



European Securities and
Markets Authority

Technical Advice

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

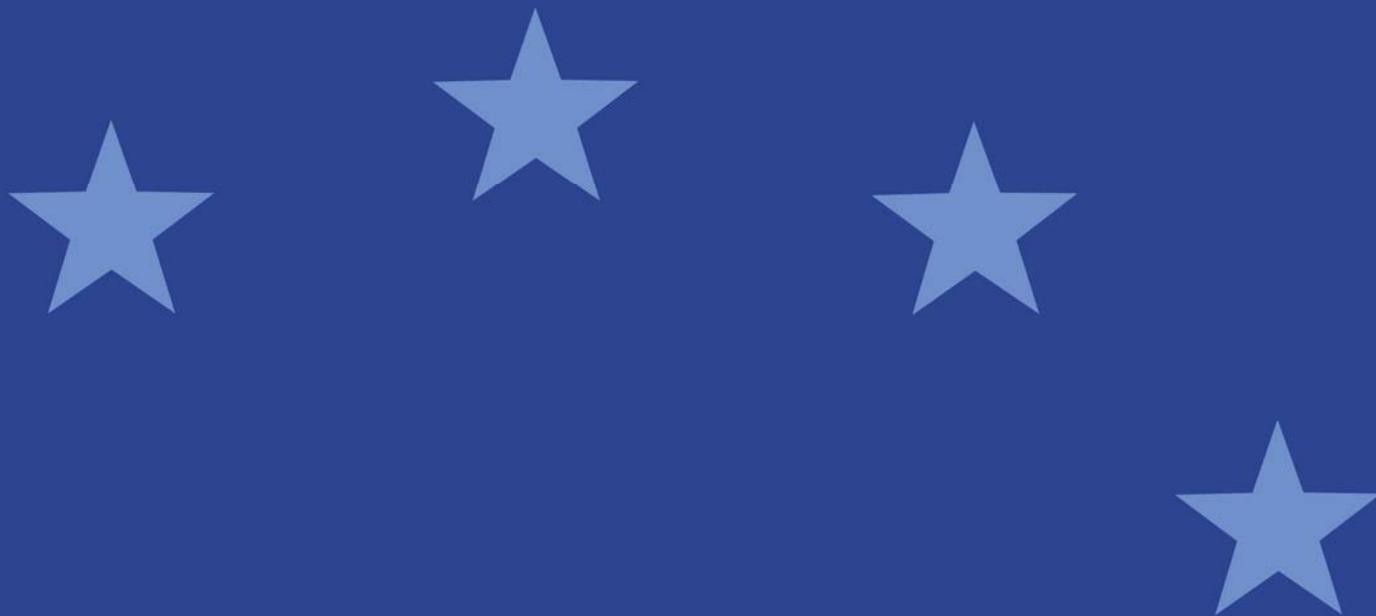


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Acronyms used

Amended Directive	The Prospectus Directive as amended by Directive 2010/73/EU
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
Delegated Regulation	Commission Delegated Regulation (EU) No 486/2012 of 30 March 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
ESMA	European Securities and Markets Authority
HFI	Historical Financial Information
IPO	Initial Public Offering
MTF	Multilateral Trading Facility
OFR	Operating and Financial Review
Proportionate Disclosure Regime	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 al-



teration of their capital, with a view to making such safeguards equivalent (77/91/EEC)

SMEs

Small and Medium Enterprises as defined in the Prospectus Directive

Executive Summary

Reasons for publication

The European Commission sent a formal request on 20 January 2011 to ESMA to provide technical 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).

On 20 June 2012 ESMA released a Consultation Paper (Ref. ESMA/2012/380) requesting input from market participants to assist in providing advice to the European Commission.

Contents

In accordance with the terms of the Mandate, ESMA presents by means of this Technical Advice a combined document that comprises both its feedback statement and its final technical advice concerning the disclosure requirements for convertible or exchangeable debt securities. The document has been structured in such a way that the Technical Advice immediately follows the Feedback Statement.

This Technical Advice 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 for convertible/exchangeable debt securities.

Section I explains the general background, Section II explains the overall result of the consultation, Section III sets out a summary of the feedback received and ESMA's responses thereto and Section IV sets out the Technical Advice to the European Commission.

Next steps

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 second quarter of 2013.



The remaining work from the Mandate on section 3.4, the criteria to be applied in assessing the equivalence of a third-country financial market (Article 4 (1)), is postponed due to the on-going review of the Transparency Directive¹, Market Abuse Directive² and MiFID.

¹ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC (Transparency Directive).

² Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse)

I. Background

1. The following Feedback Statement addresses the principal comments received from stakeholders on the consultation provided that they directly relate to the issues referred to in the Mandate. The Feedback Statement is not intended as an exhaustive account of every point made by market participants.
2. ESMA received 12 responses from market participants on the Consultation Paper “Prospectus disclosure requirements for convertible or exchangeable debt securities”.

II. Results of the consultation

3. Overall, the majority of respondents (9 participants out of 12) agreed with ESMA’s proposals for amendments to the Prospectus Regulation, aimed at clarifying the disclosure regime applicable to prospectuses related to convertible or exchangeable debt securities. In particular, they agreed that there is a need to clarify the current requirements of the Prospectus Regulation applicable to the underlying shares, whether admitted to trading on a regulated market or not.
4. With regard to ESMA’s reasoning concerning the applicability to equity securities of items 3.1 and 3.2 of Annex III of the Prospectus Regulation³ and the proposal to limit their application to those debt securities falling under the definition of equity securities in Article 2(1)(b) of the Prospectus Directive which are convertible or exchangeable within 12 months of the issuance date, the views of respondents were split. On the one hand, in fact, some participants believed that a literal interpretation of the Prospectus Regulation should be followed, and, on this basis, items 3.1 and 3.2 should be considered applicable only to shares, as the scope of Annex III is limited to shares and other transferable securities equivalent to shares. On the other hand, other respondents (mainly associations of issuers and investors) agreed with ESMA’s interpretation and deemed it important not to limit the application of those two items to debt securities convertible or exchangeable within 12 months of the issuance and that are equity securities according to the Prospectus Directive.
5. In its Consultation Paper, ESMA asked market professionals to provide data on the costs of producing the statements of working capital and capitalization and indebtedness. However, none of the respondents communicated any precise cost estimates.
6. All respondents agreed with ESMA’s assessment of the application of the proportionate disclosure regime envisaged by Articles 26a and 26b of the Prospectus Regulation as amended by the Commission Delegated Regulation (EU) No 486/2012 (“Delegated Regulation” or “DR”).

ESMA’s Response:

7. Considering the comments received, the following amendments have been made to the proposals presented in ESMA’s consultation paper:
 - With regard to equity securities issuers, provided that the underlying shares are not admitted to trading on a regulated market and which fall under the definition of equity securities set out in Article 2 (1) (b) of the Prospectus Directive, the application of items 3.1 and 3.2 of Annex III will not be limited to debt securities which can be converted or exchanged within 12 months of their issue date;
 - Application of the proportionate disclosure regime for rights issues to pre-emptive rights of debt securities convertible or exchangeable for new shares;
 - Amendments to Annex XVIII so as to include also the combination of schedules and building blocks applicable when the issuer, the offeror and the person asking for admission to trading on a regulated market may draw up a prospectus according to the proportionate disclosure regimes (set out in An-

³ Those items refer to the working capital and capitalization and indebtedness statements.

nexes XXIII to XXIX), provided that the respective conditions laid down in Articles 26a and 26b are fulfilled.

III. Summary of the feedback and our responses

Amendments to the Prospectus Regulation proposed for clarification of the Prospectus Regulation

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 XI^A are applicable to underlying shares already admitted to trading on a regulated market? If not, please provide the reasoning behind your position.

8. Almost all respondents agreed with ESMA's proposal to clarify the disclosure requirements concerning the underlying shares already admitted to trading on a regulated market in the Prospectus Regulation.
9. A few respondents argued that the requirements of item 4.2.2 of Annex XII should also apply to underlying shares issued by issuers listed on MTFs and that the current Prospectus Regulation is satisfactory and cover all possible situations.

ESMA's response:

10. Regarding comments received from a few market participants, ESMA has considered that, even when the issuer may benefit from the proportionate disclosure regime, the reason for which a certain amount of information can be omitted from the proportionate schedules is that the issuer is listed on a regulated market and such information is already available to shareholders and the public in general. However the cases considered by these respondents did not refer to the proportionate disclosure regime. In addition, they suggested applying the requirements of item 4.2.2 of Annex XII (which re-

⁴ Item 4.2.2 of Annex XII requires: "A statement setting out the type of the underlying and details of where information on the underlying can be obtained:

- 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 and a description of the index if it is composed by the issuer. If the index is not composed by the issuer, where information about the index can be obtained,
- 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."

fers to where information on the underlying shares can be obtained) also when the underlying shares are traded on MTFs irrespective of whether or not those markets have appropriate disclosure rules. Therefore, it does not seem reasonable to place the burden of having to look for and collect information which is not necessarily publicly available upon investors.

11. Based on the argument provided in the Consultation Paper, referring to the need for legal clarity, and taking into account the view of the majority of participants, ESMA will retain its approach proposed in its Consultation Paper, and will recommend amending the Prospectus Regulation so as to clarify that if the underlying shares are already admitted to trading on a regulated market, information to be included in the prospectus is only that provided by item 4.2.2 of Annex XII. Upon further reflection, ESMA considers it more appropriate to add a clarification to Articles 8 and 16 of the Prospectus Regulation (securities note schedules for debt securities) rather than to Article 15 (securities note schedule for derivative securities) as debt securities convertible or exchangeable into third party shares are debt securities pursuant to the aforementioned Articles 8 and 16.

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.

12. The majority of respondents were in favour of considering Annex XIV, except item 2, applicable to underlying shares issued by a third party (i.e. different from the debt securities issuer and not belonging to the issuer's group) not admitted to trading on a regulated market.
13. Only two respondents (one bank association and one bank) expressed the view that in the case of debt securities convertible or exchangeable into third party shares, the debt securities issuer should refer only to information publicly available in the prospectus, irrespective of whether the underlying shares are or are not admitted to trading on a regulated market, but provided that they are admitted on an MTF. Otherwise, in their opinion, the application of Annex XIV, with the exception of item 2, would require due diligence to be carried out on the third party. These respondents did not clearly specify what the disclosure regime for underlying shares not admitted to trading on a regulated market issued by a third party should be. However, ESMA understands their comments to be that item 4.2.2 of Annex XII should be applied also to those third party shares not already admitted to trading on a regulated market, with the consequence that the prospectus should contain only very limited information about the underlying shares (e.g. name of issuer, ISIN Code) along with a reference to where information on the shares can be obtained.

ESMA's response:

14. When looking more specifically at the disclosure requirements provided by Annex XIV, except item 2, it can be noted that all the information required concerns only the underlying shares and not their issuer. The information covered by the disclosure requirements is not easily available to investors when the issuer of the underlying shares is not listed on a regulated market. The reasoning behind the application of Annex XIV (except item 2) rather than item 4.2.2 of Annex XII is very much linked to this circumstance. In addition, when the underlying shares are traded on an MTF, it has to be taken into account that MTFs are markets not subject to the Transparency Directive and each MTF may determine on its own what disclosure requirements should be complied with by issuers whose securities are traded thereon.
15. Considering the above, ESMA disagrees with those respondents who suggest applying item 4.2.2 of Annex XII to underlying shares not admitted to trading on a regulated market and does not believe there could be a legal basis to allow the application of item 4.2.2 of Annex XII to the aforementioned type of underlying shares. Moreover, having considered that the information required by Annex XIV, except item 2, relates only to the underlying shares, ESMA is of the opinion that due diligence on the

third party issuer would not be necessary. In situations where the third party issuer does not cooperate with the issuer of the debt securities in drawing up the prospectus, the latter should rather use an appropriate source of information (e.g. public register of commerce where the memorandum and articles of association of the issuer has been filed).

16. Having considered the answers received, ESMA will proceed as proposed in the Consultation Paper and recommends adding a new provision in Annex XVIII concerning the disclosure regime applicable to third party underlying shares not admitted to trading on a regulated market so as to envisage the application of Annex XIV, except for item 2, and accordingly revise Article 17 in order to expand the scope of Annex XIV, except for item 2. This proposal relating to prospectus disclosure requirements does not affect the specific circumstances, if any, in which the aforementioned securities can be issued/offered or admitted to trading on a regulated market according to the national legislation.

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.

17. Only two respondents disagreed with the proposal to clarify the disclosure regime in Annex XVIII of the Prospectus Regulation 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 as the debt securities issuer. According to the opinion of one respondent it is already clear that only when the underlying shares issued by an entity belonging to the same group of the debt securities issuer are not admitted to trading on any market the share registration document or Annex XIV including item 2 should be applicable to such an entity. With reference to this question, this respondent repeated the view that when the underlying shares are admitted to trading on an MTF the prospectus should only refer to publicly available information according to the rules of the specific MTF also as regards the underlying shares issuer which is a company belonging to the same group of the debt securities issuer. A second respondent also believes that the current Prospectus Regulation is clear enough in this regard. However, in the case that ESMA decides to propose the envisaged amendment, this market participant suggests a specific provision be introduced for debt securities with an option of conversion into shares of an issuer to be listed for the first time (i.e. IPO) provided that the IPO actually occurs; the suggested new provision should clarify that the share registration document is not applicable in such a circumstance.
18. Apart from the two respondents mentioned above, all the other participants agreed with the amendments proposed in the Consultation Paper relating to the disclosure regime for the issuer of the underlying shares not admitted on a regulated market when it is an entity belonging to the same group of the debt securities issuer. In particular, ESMA will also recommend specifying the combinations of schedules and building blocks applicable to the issuer of the underlying shares in Annex XVIII.

ESMA's response:

19. Our previous comments in paragraph 14, regarding the opinion of one respondent relating to the application of item 4.2.2 of Annex XII also when underlying shares are admitted on an MTF, are applicable also in this case. ESMA will therefore continue with its initial proposal aimed at clarifying in Annex XVIII that the share registration document is applicable to the issuer of the underlying shares not admitted on a regulated market when it is an entity belonging to the same group of the debt securities issuer.

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.

20. Only half of participants provided an answer to this question, as it was considered overly technical by the others. The majority of those who replied agreed with ESMA's view. One respondent pointed out that even if recital 7 contains some inconsistency, it would not be necessary to make the proposed clarification, since it does not seem very realistic that an issuer could issue bonds convertible into or exchangeable for shares already issued but not admitted to trading on a regulated market or whose shares of the same class are already admitted to trading on a regulated market. In addition, this participant highlighted that a recital should not have a greater impact or equal impact value to an article of the Prospectus Regulation.

ESMA's response:

21. ESMA agrees that a recital of the regulation cannot have the same or greater impact value than its articles. However, having also considered that the amendments proposed in the Consultation Paper for clarifying the instructions provided by Annex XVIII, as to the disclosure regime for the underlying shares, are based on whether the latter securities are or are not already admitted to trading on a regulated market, a clearer text of the second sentence of recital 7 would be ancillary to the correct interpretation of the rules.
22. ESMA will therefore maintain its proposal that a rewording of Recital 7 could further 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.

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?

23. Regarding ESMA's interpretation of the current legal framework concerning prospectus disclosure requirements for convertible or exchangeable debt securities, the only point of disagreement raised by respondents was related to the matter of the application of items 3.1 and 3.2 of Annex III to debt securities exchangeable or convertible into shares within 12 months from the date of their issuance which, pursuant to 2(1)(b) of the Prospectus Directive, fall under the definition of equity securities and whose underlying shares are not admitted to trading on a regulated market.
24. In particular, the majority of respondents agreed that the working capital statement and the capitalization and indebtedness statement all form material information to be included in prospectuses related to convertible or exchangeable debt securities which are equity securities according to the prospectus regime, and when the underlying shares are not admitted to trading on a regulated market. Nevertheless, they believe that the scope of these disclosure requirements should not be limited to those debt securities which could be converted or exchanged within the 12 month period after their issuance, but instead should be consistent with the longer period to which the issuers' financial strategies refer. They also pointed out that items 3.1 and 3.2 are statements provided by the issuer, and not by an external auditor, so that the regulatory burden is likely to be very low.
25. Conversely, 4 of the respondents were of the opinion that items 3.1 and 3.2 of Annex III are required by the Prospectus Regulation only for shares. The different nature of convertible or exchangeable debt

securities is further identified by the fact that the bondholder may choose to obtain cash at maturity instead of conversion. In addition, some respondents highlighted that even when convertible/exchangeable bonds can legally be converted or exchanged in the first year after the issue date, from a financial point of view this choice would not be economical for bondholders as the strike price of the option is normally out of the money in the first year of existence of convertible/exchangeable bonds. In their opinion, it is a matter of fact that the working capital statement and capitalization and indebtedness statement would become out of date at the time in which investors could find it profitable to convert or exchange their bonds. According to one of those respondents, an obligation to provide updated data concerning capitalization and indebtedness could limit the issuer's freedom as regards the choice of the most suitable time for making a public offering, as it would avoid tapping the market in the months just before the approval of its annual financial statements. Moreover, ESMA's proposal relating to items 3.1 and 3.2 of Annex III could imply a significant increase in costs for the issuers, leading them to an undesirable behavior aimed at circumventing the rules. In fact, in their opinion, issuers could decide: i) to issue bonds convertible or exchangeable only after one year moving away from normal international practice in this field, which would have a negative impact on the pricing of the financial instrument, and as a consequence on the cost of issuance for the issuer; ii) to make a private placement of the convertible or exchangeable bonds (e.g. an offer to institutional investors) and list them on a non-regulated market so as not to be submitted to the obligation to publish a prospectus.

26. None of the respondents provided data relating to precise cost estimates of 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.

ESMA's response:

27. ESMA acknowledges that there have been different practices among the various EU jurisdictions concerning the application of items 3.1. and 3.2. of Annex III (i.e. working capital and capitalization and indebtedness statement) of the Prospectus Regulation for convertible and exchangeable debt securities which are equity securities and whose underlying shares are not admitted to trading on a regulated market.
28. ESMA has carefully reconsidered the issue of the relevance of this information for investors, focusing its attention on the time of the investment decision. In fact the prospectus, pursuant to article 5.1 of the Prospectus Directive, shall contain the information which is necessary to enable investors to make an informed assessment of the investment proposed⁵ when securities are offered to them. Therefore, the assessment of the materiality of information should be developed at the time of the investment decision rather than at the time when the securities can be converted or exchanged.
29. Upon consideration of the answers received, to tackle this issue, ESMA has taken into account the following elements:
 - From the perspective of investor protection, when convertible/exchangeable bonds are equity securities according to the Prospectus Directive and their underlying shares are not listed on a regulated market, at the time of the investment decision investors need to have at their disposal essential updated information relating both to the issuer's (of the underlying shares) ability to continue as a going concern (information provided by the working capital statement) and to its indebtedness compared to its capitalization. The latter statement allows investors to obtain valuable information on the degree of the issuer's risk associated to the level of indebtedness. Both

⁵ Article 5.1 of the Prospectus Directive reads: "Without prejudice to Article 8(2), the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets, and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analyzable and comprehensible form."

statements present an updated “snapshot” of the issuer’s financial situation which would not be otherwise available to the market at the time of the investment decision.

- It is a matter of fact that, referring always to the securities under discussion here, when the issuer of the underlying shares encounters difficulties in fulfilling its obligations, such financial conditions can have an impact on the value of its shares. In this regard, ESMA has taken into account that the most common methods used in the financial field for the appraisal of the value of convertible or exchangeable bonds assess also the theoretical market value of the option. The latter, in turn, depends, among other variables, on the expected remuneration of the underlying shares (e.g. in terms of expected dividend). By way of example of cases in which the financial conditions of the issuer may have a negative effect on the value of the option: should the issuer of the underlying shares provide a negative working capital statement in the prospectus, it would mean that at the time of the investment decision the value of the option might be nil. This circumstance could lead investors not to subscribe or purchase convertible or exchangeable bonds of that specific issuer or rather assess different types of securities as more suitable to the degree of investment risk they are able to face (e.g. plain vanilla debt securities which do not carry any option, but normally provides for a higher yield than convertible or exchangeable bonds).
- The statements of working capital and capitalization and indebtedness are even more significant to investors of debt securities which can be converted or exchanged into shares only at the issuer’s discretion (e.g. mandatory convertible bonds);
- It has to be noted that since the entry into force of the Prospectus Regulation, prospectuses related to public offerings of shares have been published in all months of the year, notwithstanding the fact that these prospectuses have had to include the two statements in question. ESMA, therefore, does not believe that the requirement for this additional information could have a significant impact on the issuer’s decision concerning the most appropriate time to make a public offer of debt securities exchangeable or convertible that fall under the definition of equity securities in the Prospectus regime and whose underlying shares are not admitted to trading on a regulated market.

30. Consequently, ESMA confirms its opinion that the working capital statement and capitalization and indebtedness statement are material information for investors for the securities concerned.
31. ESMA noted that the working capital and capitalization and indebtedness statements are required by the Prospectus Regulation also when the proportionate disclosure regime currently applies.
32. Regarding the issue of the costs for drawing up the working capital and capitalization and indebtedness statements, given the absence of precise cost estimates provided by the market participants, ESMA believes it useful to take into account information which came out in the market feedback relating to the ESMA’s Consultation Paper on the proportionate disclosure regime⁶. In that context, in fact, at a more general level market professionals were asked to provide data on the costs of producing a prospectus. Respondents estimated that the most burdensome information is represented by the Operating and Financial Review (OFR) and the Historical Financial Information (HFI). On the basis of the data provided by participants, compared with the costs indicated for drawing up the OFS and HFI, those ones relating to the indebtedness statement represent less than 0,5% of the cost of the entire prospectus. Furthermore, the working capital statement was not inserted in the category of particularly burdensome requirements.
33. Having also considered the remarks made by some respondents about both the lack of rationale behind a limitation of working capital and capitalization and indebtedness statements to those bonds convertible or exchangeable within a 12 month period after the issue date and the risk that such a provision could lead issuers to circumvent it, ESMA has decided to change its original proposal, enlarging the scope of items 3.1 and 3.2 of Annex III to all convertible or exchangeable debt securities which fall into the definition of equity securities provided by Art. 2.2(b) of the Prospectus Directive and whose underlying shares are not admitted to trading on a regulated market. Therefore, ESMA

⁶ Final Report ESMA/2011/323, part VII, paragraph 229.

will recommend that items 3.1 and 3.2 of Annex III be included in the prospectus irrespective of when the option of conversion or exchange can be exercised.

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

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.

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?

34. Respondents agreed that exchangeable debt securities are not necessarily in the scope of Article 29.6 of the Second Directive, as they normally are securities exchangeable for existing shares, while rights issues can only concern new shares. In the opinion of some participants the rights issues regime may apply to any security which gives access, by way of conversion, exchange, exercise of warrants, to new shares.
35. One respondent highlighted the ambiguity of the expression "exchangeable debt securities" as it does not necessarily have an exclusive meaning of exchangeability for existing shares. In fact, they noted that for instance Annex XVIII, row 7, of the Prospectus Regulation considers "*bonds exchangeable or convertible into third party shares or issuers' or group shares which are admitted on a regulated market*" without distinction of terms and that since the underlying shares are already traded on a regulated market they are already issued. Therefore, it seems possible that convertible debt securities could be converted into new shares.
36. Respondents fully supported ESMA's view to consider rights issues of debt securities convertible into issuer's new shares in the scope of the proportionate disclosure regime envisaged by Article 26.a of the Prospectus Regulation as introduced by the Delegated Regulation. However, in light of the aforementioned considerations regarding the fact that differences between convertible and exchangeable bonds cannot be identified unequivocally on the basis of the Prospectus regime, some participants believe it important that ESMA provides for further clarification concerning the type of securities to which the proportionate disclosure regime for rights issues may apply.

ESMA's response:

37. Taking into account the comments made by market participants, overall ESMA deems it important to consider that as rights issues are a technique for protecting the existing issuer's shareholders from the dilution of their holdings in the context of capital raising in cash, the situation in which new shares are issued has to be intended as a pre-condition of pre-emptive offers. In the absence of a new issuance of shares there could not be any rights issues and, as a consequence, Article 7 (2) (g) of the Prospectus Directive could not apply.
38. Furthermore, as regards the question relating to which options (e.g. conversion or exchange) could fall into the scope of Article 29 (6) of the Second Directive, ESMA agrees with those respondents who have highlighted the ambiguity of the terms "exchangeable" and "convertible". In fact, issuances of debt securities which are exchangeable for new shares may be found on the market, for instance when the issuer offers bondholders of outstanding plain vanilla debt securities an option to exchange them with its new shares, so that the latter ones become the consideration for bonds repayment. Similarly, convertible bonds may also have as underlying existing shares, but this practice mainly concerns indi-

rect convertible bonds where the issuer of the underlying is an entity different from the bonds' issuer. Even if the aforementioned situations do not refer to rights issues, it is a matter of fact that the use of the term "exchangeable" or "convertible" does not necessarily allow the reader to identify whether the underlying should be new or existing shares.

39. ESMA would like also to draw the attention to the fact that even on the basis of the broad implementation of Article 7 (2) (g) of the Prospectus Directive carried out by Articles 2 (13) and 26a of the Prospectus Regulation, the proportionate disclosure regime for rights issues may be applied to the extent that the debt securities issuer is the same as the underlying shares issuer.
40. ESMA therefore believes it important to widen its original proposal and to recommend that when the proportionate disclosure regime for rights issues is applicable Annex XVIII of the Prospectus Regulation should clarify the combinations of schedules and building blocks for debt securities which are either exchangeable for or convertible into new shares issued by the debt securities issuer.

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)

41. Pursuant to Article 26.b of the Prospectus Regulation the proportionate schedules set out in Annexes XXV to XXVIII shall apply to public offering or admission to trading on a regulated market of securities issued by SMEs and Small Caps situated or operating within a Member State. As a consequence, in its Consultation Paper ESMA only acknowledged that convertible or exchangeable debt securities issued by SMEs and Small Caps are in the scope of the specific proportionate disclosure regime tailored for these two categories of companies by the mentioned Article 26b and did not present either proposals or questions in this connection.
42. On the whole, however the feedback from the market relating to the proportionate disclosure regime highlighted the need to have a clear picture of what constitutes the combination of schedules and building blocks applicable. For this purpose, ESMA has also decided to propose to supplement Annex XVIII with a new part representing the combination of schedules and building blocks applicable for the proportionate disclosure regime relating to convertible or exchangeable debt securities issued by SMEs and Small Caps.

IV. Technical Advice on the prospectus disclosure requirements for convertible or exchangeable debt securities

IV.I Introduction

43. The European Commission has invited ESMA to give advice on the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities in sections 3.3 (proportionate disclosure regime) and 4 (review of the provisions of the Prospectus Regulation) of the Mandate for the purpose of ensuring a uniform application of Union legislation on prospectuses and achieving a level playing field for all market participants. Based on the considerations already stated above and with a view to maintaining investor protection and increasing legal clarity as well as the efficiency of the prospectus regime, the following provisions of the Prospectus Regulation would need to be revised:

IV.II Review of the provisions of the Prospectus Regulation

Advice:

44. **Amendments for clarification of the Prospectus Regulation**

- a. reformulating Recital 7 so as to 1) 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 2) avoid any reference as to whether or not the underlying shares to be delivered have already been issued
45. Amendments for ensuring consistency of the Prospectus Regulation
- a. in Annex XVIII (rows 2, 3, 7, 8, 9 and 10 of the current table of combinations) substituting the term “bond” with “debt securities” in order to align it with the text of the applicable Articles of the Prospectus Regulation
 - b. 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
46. Amendments proposed for clarifying the application of Annex XVIII
- a. as regards debt securities exchangeable or convertible into third party shares not admitted to trading on a regulated market, adding a new provision in Annex XVIII 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
 - b. splitting row 9 (new row 10) 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
47. Amendments proposed for creating a legal basis for application of item 4.2.2 of Annex XII
- a. adding a new paragraph to Articles 8 and 16 aimed at clarifying that for debt securities exchangeable or convertible into third party shares or issuer’s 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
48. Amendments proposed to complete the information when the share registration document is applicable
- a. 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 which are not already admitted to trading on a regulated market, the information required by items 3.1 and 3.2 of Annex III should also be included in the prospectus.
49. A revised text of Annex XVIII which takes into account the above mentioned proposals has been presented by ESMA in Section IV.IV.ii and Appendix VIII of this document.

IV.III Proportionate disclosure regime regarding rights issues of debt securities convertible or exchangeable into issuer's shares and debt securities convertible or exchangeable into issuer's shares issued by SMEs and Small Caps

50. ESMA considers that capital raising transactions may also be carried out by means of the issuance of debt securities which give the right to subscribe to new shares issued by the same debt securities issuer. In fact, in this case the capital raising may occur not at the time of issue, but at a later date when the above mentioned right is exercised by its holders.
51. Taking into account the scope of the Mandate, ESMA deems it useful to highlight that in financial practice the right to subscribe to new shares may be either represented by an option of conversion or an exchange or a warrant carried by the debt securities, depending on how the issuer decides to structure the issuing. ESMA does not believe it would be beneficial introducing a definition of "convertible" or "exchangeable" debt securities, as the use of one or the other term is more a matter of market practice rather than real expression of whether the underlying shares are new shares or not.
52. ESMA retains that the proportionate disclosure regime as introduced by Articles 2(13) and 26(a) of the Prospectus Regulation is applicable also to rights issues of convertible or exchangeable debt securities provided that the underlying shares are new shares issued by the same entity issuing debt securities and that the issuer complies with conditions set out in Article 7.2(g) of the Prospectus Directive.

IV.IV Revision of Annex XVIII

53. Regarding the combination of schedules and building blocks applicable to rights issues of convertible or exchangeable debt securities and to debt securities convertible or exchangeable into issuer's shares issued by SMEs and Small Caps, a new part ("Part II") of Annex XVIII elaborated by ESMA is presented below and in Appendix VIII of this document. ESMA would like to draw the attention to the fact that "Part II" of the proposed new Annex XVIII does not include the combination of schedules and building blocks relating to the proportionate disclosure regime that may be applicable to those securities which are out of the scope of the current mandate (i.e. securities mentioned in rows 1, 2, 3, 4, 5, 6, 10, 11 of the current Annex XVIII).

IV.IV.i. Explanatory note of changes made to Annex XVIII of the Prospectus Regulation

List of amendments

54. The table in Annex XVIII has been split in two parts: one is the existing one amended as indicated below; the second one has been added with regard to the proportionate disclosure regime for rights issues and for SMEs and Small Caps.

PART I

55. Rows 2, 3, 7, 8, 9 and 10: the term "bonds" has been substituted with the expression "debt securities" so as to be consistent with the wording used in Articles of the Prospectus Regulation, and in particular Articles 7, 12, 14, 16, 20 and 21.

56. Row 8, has been split into two parts so as to also clarify the combinations of schedules and building blocks as regards the issuer of the underlying shares, when the latter issuer is not the debt securities issuer, but a third party .
57. Row 9, it has been specified that items 3.1 and 3.2 of the share securities note are applicable (see “Securities Note” section).
58. Row 10, has been split into two parts so as to also clarify the combinations of schedules and building blocks as regards the issuer of the underlying shares, when the latter issuer is not the debt securities issuer, but an entity belonging to its group (see “Registration Note” and “Securities Note” section).
59. In the part relating to Registration Document, in the Column 7 (PRO FORMA INFORMATION) it has been added “(if applicable)” so as to clarify that such building block is not always applicable.

PART II

60. A new Part II has been added relating to the proportionate disclosure regime for a rights issue of debt securities exchangeable for or convertible into new issuer’s shares not admitted to trading on a regulated market, provided that conditions laid down in Article 26a of Commission Delegated Regulation (EU) No 486/2012 are fulfilled and that the issuer of the shares is the same of the debt securities issuer. Furthermore, also the combination of the proportionate schedules for public offering/admission to trading of convertible debts securities issued by SMEs and Small Caps, pursuant to Article 26b of the aforementioned Delegated Regulation, has therein been considered. A new column has been added to represent the combinations of proportionate schedules set out in Annexes XXIII to XXVIII in the cases considered above. This new part does not include all the other rows of the current Annex XVIII which concerns securities not in the scope of the Mandate.

IV.IV.ii Annex XVIII of the Prospectus Regulation

N.	REGISTRATION DOCUMENT										
	ANNEX XVIII Part I	SCHEDULES					BUILDING BLOCK	SCHEDULES			
	TYPES OF SECURITIES	SHARE	DEBT and DERIVATIVE (< EUR 100.000)	DEBT and DERIVATIVE (> or = EUR 100.000)	ASSET BACKED SEC.	BANKS DEBT and DERIVATIVE	PRO FORMA INFORMATION (IF APPLICABLE)	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	
1	Shares (preference shares, redeemable shares, shares with preferential subscription rights, etc...)										
2	Debt securities (vanilla debt securities, income Debt securities, structured Debt securities, etc...) with a denomination of less than EUR 100.000		OR			OR					
3	Debt securities (vanilla Debt securities, income Debt Securities, structured Debt securities, etc...) with a denomination of at least EUR 100.000			OR		OR					
4	Debt securities guaranteed by a third party		OR	OR		OR					
5	Derivative sec. guaranteed by a third party		OR	OR		OR					
6	Asset backed securities										
7	Debt securities exchangeable or convertible into third party shares or issuer's or group shares which are admitted on a regulated market		OR	OR		OR					
8	Debt securities exchangeable or convertible into third	Issuer of debt Securities exchangeable or convertible	OR	OR		OR					

	party shares not admitted on a regulated market										
		Issuer of (Underlying) Shares									
9	Debt securities exchangeable or convertible into the issuer's shares not admitted on a regulated market										
10	Debt securities exchangeable or convertible into group's shares not admitted on a regulated market	Issuer of debt securities exchangeable or convertible		OR	OR		OR				
		Issuer of (underlying) shares									
11	Debt securities with warrants to acquire the issuer's shares not admitted to trading on a regulated market										
12	Shares with warrants to acquire the issuer's shares not admitted to trading on a regulated market										
13	Derivatives sec. giving the right to subscribe or to acquire the issuer's shares not admitted on a regulated market										
14	Derivatives sec. giving the right to acquire group's shares not admitted on a regulated market			OR	OR		OR				
15	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			OR	OR		OR				



cash settlement)									
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N.	ANNEX XVIII Part I	SECURITIES NOTE						
		SCHEDULES				ADDITIONAL BUILDING BLOCKS		
		SHARE	DEBT (< EUR 100.000)	DEBT (> or = EUR 100.000)	DERIVATIVES SEC.	GUARANTEES	ASSET BACKED SEC.	UNDERLYING SHARE
1	Shares (preference shares, redeemable shares, shares with preferential subscription rights, etc...)							
2	Debt Securities (vanilla Debt Securities, income Debt Securities, structured Debt Securities, etc...) with a denomination of less than EUR 100.000							
3	Debt Securities (vanilla Debt Securities, income Debt Securities, structured Debt Securities, etc...) with a denomination of at least EUR 100.000							
4	Debt Securities guaranteed by a third party		OR	OR				
5	Derivative sec. guaranteed by a third party							
6	Asset backed securities		OR	OR				
7	Debt Securities exchangeable or convertible into third party shares or issuer's or group shares which are admitted on a regulated market		OR	OR	only item 4.2.2			

8	Debt Securities exchangeable or convertible into third party shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		(Underlying) Shares							except item 2
9	Debt Securities exchangeable or convertible into the issuer's shares not admitted on a regulated market		Only items 3.1 and 3.2	OR	OR				
10	Debt Securities exchangeable or convertible into group's shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		(Underlying) Shares	Only items 3.1 and 3.2						
11	Debt securities with warrants to acquire the issuer's shares not admitted to trading on a regulated market			OR	OR	except item 4.2.2			
12	Shares with warrants to acquire the issuer's shares not admitted to trading on a regulated market					except item 4.2.2			
13	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			
14	Derivatives sec. giving the right to acquire group's shares not					except item 4.2.2			

	admitted on a regulated market						
15	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)						

N.	REGISTRATION DOCUMENT									
	ANNEX XVIII Part II: PDR	SCHEDULES					BUILDING BLOCK	SCHEDULES		
	TYPES OF SECURITIES	PROPORTIONATE SCHEDULE FOR SHARE	DEBT and DERIVATIVE (< EUR 100.000)	DEBT and DERIVATIVE (> or = EUR 100.000)	ASSET BACKED SEC.	BANKS DEBT and DERIVATIVE	PRO FORMA INFORMATION (IF APPLICABLE)	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
1	Rights issues of debt Securities convertible or exchangeable into issuer's shares, when the issuer has shares of the same class already admitted on a regulated market or MTF if conditions in Art. 26.a(2) are full filled									
2	SMEs and Small Caps Debt Securities exchangeable or convertible into third party shares		OR	OR		OR				
	Debt Securities exchangeable or convertible (Underlying) Shares									
3	SMEs and Small Caps Debt Securities exchangeable or convertible into the issuer's shares not admitted on a regulated market									

4	SMEs and Small Caps Debt Securities exchangeable or convertible into group's shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR		OR				
		(Underlying) Shares									

N.	ANNEX XVIII Part II: PDR		SECURITIES NOTE						
			SCHEDULES			ADDITIONAL BUILDING BLOCKS			
	TYPES OF SECURITIES	PROPORTIONATE SCHEDULE FOR SHARE	DEBT (< EUR 100.000)	DEBT (> or = EUR 100.000)	DERIVATIVES SEC.	GUARANTEES	ASSET BACKED SEC.	UNDERLYING SHARE	
1	Rights issues of debt securities exchangeable or convertible into issuer's shares, when the issuer has shares of the same class already admitted on a regulated market or MTF if conditions in Art. 26.a(2) are full filled		Only items 3.1 and 3.2	OR	OR				except item 2
2	SMEs and Small Caps Debt securities exchangeable or convertible into third party shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		Underlying) Shares							except item 2
3	SMEs and Small Caps Debt securities exchangeable or convertible into the issuer's shares not admitted on a regulated market		Only items 3.1 and 3.2	OR	OR				
4	SMEs and Small Caps Debt securities exchangeable or converti-	Debt securities		OR	OR				



	ble into group's shares not admitted on a regulated market	(Underlying) Shares	Only items 3.1 and 3.2						
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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 envis-**



aged 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.

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

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.

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 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.

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.

- 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 CESR¹².

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 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.

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.

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

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.

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;

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.

- 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 Mi-

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.

FID,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:

- 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;

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.

- 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 State.

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 Member States within the European Securities Committee. 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.
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 MARKET 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:

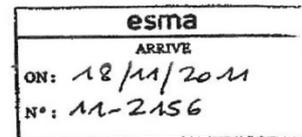
Emiliano TORNESE, Telephone: +32-2-29 85400, emiliano.tornese@ec.europa.eu



Annex IV Letter from the Commission Services on the content and timetable of the part 2 of the request 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:

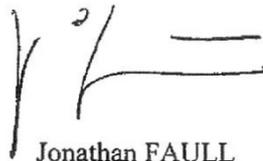
- (1) a possible format and form of a consent to use a prospectus in a retail cascade;
- (2) a review of other provisions of the Prospectus Regulation including possible additional delegated acts for technical adjustment and clarification of some existing Level 2 measures;
- (3) the criteria to be applied 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 Paragraph 44 a. of the Technical Advice – 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: the majority of respondents who replied agreed with ESMA's view.

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 Paragraph 45 a. of the Advice – substituting the term “bonds” 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 Paragraph 45 b. of the Advice – 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.	N/A

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 Paragraph 46 a. of the Advice - 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.	Positive feedback from the consultation
As proposed in Paragraph 46 b. of	A split of row 9 (new row 10) in both the section on regis-	No cost to the issuers or persons drawing	Positive feedback from the consultation

the Advice – split of row 9.	tration document as well as securities note to include references to the specific annexes applicable for the “debt securities” respectively the “underlying equity securities” issued by an entity belonging to the debt securities issuer provides additional clarity for the reader of Annex XVIII.	up a prospectus. The Prospectus Regulation Annex XVIII would have to be modified to reflect the split of row 9.	
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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 Paragraph 47 a. of the Advice – clarifying that only item 4.2.2. of Annex XII is applicable to underlying shares admitted to trading on a regulated market	<p>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.</p> <p>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.</p>	No cost to the issuer or person drawing up a prospectus as there is no change in practice.	Positive feedback from the consultation

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 Paragraph 48 a. of the Advice - adding a new provision aimed at specifying that when debt securities are exchangeable or convertible into shares not admitted to trading issued by the same issuer or by an entity belonging to its group, the information required by items 3.1 and 3.2 of Annex III should also be included in the prospectus	<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>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>	<p>None of the respondents provided data relating to precise cost estimates. ESMA has believed it useful to take into account information which came out in the market feedback relating to the ESMA's Consultation Paper on the proportionate disclosure regime¹⁸. In that context it was indicated that indebtedness statement represents less than 0,5% of the cost of the entire prospectus; the working capital statement was not inserted in the category of particularly burdensome requirements.</p>

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

5. Proportionate disclosure regime regarding debt securities convertible or exchangeable into issuer's shares issued by SMEs and Small Caps

Risk addressed / Policy objective

- Investor protection / Level playing field

Scope issues

- All rights issues providing access to issuer's shares benefit from the proportionate disclosure regime
- For SMEs and Small Caps a proportionate disclosure is already envisaged.
- For both types of the abovementioned proportionate disclosure regime a revised Annex XVIII, in a new part II, would explain the combination of schedules and building blocks applicable

Proposal	Benefits	Costs	Evidence
As proposed in Section IV.III of the Advice— application of the proportionate	The proportionate disclosure regime for rights issues in Article 7.2(g) and Article 26a PR covers situations	Issuers would benefit from an alleviation of costs in drawing up prospectuses for	Feedback from the market: fully supported for debt securities convertible into or exchangeable for

¹⁸ Final Report ESMA/2011/323, part VII, paragraph 229.

<p>disclosure regime</p>	<p>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 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).</p>	<p>rights issues of debt securities convertible into issuer's shares.</p> <p>Annex XVIII would have to be modified to include this combination.</p>	<p>issuer's new shares.</p>
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Annex VI SMSG opinion



Date: 2 August 2012
ESMA/2012/SMSG/47

Chair
ESMA
103 rue de Grenelle
75007 Paris

Ref: Request for advice on the consultation paper on draft technical standards under the Prospectus Directive

Dear Steven,

Thank you for your letter of 18 July 2012 inviting the Securities and Markets Stakeholder Group to provide advice on ESMA's consultation paper on draft technical standards under the Prospectus Directive.

As you are aware, the Group provided input in the area of the Prospectus Directive last year in the form of an informal paper reflecting individual views of Group members.

ESMA is requesting d the SMSG to provide its advice by the 20 August. As you will understand it would be very difficult indeed for the SMSG to produce a document and decide on it at the SMSG level while respecting the rules of procedure of the SMSG in such a short time as one month, the next plenary meeting being only in September, and in addition during a time of the year when many members of the SMSG can be expected to be at least in part on holiday.

The SMSG will therefore regretfully not respond to this consultation paper.

Yours sincerely,

A handwritten signature in black ink, appearing to read "G. Prache", written over a horizontal line.

Guillaume Prache
Chair



cc SMSG members

Annex VII Technical Advice

A) Review of the provisions of the Prospectus Regulation

1. Amendments for clarification of the Prospectus Regulation

- a. reformulating Recital 7 so as to 1) 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 2) avoid any reference as to whether or not the underlying shares to be delivered have already been issued

2. Amendments for ensuring consistency of the Prospectus Regulation

- a. in Annex XVIII (rows 2, 3, 7, 8, 9 and 10 of the current table of combinations) substituting the term “bond” with “debt securities” in order to align it with the text of the applicable Articles of the Prospectus Regulation
- b. 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

3. Amendments proposed for clarifying the application of Annex XVIII

- a. as regards debt securities exchangeable or convertible into third party shares not admitted to trading on a regulated market, adding a new provision in Annex XVIII 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
- b. splitting row 9 (new row 10) 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*

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

- a. adding a new paragraph to Articles 8 and 16 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 regu-

lated market for the information concerning the underlying shares only item 4.2.2 of Annex XII is applicable

5. **Amendments proposed to complete the information when the share registration document is applicable**
 - a. **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 which are not already admitted to trading on a regulated market, the information required by items 3.1 and 3.2 of Annex III should also be included in the prospectus.**
6. **A revised text of Annex XVIII which takes into accounts the above mentioned proposals has been presented by ESMA in Appendix VIII of this document.**
- B) Proportionate disclosure regime regarding rights issues of debt securities convertible or exchangeable into issuer's shares and debt securities convertible or exchangeable into issuer's shares issued by SMEs and Small Caps**
7. **ESMA considers that capital raising transactions may also be carried out by means of the issuance of debt securities which give the right to subscribe to new shares issued by the same debt securities issuer. In fact, in this case the capital raising may occur not at the time of issue, but at a later date when the above mentioned right is exercised by its holders.**
8. **Taking into account the scope of the Mandate, ESMA deems it useful to highlight that in financial practice the right to subscribe to new shares may be either represented by an option of conversion or an exchange or a warrant carried by the debt securities, depending on how the issuer decides to structure the issuing. ESMA does not believe it would be beneficial introducing a definition of "convertible" or "exchangeable" debt securities, as the use of one or the other term is more a matter of market practice rather than real expression of whether the underlying shares are new shares or not.**
9. **ESMA retains that the proportionate disclosure regime as introduced by Articles 2(13) and 26.(a) of the Prospectus Regulation is applicable also to rights issues of convertible or exchangeable debt securities provided that the underlying shares are new shares issued by the same entity issuing debt securities and that the issuer complies with conditions set out in Article 7.2(g) of the Prospectus Directive.**
10. **Regarding the combination of schedules and building blocks applicable to rights issues of convertible or exchangeable debt securities and to debt securities convertible or exchangeable into issuer's shares issued by SMEs and Small Caps, a new part ("Part II") of Annex XVIII elaborated by ESMA is presented in Appendix VIII of this document. ESMA would like to draw the attention to the fact that "Part II" of the proposed new Annex XVIII does not include the combination of schedules and building blocks relating to the proportionate disclosure**



sure regime that may be applicable to those securities which are out of the scope of the current mandate (i.e. securities mentioned in rows 1, 2, 3, 4, 5, 6, 10, 11 of the current Annex XVIII).

Annex VIII Revised Annex XVIII

N.	ANNEX XVIII Part I	REGISTRATION DOCUMENT								
		SCHEDULES					BUILDING BLOCK	SCHEDULES		
		TYPES OF SECURITIES	SHARE	DEBT and DERIVATIVE (< EUR 100.000)	DEBT and DERIVATIVE (> or = EUR 100.000)	ASSET BACKED SEC.	BANKS DEBT and DERIVATIVE	PRO FORMA INFORMATION (IF APPLICABLE)	COLLECTIVE INVESTMENT UNDERTAKING OF THE CLOSED-END TYPE	STATES AND THEIR REGIONAL AND LOCAL AUTHORITIES
1	Shares (preference shares, redeemable shares, shares with preferential subscription rights, etc...)									
2	Debt securities (vanilla debt securities, income Debt securities, structured Debt securities, etc...) with a denomination of less than EUR 100.000		OR			OR				
3	Debt securities (vanilla Debt securities, income Debt Securities, structured Debt securities, etc...) with a denomination of at least EUR 100.000			OR		OR				
4	Debt securities guaranteed by a third party		OR	OR		OR				
5	Derivative sec. guaranteed by a third party		OR	OR		OR				
6	Asset backed securities									
7	Debt securities exchangeable or convertible into third party shares or issuer's or group shares which are		OR	OR		OR				

	admitted on a regulated market									
8	Debt securities exchangeable or convertible into third party shares not admitted on a regulated market	Issuer of debt Securities exchangeable or convertible		OR	OR		OR			
		Issuer of (Underlying) Shares								
9	Debt securities exchangeable or convertible into the issuer's shares not admitted on a regulated market									
10	Debt securities exchangeable or convertible into group's shares not admitted on a regulated market	Issuer of debt securities exchangeable or convertible		OR	OR		OR			
		Issuer of (underlying) shares								
11	Debt securities with warrants to acquire the issuer's shares not admitted to trading on a regulated market									
12	Shares with warrants to acquire the issuer's shares not admitted to trading on a regulated market									
13	Derivatives sec. giving the right to subscribe or to acquire the issuer's shares									

	not admitted on a regulated market									
14	Derivatives sec. giving the right to acquire group's shares not admitted on a regulated market		OR	OR		OR				
15	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)		OR	OR		OR				

N	ANNEX XVIII Part I	SECURITIES NOTE						
		SCHEDULES				ADDITIONAL BUILDING BLOCKS		
		SHARE	DEBT (< EUR 100.000)	DEBT (> or = EUR 100.000)	DERIVATIVES SEC.	GUARANTEES	ASSET BACKED SEC.	UNDERLYING SHARE
1	Shares (preference shares, redeemable shares, shares with preferential subscription rights, etc...)							
2	Debt Securities (vanilla Debt Securities, income Debt Securities, structured Debt Securities, etc...) with a denomination of less than EUR 100.000							
3	Debt Securities (vanilla Debt Securities, income Debt Securities, structured Debt Securities, etc...) with a denomination of at least EUR 100.000							
4	Debt Securities guaranteed by a third party		OR	OR				
5	Derivative sec. guaranteed by a third party							
6	Asset backed securities		OR	OR				
7	Debt Securities exchangeable or convertible into third party shares or issuer's or group shares which are admitted on a regulated market		OR	OR	only item 4.2.2			

8	Debt Securities exchangeable or convertible into third party shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		(Underlying) Shares							except item 2
9	Debt Securities exchangeable or convertible into the issuer's shares not admitted on a regulated market		Only items 3.1 and 3.2	OR	OR				
10	Debt Securities exchangeable or convertible into group's shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		(Underlying) Shares	Only items 3.1 and 3.2						
11	Debt securities with warrants to acquire the issuer's shares not admitted to trading on a regulated market			OR	OR	except item 4.2.2			
12	Shares with warrants to acquire the issuer's shares not admitted to trading on a regulated market					except item 4.2.2			
13	Derivatives sec. giving the right to subscribe or to acquire the issuer's shares not admitted on a regulat-					except item 4.2.2			

	ed market							
14	Derivatives sec. giving the right to acquire group's shares not admitted on a regulated market				except item 4.2.2			
15	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)							

N	ANNEX XVIII Part II: PDR	REGISTRATION DOCUMENT								
		SCHEDULES					BUILDING BLOCK	SCHEDULES		
		TYPES OF SECURITIES	PROPORTIONATE SCHEDULE FOR SHARE	DEBT and DERIVATIVE (< EUR 100.000)	DEBT and DERIVATIVE (> or = EUR 100.000)	ASSET BACKED SEC.	BANKS DEBT and DERIVATIVE	PRO FORMA INFORMATION (IF APPLICABLE)	COLLECTIVE INVESTMENT UNDERTAKING OF THE CLOSE D-END TYPE	STATES AND THEIR REGIONAL AND LOCAL AUTHORITIES
1	Rights issues of debt Securities convertible or									

	exchangeable into issuer's shares, when the issuer has shares of the same class already admitted on a regulated market or MTF if conditions in Art. 26.a(2) are full filled									
2	SMEs and Small Caps Debt Securities exchangeable or convertible into third party shares	Debt Securities exchangeable or convertible		OR	OR		OR			
		(Underlying) Shares								
3	SMEs and Small Caps Debt Securities exchangeable or convertible into the issuer's shares not admitted on a regulated market									
4	SMEs and Small Caps Debt Securities exchangeable or convertible into group's shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR		OR			
		(Underlying) Shares								

N	ANNEX XVIII Part II: PDR		SECURITIES NOTE						
			SCHEDULES			ADDITIONAL BUILDING BLOCKS			
	TYPES OF SECURITIES	PROPORTIONATE SCHEDULE FOR SHARE	DEBT (< EUR 100.000)	DEBT (> or = EUR 100.000)	DERIVATIVES SEC.	GUARANTEES	ASSET BACKED SEC.	UNDERLYING SHARE	
1	Rights issues of debt securities exchangeable or convertible into issuer's shares, when the issuer has shares of the same class already admitted on a regulated market or MTF if conditions in Art. 26.a(2) are full filled		Only items 3.1 and 3.2	OR	OR				except item 2
2	SMEs and Small Caps Debt securities exchangeable or convertible into third party shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		Underlying Shares							except item 2
3	SMEs and Small Caps Debt securities exchangeable or convertible into the issuer's shares not admitted on a regulated market		Only items 3.1 and 3.2	OR	OR				
4	SMEs and Small Caps Debt securities exchangeable or convertible	Debt securities		OR	OR				

	<p>ble into group's shares not admitted on a regulated market</p>	<p>(Underlying Shares</p>	<p>Only items 3.1 and 3.2</p>						
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Annex IX Legislative text

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 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

(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 100 000

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 100 000 or, where there is no individual denomination, securities that can only be acquired on issue for less than EUR 100 000 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 100 000

1 For the securities note for debt securities with a denomination per unit of less than EUR 100 000 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 100 000

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 100 000 or, where there is no individual denomination, securities that can only be acquired on issue for at least EUR 100 000 per security, information shall be given in accordance with the schedule set out in Annex IX.”

“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 100 000

1 For the securities note for debt securities with a denomination per unit of at least EUR 100 000 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

1. 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.”

“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 100 000;

3. debt and derivative securities registration document schedule for securities with a denomination per unit at least EUR 100 000.

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.”

“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 Council⁹.

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.”



Annexes to the Prospectus Regulation

“ANNEX I

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

ANNEX II

Pro forma financial information building block

ANNEX III

Minimum disclosure requirements for the share securities note (schedule)

(...)

3. ESSENTIAL INFORMATION

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.

3.2. Capitalization and indebtedness

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.

(...)

“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 100 000)”

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 100 000)

“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 100 000)”

“ANNEX XI

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

“ANNEX XII

Minimum disclosure requirements for the securities note for derivative securities (schedule)”

“(…)
 4.2.2. A statement setting out the type of the underlying and details of where information on the underlying can be obtained:
 –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 index¹⁹:
 – the name of the index,
 – a description of the index if it is composed by the issuer or by any legal entity belonging to the same group,
 – a description of the index provided by a legal entity or a natural person acting in association with, or on behalf of, the issuer, unless the prospectus contains the following statements:
 – the complete set of rules of the index and information on the performance of the index are freely accessible on the issuer’s or on the index provider’s website,
 and
 – the governing rules (including methodology of the index for the selection and the re-balancing of the components of the index, description of market disruption events and adjustment rules) are based on predetermined and objective criteria.
 If the index is not composed by the issuer, where information about the index can be obtained.
 – 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 100 000 (Schedule)”**

**“ANNEX XIV
 Additional information building block on underlying share for some equity securities”**

“(…)
 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.”

**“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”**

¹⁹ As amended by Commission Delegated Regulation (EU) No 862/2012.

“ANNEX XXV

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

“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 capitalisation”

“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)”

“ANNEX XXVIII

Proportionate Schedule for Minimum Disclosure Requirements for the Depositary Receipts issued over shares for SMEs and companies with reduced market capitalisation”