (Debt and derivative securities with a denomination per unit of at least EUR 50 000²⁶)”

“ANNEX XI
Minimum disclosure requirements for the banks registration document (schedule)”

“ANNEX XII
Minimum disclosure requirements for the securities note for derivative securities (schedule)”
<p>“(…)</p> <p>4.2.2. A statement setting out the type of the underlying and details of where information on the underlying can be obtained:</p> <ul style="list-style-type: none"> - an indication where information about the past and the further performance of the underlying and its volatility can be obtained, - where the underlying is a security, - the name of the issuer of the security, - the ISIN (international security identification number) or other such security identification code, - where the underlying is an index, - the name of the index <p>and a description of the index if it is composed by the issuer.</p> <p>If the index is not composed by the issuer, where information about the index can be obtained,</p> <ul style="list-style-type: none"> - where the underlying is an interest rate, - a description of the interest rate, - others: - Where the underlying does not fall within the categories specified above the securities note shall contain equivalent information. - where the underlying is a basket of underlyings, - disclosure of the relevant weightings of each underlying in the basket.”

“ANNEX XIII
Minimum disclosure requirements for the securities note for debt securities with a denomination per unit of at least EUR 50 000²⁷ (Schedule)”

²⁴ See footnote 18.

²⁵ See footnote 18

²⁶ See footnote 18

²⁷ See footnote 18.

“ANNEX XIV

Additional information building block on underlying share for some equity securities”
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“(…)

2. When the issuer of the underlying is an entity belonging to the same group, the information to provide on this issuer is the one required by the share registration document schedule.”
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European Securities and
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ANNEX XVIII
Table of combinations

ANNEX XVIII	REGISTRATION DOCUMENT								
	SCHEDULES					BUILDING BLOCK	SCHEDULES		
TYPES OF SECURITIES	SHARE	DEBT and DERIVATIVE (< EUR 50.000)	DEBT and DERIVATIVE (> or = EUR 50.000)	ASSET BACKED SEC.	BANKS DEBT and DERIVATIVE	PRO FORMA INFORMATION	COLLECTIVE INVESTMENT UNDERTAKING OF THE CLOSED-END TYPE	STATES AND THEIR REGIONAL AND LOCAL AUTHORITIES	PUBLIC INTERNATIONAL BODIES/Debt Securities guaranteed by A Member State of the OECD
Shares (preference shares, redeemable shares, shares with preferential subscription rights, etc...)									
Bonds (vanilla bonds, income bonds, structured bonds, etc...) with a denomination of less than EUR 50.000		OR			OR				
Bonds (vanilla bonds, income bonds, structured bonds, etc...) with a denomination of at least EUR 50.000			OR		OR				
Debt Securities guaranteed by a third party		OR	OR		OR				
Derivative securities guaranteed by a third party		OR	OR		OR				

*Asset backed securities									
Bonds exchangeable or convertible into third party shares or issuer's group shares which are admitted on a regulated market		OR	OR		OR				
Bonds exchangeable or convertible into the issuer's shares not admitted on a regulated market									
Bonds exchangeable or convertible into group's shares not admitted on a regulated market		OR	OR		OR				
Bonds with warrants to acquire the issuer's shares not admitted to trading on a regulated market									
Shares with warrants to acquire the issuer's shares not admitted to trading on a regulated market									
Derivatives sec. giving the right to subscribe or to acquire the issuer's shares not admitted on a regulated market									
Derivatives sec. giving the right to acquire group's shares not admitted on a regulated market		OR	OR		OR				
Derivatives sec. giving the right to subscribe or to acquire issuer's or group shares which are		OR	OR		OR				

admitted on a regulated market and derivatives sec. linked to any other underlying than issuer's or group shares which are not admitted on a regulated market (including any derivatives sec. entitling to cash settlement)								
ANNEX XVIII	SECURITIES NOTE							
	SCHEDULES				ADDITIONAL BUILDING BLOCKS			
TYPES OF SECURITIES	SHARE	DEBT (< EUR 50.000)	DEBT (> or = EUR 50.000)	DERIVATIVES SEC.	GUARANTEES	ASSET BACKED SEC.	UNDERLYING SHARE	
Shares (preference shares, redeemable shares, shares with preferential subscription rights, etc...)								
Bonds (vanilla bonds, income bonds, structured bonds, etc...) with a denomination of less than EUR 50.000								
Bonds (vanilla bonds, income bonds, structured bonds, etc...) with a denomination of at least EUR 50.000								
Debt Securities guaranteed by a third party		OR	OR					
Derivative sec. guaranteed by a third party								
Asset backed securities		OR	OR					
Bonds exchangeable or convertible into third party shares or issuer's group shares which are		OR	OR	only item 4.2.2				

admitted on a regulated market							
Bonds exchangeable or convertible into the issuer's shares not admitted on a regulated market		OR	OR				
Bonds exchangeable or convertible into group's shares not admitted on a regulated market		OR	OR				
Bonds with warrants to acquire the issuer's shares not admitted to trading on a regulated market		OR	OR	AND except item 4.2.2			
Shares with warrants to acquire the issuer's shares not admitted to trading on a regulated market				AND except item 4.2.2			
Derivatives sec. giving the right to subscribe or to acquire the issuer's shares not admitted on a regulated market				except item 4.2.2			
Derivatives sec. giving the right to acquire group's shares not admitted on a regulated market				except item 4.2.2			
Derivatives sec. giving the right to subscribe or to acquire issuer's or group shares which are admitted on a regulated market and derivatives sec. linked to any other underlying than issuer's or group shares which are not admitted on a regulated market (including any derivatives sec. entitling to cash settlement)							



"Article 1
Amendments to Regulation (EC) No 809/2004

Regulation (EC) No 809/2004 is amended as follows:

- (1) (...)
(2) In Article 2, the following point 13 is added:

"13. "Rights issue", means any issue of statutory pre-emption rights which allow for the subscription of new shares and is addressed only to existing shareholders. Rights issue also includes an issue where such statutory pre-emption rights are disabled and replaced by an instrument or a provision conferring near identical rights to existing shareholders when those rights meet the following conditions:

- (a) shareholders are offered the rights free of charge;
(b) shareholders are entitled to take up new shares in proportion to their existing holdings, or, in the case of other securities giving a right to participate in the share issue, in proportion to their entitlements to the underlying shares;
(c) the rights to subscribe are negotiable and transferable or, if not, the shares arising from the rights are sold at the end of the offer period for the benefit of those shareholders who did not take up those entitlements;
(d) the issuer is able, as regards the entitlements referred to in point (b), to impose limits or restrictions or exclusions and make arrangements it considers appropriate to deal with treasury shares, fractional entitlements and requirements laid down by law or by a regulatory authority in any country or territory;
(e) the minimum period during which shares may be taken up is the same as the period for the exercise of statutory pre-emption rights laid down in Article 29(3) of Council Directive 77/91/EEC*;
(f) the rights lapse at the expiration of the exercise period.

(...)

- (8) In Article 21, the following paragraph 3 is added:

"3. The issuer, the offeror and the person asking for admission to trading on a regulated market may choose to draw up a prospectus in accordance with the proportionate schedules set out in Annexes XXIII to XXIX instead of the schedules set out in Annexes I, III, IV, IX, X and XI as described in the second subparagraph provided that the respective conditions laid down in Articles 26a, 26b and 26c are fulfilled.

Where the issuer, the offeror and the person asking for admission to trading on a regulated market makes that choice:

- (a) the reference to Annex I in Annex XVIII shall be read as a reference to Annexes XXIII or XXV;
(b) the reference to Annex III in Annex XVIII shall be read as a reference to Annex XXIV;
(c) the reference to Annex IV in Annex XVIII shall be read as a reference to Annex XXVI;
(d) the reference to Annex IX in Annex XVIII shall be read as a reference to Annex XXVII;
(e) the reference to Annex X in Annex XVIII shall be read as a reference to Annex XXVIII;
(f) the reference to Annex XI in Annex XVIII shall be read as a reference to Annex XXIX."

(...)

- (13) The following Chapter IIIa is inserted:

"CHAPTER IIIa
PROPORTIONATE DISCLOSURE REGIME
Article 26a
Proportionate schedule for rights issues

1. The proportionate schedules set out in Annexes XXIII and XXIV shall apply to rights issues, provided that the issuer has shares of the same class already admitted to trading on a regulated market

or a multilateral trading facility as defined in point 15 of Article 4(1) of Directive 2004/39/EC of the European Parliament and of the Council*.

2. Issuers whose shares of the same class are already admitted to trading on a multilateral trading facility can only make use of the schedules set out in Annexes XXIII and XXIV when the rules of that multilateral trading facility contain the following:

(a) provisions requiring issuers to publish annual financial statements and audit reports within six months after the end of each financial year, half yearly financial statements within four months after the end of the first six months of each financial year and make public inside information as defined in point 1 of the first paragraph of Article 1 of Directive 2003/6/EC pursuant to Article 6 of that Directive;

(b) provisions requiring issuers to make the reports and information referred to in point (a) available to the public by publishing them on their websites;

(c) provisions preventing insider dealing and market manipulation in accordance with Directive 2003/6/EC.

3. A statement at the beginning of the prospectus shall indicate clearly that the rights issue is addressed to shareholders of the issuer and that the level of disclosure of the prospectus is proportionate to that type of issue.

Article 26b

Proportionate schedules for small and medium-sized enterprises and companies with reduced market capitalisation

The proportionate schedules set out in Annexes XXV to XXVIII shall apply when securities issued by small and medium-sized enterprises and companies with reduced market capitalisation are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.

However, small and medium-sized enterprises and companies with reduced market capitalisation may instead choose to draw up a prospectus in accordance with the schedules set out Annexes I to XVII and XX to XXIV.

Annex XXIII
Proportionate Schedule for Minimum Disclosure Requirements for the Share Registration Document for Rights Issues

ANNEX XXIV
Proportionate Schedule for Minimum Disclosure Requirements for the Share Securities Note for Rights Issues
<p>3. KEY INFORMATION</p> <p>3.1 Working capital Statement Statement by the issuer that, in its opinion, the working capital is sufficient for the issuer’s present requirements or, if not, how it proposes to provide the additional working capital needed.</p> <p>3.2 Capitalization and indebtedness</p> <p>A statement of capitalization and indebtedness (distinguishing between guaranteed and unguaranteed, secured and unsecured indebtedness) as of a date no earlier than 90 days prior to the date of the document. Indebtedness also includes indirect and contingent indebtedness.</p>

“ANNEX XXV

Proportionate Schedule for Minimum Disclosure Requirements for the Share Registration Document for SMEs and companies with reduced market capitalization”

“ANNEX XXVI

Proportionate Schedule for Minimum Disclosure Requirements for the Debt and Derivative Securities <100 000 EUR Registration Document for SMEs and companies with reduced market capitalisation²⁸”

“ANNEX XXVII

Proportionate Schedule for Minimum Disclosure Requirements for the Debt and Derivative Securities ≥100 000 EUR Registration Document for SMEs and companies with reduced market capitalisation (schedule)²⁹”

ANNEX XXVIII

Proportionate Schedule for Minimum Disclosure Requirements for the Depository Receipts issued over shares for SMEs and companies with reduced market capitalisation³⁰

²⁸ Sub-items as in Annex IV of Commission Regulation (EC) No 809/2004, except the amendment in item 13 (Financial Information).

²⁹ Sub-items as in Annex IX of Commission Regulation (EC) No 809/2004, except the amendment in item 11 (Financial Information).

³⁰ For Items 26–32, Sub-items as in Annex X of Commission Regulation (EC) No 809/2004.