



European Securities and
Markets Authority

Report

Comparison of liability regimes in Member States in relation to the Prospectus Directive



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Acronyms used

AT	Austria
BE	Belgium
BG	Bulgaria
CFSC	Corporate Finance Standing Committee
The Commission	The European Commission
CY	Cyprus
CZ	The Czech Republic
DE	Germany
DK	Denmark
EE	Estonia
EEA	European Economic Area
EL	Greece
ES	Spain
ESMA	European Securities and Markets Authority
EU	The European Union
FI	Finland
FR	France
HU	Hungary
IE	Ireland
IS	Iceland
IT	Italy
LT	Lithuania
LV	Latvia
LU	Luxembourg
MT	Malta
NL	The Netherlands
NO	Norway
PD	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 as amended
PL	Poland



PT	Portugal
RO	Romania
SE	Sweden
SI	Slovenia
SK	Slovakia
UK	United Kingdom

1. Executive Summary

Reasons for publication

In the context of the Directive 2010/73/EU, amending Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, the European Commission (the Commission) sent a request to ESMA on 20 January 2011 for technical advice on a number of possible delegated acts (Annex I). In particular, part III of the mandate invited ESMA to assist the Commission in the preparation of a comparative table compiling the liability regimes applied by the Member States in relation to the Prospectus Directive. 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’.

This report addresses the Commission’s request by providing factual information on the national liability regimes in the EEA States, thereby assisting the Commission in identifying and monitoring the different arrangements and frameworks in the EEA States. An equally important objective for ESMA is to provide some clarity to the market participants about the different regimes in place.

Contents

The report covers the national sanctioning regimes (administrative and criminal) for infringements of national legislation and rules transposing the Prospectus Directive and of the Commission Regulation No 809/2004 of 29 April 2004¹ implementing the Prospectus Directive (the Prospectus Directive framework). In this context, ‘sanctions’ should be understood as a broad concept covering any measures or actions applied when an infringement is committed. The work also encompasses national regimes setting out the conditions for investors’ right of restitution for losses from the author of the violation (civil liability) and from the government.

The report is divided into five main parts: an introduction (which includes disclaimers, describes the methodology followed in its preparation and indicates the EU legislation in this field); a summary of the main characteristics of the national regimes divided into four sub-sections (civil, administrative, criminal and government liability); conclusions; a table which compares the different national regimes (Annex II); and a description of each individual national regime in the form of a questionnaire filled in by each national competent authority (Annex III).

¹ 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, OJ L 149, 30.04.2004, p. 1

2. Introduction

2.1 Methodology

1. In March 2012, ESMA's Corporate Finance Standing Committee (CFSC) set up a dedicated task force to address the task of compiling a comparative table of information pertaining to a broad range of liability regimes in the EEA States which all collectively set out the liability regime under the Prospectus Directive (the PD).
2. In order to compile the information on the different national liability regimes, the task force, assisted by the Consultative Working Group of the CFSC (an advisory group composed of market participants), drew up a questionnaire which was circulated to the different competent authorities of members of the EEA for completion. Due to the breadth of liability regimes some competent authorities may have sought external advice in order to provide their responses.
3. The responses to the questionnaire were analysed to ascertain whether common approaches exist within the different areas of liability. The answers received posed some variation in both detail of the regime as set out in national legislation but also the range of applicable sanctions or prerequisites for all elements of a sanctioning regime. Therefore, it has been necessary at times to pursue a high level approach with a few categories when grouping the EEA States to identify principles or commonalities. The outcome of this analysis is provided in section 3 of the report. The final version of the report was reviewed by competent authorities to ensure correctness of their groupings. The order of the EEA States is alphabetical.
4. ESMA acknowledges that, while the report sets out high level factors of comparability, a reader or issuer considering to make a public offer of securities or seek admission to trading of its securities may be interested in the more detailed information for that particular jurisdiction. Therefore, for completeness, the report includes a comparative table with all answers provided to each question and the individual answers from competent authorities in their entirety.
5. ESMA submitted the report to the European Commission on 30 May 2013.

2.2 Caveats and Disclaimers

6. With regard to the scope of the exercise undertaken by ESMA it is worth noting that in accordance with the Commission's mandate, the work focuses on the national legal provisions setting out the different civil, administrative, criminal and governments' liability regimes and is not a commentary on the applicable regimes. Furthermore, the report does not provide information on the practical application of these provisions (e.g. regarding administrative liability, how many sanctions are imposed, what are the actual fines, etc.).
7. This document and the responses provided by competent authorities to ESMA's questionnaire have no legal effect; they do not present or represent any interpretation of or official position by ESMA, EEA governments or the competent authorities regarding existing laws, regulations or other forms of national legislation. This document should not and cannot be relied upon for any purpose other than providing a high level comparison of different EEA States' regimes. In particular, the answers provided by the competent authorities to ESMA's questionnaire should not be relied upon as a substitute for, or as guidance on, any aspect of the supervisory practices of the competent authorities or regulatory systems of the EEA States.

8. This document and the answers by the competent authorities are subject to and do not prejudice the actual positions from any other national authorities and in particular the relevant EEA States' competent courts which are exclusively competent to decide upon civil, criminal and government liability matters in relation to a prospectus.
9. The comparative table (Annex II) and answers provided by the competent authorities to ESMA's questionnaire (Annex III) should not be considered as providing an exhaustive and detailed description of all potentially applicable legal provisions as regards the matters discussed in the report and questionnaire.

2.3 EU legislation on prospectus liability

10. The Commission mandated ESMA to compile a table with the different national liability regimes because liability for prospectuses is not harmonized at the EEA level aside from a few elements of the administrative and civil liability for prospectuses. Competent authorities were not asked to describe these harmonized aspects in their answers to the questionnaire and therefore such are described in the paragraphs below.
11. An overview of the existing EU legislation regarding prospectus liability is provided below.

Administrative liability

12. The Directive sets out the principles that Member States have to follow when adopting their administrative liability regimes. Article 25 stipulates the following:

'1. Without prejudice to the right of Member States to impose criminal sanctions and without prejudice to their civil liability regime, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible, where the provisions adopted in the implementation of this Directive have not been complied with.'

Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. Member States shall provide that the competent authority may disclose to the public every measure or sanction that has been imposed for infringement of the provisions adopted pursuant to this Directive, unless the disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.'

13. Article 26 obliges Member States to ensure the right of appeal:

'Member States shall ensure that decisions taken pursuant to laws, regulations and administrative provisions adopted in accordance with this Directive are subject to the right to appeal to the courts.'

14. The only substantive provision in the PD regarding administrative liability is Article 6.1, which addresses the persons responsible, their identification and a statement they have to include in the prospectus:

'Responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the

admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.'

Civil liability

15. Article 6.2 of the PD deals with two matters. First, it obliges Member States to ensure 'that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus'.

16. Second, on the liability for the summary:

'No civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. The summary shall contain a clear warning to that effect.'

Liability where the issuer consents the use of its prospectus (retail cascades)

17. The third subparagraph of Article 3.2 of the PD stipulates that where the issuer has published a prospectus for a public offer or admission of its securities to a regulated market, another prospectus shall not be required in any subsequent resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available and the issuer or the person responsible for drawing up such prospectus consents to its use by means of a written agreement.

18. Recital 10 of Directive 2010/73/EU clarifies how such consent affects the liability for the prospectus:

'In the event that consent to use the prospectus has been given, the issuer or person responsible for drawing up the initial prospectus should be liable for the information stated therein and in case of a base prospectus, for providing and filing final terms and no other prospectus should be required. However, in case the issuer or the person responsible for drawing up such initial prospectus does not consent to its use, the financial intermediary should be required to publish a new prospectus. In that case, the financial intermediary should be liable for the information in the prospectus, including all information incorporated by reference and, in case of a base prospectus, final terms.'

19. The Prospectus Regulation² specifies what information regarding that consent must be included in the prospectus by making reference to Annex XXX. The Commission amended the Prospectus Regulation to regulate issuer's consent after receiving ESMA's technical advice on possible delegated acts concerning the PD as amended by the Directive 2010/73/EU (ESMA 2012/137). Although ESMA's advice does not constitute EU legislation and therefore has no legal effect on the EU jurisdictions, ESMA considers useful to reproduce here a number of paragraphs included in said

² Article 20(a) of the Prospectus Regulation as amended by the Commission Delegated Regulation (EU) No 862/2012 of 4 June 2012 amending Regulation (EC) No 809/2004 as regards information on the consent to use of the prospectus, information on underlying indexes and the requirement for a report prepared by independent accountants or auditors, OJ L 265, 22.09.2012, p. 4

advice regarding liability for prospectuses used by financial intermediaries when making a public offer.

20. In particular, when an issuer grants financial intermediaries its consent to use a prospectus,

'ESMA considers it necessary to specify in the prospectus itself that the issuer or the person responsible for drawing up the prospectus thereby also accepts responsibility for its content with respect to its use for public offers made by financial intermediaries acting with the consent of the issuer.'

Such clarification is considered valuable information for the investor, and it also ensures that the issuer or the person responsible for drawing up the prospectus is aware that it is responsible for the content of the prospectus not only for the time of its own offer, but also for the whole period it granted consent to use the prospectus.' (Paragraphs 44 and 45)

21. In line with ESMA's advice, the Regulation (item 1.1 of new Annex XXX) specifies that, when consent is provided, the issuer must include in the prospectus a *'statement that it accepts responsibility for the content of the prospectus also with respect to subsequent resale or financial placement of securities by any financial intermediary which was given consent to use the prospectus.'* ESMA also noted that the consent implies the issuer's obligation to supplement the prospectus if necessary:

'In a retail cascade it is the responsibility of the issuer or the person responsible for drawing up the prospectus to ensure that the prospectus stays up-to-date for the whole period it consented that the prospectus can be used by financial intermediaries (such period needs to cover the offer period with respect to public offers or sub-offers as determined in the prospectus).' (Paragraph 119)

22. And finally, ESMA warned financial intermediaries making public offers with the issuer's prospectus that the requirement to publish a prospectus might not be the only one governing public offers of securities in a Member State:

'Notwithstanding the fact that financial intermediaries may rely on an initial prospectus with the consent of the issuer or person responsible for drawing up the prospectus, ESMA points out that financial intermediaries making public offers under the retail cascades regime should be aware that they need to comply with all applicable laws. Irrespective of the responsibility of the issuer or of the person responsible for drawing up the prospectus, financial intermediaries reselling or placing the securities could be subject to liability according to national law.' (Paragraph 118)

Rules regarding conflicts of laws and jurisdictions

23. Considering the more granular distinctions between types of liability that may arise from a prospectus in different EEA States, it is also appropriate to mention the EU legislation governing the applicable laws and competent courts. Regarding conflicts of laws, EU Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I³); for non-contractual obligations (tortious liability), Regulation (EC) 864/2007 of the European Parliament and of the

³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 04.07.2008, p. 6



Council on the law applicable to non-contractual obligations (Rome II⁴) and as regards court competence, Council Regulation (EC) 44/2001⁵ would come into play.

⁴ Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 199, 31.07.2007, p. 40

⁵ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 012 , 16.01.2001, p. 1

3. Summary of responses

3.1 Civil liability regimes

24. The PD established a harmonised legal framework for disclosure in securities prospectuses. However, the directive does not contain any harmonised provisions in respect of civil liability for incorrect information in a prospectus or other infringements relating to prospectuses. As set out in the Introduction, Article 6 of the PD only requires the Member States to ensure that their legal and administrative provisions on civil liability apply to those persons who are responsible for the information given in a prospectus. The civil liability for prospectuses therefore remains an issue of national law.
25. In most of the countries there are no specific prospectus liability provisions and the general civil law tort and contractual liability may apply.
26. Nevertheless, 15 countries (AT, BE, CY, DE, EE, EL, ES, IE, IT, LU, MT, PT, SE, SI, and UK) have also implemented specific liability regimes. In IS, in addition to the general tort liability regime, civil liability for a prospectus can be based on law regulating the sale of financial instruments and consumer law.

3.1.1 Persons subject to civil liability

27. Countries have implemented Article 6(1) of the PD (quoted in paragraph 14 of this document) into their national laws in different ways as explained below:
28. In 24 countries (AT, BE, BG, CY, CZ, DE, EE, EL, ES, FR, HU, IE, IS, IT, LT, LU, MT, NO, PL, PT, SE, SI, SK, and UK), the national law prescribes specific persons, who can be held liable for damages for information contained in a prospectus. In addition to the persons indicated in the PD, other parties could be held liable in some countries and under certain circumstances. Among them, competent authorities have mentioned for example the distributors of the securities, the auditing firm or independent experts.
29. Five countries (DK, FI, LV⁶, NL and RO) do not have provisions specifying the persons who can be held liable and therefore the general civil law provisions apply. In general, this means that anyone who causes damage can be held responsible in accordance with tort rules.

3.1.2 Type of liability

30. In the majority of countries (AT, BE, CY, CZ, DE, DK, EE, EL, ES, FI, FR, HU, IE, IS, IT, LV, MT, NL, NO, PL, PT, RO, SE and UK), the persons responsible for the information contained in a prospectus have joint and several liability.
31. In four countries (BG, LT, SI and SK), the responsible persons have joint liability. Slovakia has pointed out that in justified cases the court may decide to apply several liability.
32. Several liability is applied in LU.

⁶ In LV, only persons identified in the prospectus as responsible persons could be held liable.

3.1.3 Breaches of duties or obligations out of which civil liability may arise

33. In all the countries, the persons responsible for the information contained in a prospectus bear civil liability if the prospectus contains false or misleading information or omits material information. The civil liability for false or misleading information in a prospectus can be prescribed in specific provisions of the securities law or can arise under the general tort or contractual liability regime.
34. In addition to misleading or false information and omission of material information, 14 countries (BE, CY, CZ, DE, DK, FI, IS, LU, MT, NO, SE, SI, SK and UK) civil liability could arise from specific civil liability provisions for a public offer without a duly approved prospectus. In other countries, damages in this case could be claimed under the general civil law provisions.

3.1.4 Degree of fault

35. In most countries, the degree of fault required for civil liability is at least negligence.
36. EE and FR have mentioned that intent of the responsible person is required in certain cases. In UK, the general standard is negligence, but with the possibility of greater liability in certain cases where intent can be established.
37. Strict liability is applied in BG, HU, IE, LT and SI. In IE, this is subject to specific defences: the responsible person may avoid liability where the prospectus was issued without his knowledge or consent and upon becoming aware of its issue, he gave reasonable public notice of the fact.

3.1.5 Persons entitled to sue for damages

38. In the countries where general civil law tort liability applies to persons responsible for the information contained in a prospectus, in principle anyone is entitled to sue for damages, provided that the damage is causally linked to the breach, i.e. provision of misleading or false information in a prospectus, omission of material information from a prospectus or carrying out a public offer of securities without a duly approved prospectus. Therefore, in the context of civil liability for prospectus-related breaches, first and foremost the investors who have bought the financial instruments in the primary and secondary market would be entitled to claim for damages, but depending on the circumstances, also other parties may have suffered financial loss and would therefore be entitled to sue.
39. Nine countries (AT, DE, EE, EL, ES, IE, IT, MT, and UK) have noted that under the specific prospectus liability regime only investors are entitled to sue for damages. This includes both persons who purchased securities during the public offer (i.e. original purchasers in the primary market) and those who purchased the securities on the secondary market. In addition to the above listed countries, five countries (CY, CZ, LT, LV, SK) have also replied that the persons entitled to sue for damages are investors, without specifying whether this is based on a specific liability regime or the general civil law regime.
40. In BE, HU and SI, only original purchasers of the securities are entitled to sue. In addition, BE has noted that in BE also financial intermediaries are entitled to sue for damages.

3.1.6 Circumstances which must be proven by the plaintiff and the possibilities for the defendant to avoid liability

41. Regarding circumstances that must be proven, in the majority of countries, the liability regime requires a breach of the PD framework, the damage, fault and a causal link between the breach and the damage to be proven by the plaintiff. In NL, the burden of proof is reversed in case of either an unfair commercial practice or a misleading advertisement⁷.
42. The degree of the fault and the nature of the damage that the plaintiff has to prove vary between countries. Furthermore, depending on the country, some of the elements mentioned in the previous paragraph are presumed:
 - in BE and DK, the causal link between the misleading information and the damage is presumed;
 - in seven countries (CZ, EE, EL, ES, IT, PT and SK), the fault of the defendant is presumed.
43. Furthermore, five countries (BG, HU, IE, LT and SI) apply strict liability and therefore fault of the defendant does not need to be established.
44. It should be noted that, apart from the common four elements mentioned above, additional circumstances might have to be proven by the plaintiff depending on the jurisdiction and the type of applicable regime.
45. Regarding possibilities to avoid liability, in the countries where the liability regime requires the breach of the PD framework, the damage, fault and a causal link to be proven by the plaintiff, the defendant needs to demonstrate that one of the four elements has not been met.
46. In the countries, where the fault of the defendant or the causal link is presumed, the defendant can avoid liability if he can prove that he has not been negligent or if he can prove the absence of the causal link.
47. Depending on the liability regime, other possibilities to avoid liability may include evidence by the defendant that upon the purchase of the securities, the investor knew about the inaccuracy or incompleteness of the information contained in the prospectus or that the investor was negligent; that the information could not be considered by a reasonable investor as important when making an investment decision; that the deficiency in the prospectus was not material and therefore did not influence the price of the security.

3.1.7 Damages

48. All the countries provide that material damages⁸ could be compensated.
49. 17 countries have mentioned that the court could also consider that the loss of opportunity – which includes loss of income and loss of profit – could be compensated (BG, CZ, CY, DE, EE, FR, HU, IT,

⁷ i.e. the defendant must prove the prospectus did not contain false or misleading information or there was no omission of material information and that he was not negligent.

⁸ In the report, material damages include direct, indirect and actual damages.

LT, LU, LV, MT, NL, PL, PT, SI and SK). In Greece the specific civil liability regime provides compensation only for material damages, although compensation for lost profit could not be ruled out by general civil law provisions concerning contractual or tortious liability.

50. In DE, under the securities law regime the recoverable damage is the purchase price capped at the first issuance price.

3.1.8 Possibility to exclude, make proportionate or limit liability

51. All countries have answered that legal provisions on liability are mandatory and there is no possibility to exclude, make proportionate or limit liability under general civil law and specific liability regime.
52. Regarding the contractual liability, three countries have mentioned the possibility to limit the liability in the contract (AT, LT and NL).

3.1.9 Time limit to file a claim and the beginning of the prescription

53. The general time limit to file a claim can be ranged in three categories:

- up to five years (included): AT, BE⁹, BG, CY, DE¹⁰, DK, EE, EL, ES, FI¹¹, FR, HU, IE, IS, IT¹², LT, MT, NL, PL¹³, NO¹⁴, PT¹⁵, RO¹⁶, SI¹⁷ and SK¹⁸;
- from five to ten years (included): CZ, IS, LV, SE and UK;
- more than ten years (included): LU (the prescription is 30 years).

54. The answers regarding the time the prescription begins can also be classified in three categories:

⁹ No claim can be filed if more than 20 years have passed since the occurrence of damage.

¹⁰ A general limitation applies: the claim becomes statute-barred ten years after the date upon which the right to bring a claim arises.

¹¹ The general period of limitation is three years from the moment the person became or should have become aware of the damage and person liable for that. The right to claim for damages however ceases, if the limitation period has not been interrupted within 10 years of the act that gave rise to damages.

¹² Claims for compensation may be brought within five years since the publication of the prospectus, unless the investor can prove having discovered the false nature of the information or the omission in the two years prior to the action being taken.

¹³ The general provision in the Polish Civil Code (applicable to the liability for torts related with prospectus and public offerings) states that the time-limit to file a claim is three years from the date when the person who suffered the damage learned about it and learned about the person liable to redress, but not later than ten years from the date when the event that caused the damage occurred.

¹⁴ The limitation period shall be at the latest 20 years after the commission of the tort or other basis for liability ceased.

¹⁵ The time to file a claim is six months from the date of the knowledge of the shortcoming in a prospectus and in any case should be done within two years from the conclusion of the offer.

¹⁶ The time limit to file a claim is maximum six months from the date when the shortcomings in the prospectus have been acknowledged, but no later than one year from the date when the public offer was closed.

¹⁷ The time to file a claim is two years from the day when the damaged person learnt of the damage and of the liable person. The right to compensation of damage shall become statute-limited no later than in three years and, as for damages caused by intention, in ten years from the day when it came to the event from that the damage arose.

¹⁸ If the liability arises from the Civil Code, the time limit is of two years after the injured party learnt of the damage and of the person that inflicted it and in each case the claim shall become statute-barred three years after the damage occurred. If the liability arises from the Commercial Code, the time limit is of four years after the injured party learnt of the damage and of the person that inflicted it and the claim shall become statute-barred ten years after the damage occurred.

- from the knowledge/occurrence of damages, the date of which the action may be exercised: AT, BE, BG, CZ, DE, DK, ES, FI, FR, EL, IS, IE, LV, LT, LU, MT, NL, NO, PL, PT, RO, SE, SI, SK, and UK;
- from the date the securities are offered the date of publication of the prospectus or the securities have been bought: CY, EE, HU and IT¹⁹; under the specific liability regime this is the case also for EL.
- from the term of validity of the prospectus or the date of the closing of the offer: PT and RO.

3.1.10 Class action suits

55. ESMA understands a definition of a class action to be a possibility to bring a claim on behalf of a more or less determined (or yet unknown) group of plaintiffs against a defendant or a group of defendants (in the present context against the person subject to civil liability for a prospectus). As such the countries can be grouped as follows:

- 12 countries have provisions permitting class action: BG, DK, HU, IS, LT, LV, NL, NO, PL, PT, SE and UK;
- 17 countries do not permit class action: AT, BE, CY, CZ, DE, EE, EL, ES, FI, FR, IE, IT, LU, MT, RO, SI and SK²⁰. In some of these countries, there are, nonetheless legal provisions enabling associations or groups of investors to act together in civil liability claims: DE, EL, ES, FR, IE, RO and SK.

¹⁹ In IT, when the mentioned prescription starting from the publication of the prospectus has lapsed, it is possible to apply a prescription starting from when the investor has discovered the false nature of the information or the omission of information, provided that he can prove having discovered the false nature of the information or the omission in the two years prior to the action is taken.

²⁰ SK has noted that respective legislation should become effective in 2013.

3.2 Administrative liability regimes

3.2.1 Persons subject to administrative liability

56. Member States' legislation should comply with Article 6 of the PD, which states that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be.
57. In 26 countries (AT, BE, BG, CY, CZ, DE²¹, EE, ES, FI, FR, EL, HU, IS, IE, IT²², LT, LU, MT, NL, NO, PL, PT, RO, SI, SK and UK), the law prescribes specific parties which can be held responsible for information in the prospectus. The remaining three countries (DK, LV and SE) have generic provisions concerning the person(s) responsible for the prospectus that can be held liable.
58. In some of the countries, the scope of parties prescribed in law is broader than that of Article 6 of the PD and includes for example accountants, financial advisors and underwriters.
59. Furthermore, in most countries it is possible that several parties can be held liable for different parts of the prospectus. In eight countries (AT, CZ, IE, LU, NL, NO, SI and UK), such a possibility is not included in the law.
60. In almost all countries, sanctions can be imposed on both natural and legal persons. In AT, BG and IT²³, a sanction can only be imposed on natural persons whereas the legal person is responsible for payment of this sanction.

3.2.2 Degree of fault

61. In most of the countries, the degree of fault required for administrative liability is at least negligence. This is the case in AT, BE, CY, DE, DK, EE, ES, FI, FR, HU, IS, IT, LV, LT, MT, NL, NO and PT.
62. Strict liability is applicable in BG, EL, IE, PL²⁴, RO, SI, SK and UK.
63. In CZ, distinction is made between natural non-entrepreneurial persons for whom intent or negligence is applicable and legal persons and natural entrepreneurial persons for whom strict liability is applicable. In SI, the Competent Authority will at its own discretion evaluate the evidence to determine which degree of fault is applicable. In LU, the degree of fault is not included in the law, therefore this may be determined by the Competent Authority.

3.2.3 Infringements of the PD framework for which sanctions can be imposed

64. In general, sanctions apply to a broad range of infringements, covering breaches such as untrue information in a material aspect or omission of material information in the prospectus, selling of

²¹ In DE, this may be any person, but generally this will apply to the issuer or offeror.

²² In IT according to the law any person can be subject to administrative liability in the case of public offers.

²³ In IT according to law in the case of the admission to trading on a regulated market the issuer itself (i.e. a legal person) can be subject to administrative liability.

²⁴ It is not directly included in the law but the degree of fault is a kind of strict liability.

securities to the public without having published a PD compliant prospectus, inaccurate or misleading advertisements and advertisements inconsistent with the prospectus.

65. Two countries do not impose administrative sanctions for untrue information in the prospectus (PL and SE).
66. SE does not sanction inaccurate or misleading advertisements or advertisements inconsistent with the prospectus. Notwithstanding, in SE the Competent Authority can prohibit advertisements as an administrative measure.

3.2.4 Competent body to impose sanctions

67. In general, the competent body that imposes administrative sanctions in case of a breach of the PD framework is the competent authority of that country designated for carrying out the obligations provided for in the PD in accordance with article 21.
68. In FI, the Market Court, on the basis of an application by the competent authority, decides on penalty payment exceeding the amount of EUR 1.000.000. In ES, in the case of a very serious infringement, administrative sanctions will be imposed by the Minister of Finance at the proposal of the Competent Authority.

3.2.5 Type of sanctions

69. Sanctions applied to breaches of the PD framework can mainly be distinguished in two types: fines and other supervisory measures. The latter includes the issuance of an order requiring the responsible person to remedy the infringement, trading halts, prohibition or suspension of a public offer, suspension of licences or activity, public reprimand, prohibition or suspension of advertisements and publication of the sanctions that have been imposed as well as the identity of the responsible person.
70. DK's regulation does not encompass administrative fines vis-à-vis breaches of the PD framework.
71. Almost all countries publish the sanctions and publish the identity of the parties involved. Common exceptions for publishing the identity of natural persons are when publication of the identity could seriously disrupt the financial markets or when it may cause disproportionate damages to the parties involved. In DE, the identity is disclosed only if anonymity conflicts with the purpose of the publication. AT and SI have respectively provisions in law but do not publish the identity of the responsible person(s).

3.2.6 Range of fines

72. There are substantial differences in the range of fines among countries, as discussed below. To facilitate comparison, the ranges expressed in other currencies than Euros have been converted to the approximate range in Euros according to the exchange rates published by the European Central Bank on 11 February 2013 (please see Annex IV).
73. Unless specifically stated, the amounts and ranges indicated below apply both to legal and natural persons.

74. The maximum of the range of administrative fines is no higher than EUR 100,000 in AT, BG²⁵, EE, LT and LV. This maximum of the range is also applicable for natural persons in RO²⁶ and SI. In FI, the maximum penalty payment for natural persons amounts to ten per cent of taxable income or EUR 100,000, whichever is lower.
75. The maximum of the range of administrative fines is between EUR 100.000 and EUR 500.000 for, CY²⁷, CZ²⁸, DE²⁹, IS³⁰, LU, PL³¹ and MT. The administrative fines in IT other than those for offering securities without an approved prospectus also fall within this category.
76. The maximum of the range of administrative fines is between EUR 500,000 and EUR 5,000,000 for BE, EL, IE, SE³² and SK and for legal persons in SI and RO³³.
77. In IT, the administrative fine related to the offering without an approved prospectus is maximized at twice the total amount offered, capped at EUR 2.000.000. In NL³⁴ and PT the administrative fine is determined by twice the economic gain. For PT the range is maximized at EUR 5.000.000. In ES³⁵ the administrative fine for very serious infringements is determined by five times the gross profit.
78. In HU³⁶ the maximum of the range of administrative fines is capped between EUR 500,000 and EUR 10,000,000. In FI, the maximum penalty payment for legal persons amounts to ten percent of turnover or EUR 10,000,000, whichever is lower. The maximum of the range of administrative fines is EUR 100.000.000 in FR³⁷. In UK the size of a fine is not limited.

3.2.7 Aggravating and mitigating factors

79. Most countries' legislation foresees aggravating and/or mitigating factors to be taken into account in the laws, regulations and administrative provisions when assigning the type of sanction or the amount of the fine (e.g. financial position of the offender, cooperation with the competent authority, duration of the infringement, damages caused to investors).

²⁵ Range of fines in repeated violation between 20,000 BGN- 50,000 BGN which is approximately EUR 10,141 – EUR 25,350

²⁶ Range of fines between 10,000-100,000 RON, which is approximately EUR 2,272 – EUR 22,725

²⁷ Under certain conditions the maximum of the range of fines in CY can amount up to one third of the proceeds of an illegally conducted public offer. And in case of repeated violation this fine can be an amount up to one second of the proceeds of an illegally conducted public offer.

²⁸ Maximum amount of fine is CZK 10,000,000 which is approximately EUR 396,197.

²⁹ The fine shall exceed the financial benefit that the wrongdoer has obtained as commission of the administrative offence. If the statutory maximum does not suffice for that purpose, it may be exceeded.

³⁰ Range of fines between 10,000 – 20,000,000 ISK (natural persons) which is approximately EUR 58 – EUR 115,500 and 50,000 – 50,000,000 ISK (legal persons) which is approximately EUR 288 -EUR 288,500

³¹ The maximum of the range of administrative fines in Poland is EUR 250,000 for both legal and natural persons. Please note, that the aforementioned act is being amended and it is under the legislative procedure –the maximum range of administrative fines will be EUR 1,250,000 for both legal and natural person.

³² Range of fines between SEK 50,000 – SEK 10,000,000 which is approximately EUR 5,752 - EUR 1,150,500.

³³ There is a range of fines between 15,000-2,500,000 RON which is approximately EUR 3,408 to EUR 568,143.

³⁴ In NL the size of a fine is not limited if the economic gain is higher than EUR 2,000,000. In that case the fine will be twice the economic gain. If the economic gain is lower than EUR 2,000,000 the range is maximized at EUR 4,000,000 and in case of recidivism within 5 years EUR 8,000,000.

³⁵In ES the administrative fine for very serious infringements is the largest amount of five per cent of the infringing firm's own funds, five per cent of the total funds owned by the firm or EUR 600,000.

³⁶ Range of fines between 100,000 – 2,000,000,000 HUF which is approximately EUR 340 – EUR 6,780,000.

³⁷ In FR the maximum fine is EUR 100.000.000 or ten times the profit (applicable when a profit has been made). For employees of investment service providers, there is a different range of fines.

80. In BE, CY, MT and SE the Competent Authority may take in consideration certain aggravating or mitigating factors, although such is not explicitly foreseen in the law. In DE, besides the aggravating or mitigating factors stipulated in the relevant regulations, the Competent Authority is able to take other factors into account.

3.2.8 Time limit for imposing liability and the beginning of the prescription

81. The general time limit to initiate administrative proceedings can be ranged in four categories:

- up to three years (included): AT, BG³⁸, DE, EE, ES³⁹, FR, LT⁴⁰, MT, RO, SE⁴¹, SI⁴² and UK;
- from three to five years (included): CZ⁴³, DK, HU⁴⁴, IT⁴⁵, NL and PT;
- more than five years: IS⁴⁶, LV and SK⁴⁷;
- in six countries there is no such time limit (BE⁴⁸, CY, EL, IE, LU and PL). In FI and NO, although not specifically regulated, a time limit based on general administrative principles might apply.

82. Concerning the date when the prescription period starts counting, countries can be grouped into two categories:

- from the moment the misconduct takes place or ends: AT, BG, CZ, DE, DK, EE, ES, FR, HU, IS, IT, LT, NL, PT, RO⁴⁹, SI and SK ;
- from the moment the misconduct is discovered: LV, MT, PL and UK.

³⁸ In BG the time limit is two years from the moment the misconduct ended and is three months from the moment the misconduct is discovered.

³⁹ In ES the time limit depends on the type of violation (two or five years)

⁴⁰ In LT the time limit depends on whether the conduct is related to natural persons (six months limit) or legal persons (two year limit)

⁴¹ In SE a special fee may be imposed only if the party has been notified within six months of the breach of the fact that the Competent Authority is considering the question of a special fee.

⁴² In SI the time limit depends on the type of violation (two, three or five years)

⁴³ In CZ the time limit is five years from the moment the misconduct ended and is one year from the moment the misconduct is discovered.

⁴⁴ In HU the time limit is five years from the moment the misconduct ended and is two years from the moment the misconduct is discovered.

⁴⁵ In IT the time limit is five years from the moment the misconduct ended and is 180 days from the moment the misconduct is discovered.

⁴⁶ The time limit is seven years after the conduct had taken place.

⁴⁷ In SK the time limit is ten years from the moment the misconduct ended and is two years from the moment the misconduct is discovered.

⁴⁸ In BE it is only specified it has to be within reasonable time.

⁴⁹ In RO the time limit is three years from the moment the misconduct has been committed and in case of continued offences it is three years from the moment the misconduct is discovered.

3.2.9 Settlement Procedure

83. In some countries the competent authority has the opportunity to proceed with a settlement procedure that may not lead to a formal sanction being imposed on the responsible party. The countries that have such a settlement procedure in place are BE, CY, FR⁵⁰, IE, LV, LT, SK and UK.
84. In EE, ES⁵¹ and IS such a settlement procedure is only possible for minor infringements.
85. In 18 countries, no settlement procedure is present (AT, BG, CZ, DE, DK, EL, FI, HU, IT, LU, MT, NL, NO, PL, PT, RO, SE and SI).

3.2.10 Right of Appeal

86. In all countries the sanctions imposed by competent authorities are subject to the right of appeal before a court. As discussed below, in some countries a previous appeal to an administrative body is required or allowed.
87. In six countries a previous appeal to an administrative body is required before appealing to a court (CZ, DE, DK, NO, PL⁵² and SK).
88. In six countries a previous appeal to an administrative body is allowed but not mandatory (AT, BG, EL, MT, SI and UK⁵³).
89. In ES an appeal to an administrative body is required in the case of minor or serious infringements. In cases of very serious infringements a previous appeal to an administrative body is allowed though not mandatory.
90. In 16 countries appealing to an administrative body is neither required nor allowed (BE, CY, EE, FI, FR, HU, IS, IE, IT, LT, LV, LU, NL⁵⁴, PT, RO and SE).

⁵⁰ Only for the professional service providers acting on the market.

⁵¹ In general the infringements related to prospectuses are serious and very serious so an administrative sanction may not be avoided.

⁵² In PL the Competent Authority reviews the case again before appealing to a court.

⁵³ The administrative body to which a previous appeal is possible is called the independent Tribunal.

⁵⁴ In NL an appeal to an administrative body is neither required nor allowed regarding decisions relating to the supervision on prospectuses. Only a fine requires a previous appeal to an administrative body before appealing to a court.

3.3 Criminal liability regimes

3.3.1 General or specific provisions

91. The majority of countries have specific provisions in their criminal law for prospectus related offences.
92. In particular, in 20 countries specific criminal prospectus provisions apply (AT, BE, CY, DE, DK, EE, EL, ES, FR, IE, IS, IT, LU, LV, MT, NL, NO, PL, SI and UK). In addition to specific provisions, general criminal provisions, such as those on fraud, have been pointed out as applicable by 12 countries (CY, DE, DK, EE, EL, ES, FR, IS, LU, LV, NL and UK).
93. In contrast, in other eight countries prospectus-related criminal offences are only subject to the general criminal provisions (BG, CZ, FI, HU, PT, RO, SE and SK).
94. There is one country where there are no criminal offences related to prospectus (LT).

3.3.2 Persons subject to criminal liability

95. In 24 countries criminal provisions in the national legislation do not set out the specific parties who can be held criminally responsible (AT, BE, BG, CY, CZ, DE, EE, FI, FR, HU, IE, IT, LU, LV, MT, NL, NO, PL, PT, RO, SE, SI, SK and UK).
96. Other four countries have indicated the specific persons who can be held criminally responsible as being the issuer and its directors (ES and EL), as well as the managers of the issuer (DK), the persons set out in Article 6.1 of the PD (IS).
97. In seven countries criminal sanctions for prospectus related offences cannot be applied to legal persons (BG, CZ, DE, EL, IT, SE and SK).

3.3.3 Conducts which constitute a criminal offence

98. In 11 countries both the lack of an approved prospectus and false or incomplete information in a prospectus are punishable by either specific criminal provisions (AT, BE, DK, EL, IE, IS, MT, NO and PL) or general criminal provisions (FI and SK).
99. In five countries a public offer made without an approved prospectus is punishable by specific criminal provisions, whereas other criminal offences related to prospectus (such as fraud resulting in false or incomplete information in a prospectus) may be subject to general criminal provisions (CY, LU, LV, NL and UK).
100. In 12 countries only false or incomplete information in a prospectus is considered as criminal offence pursuant to specific criminal provisions (DE, EE, ES, FR, IT and SI) or general criminal provisions (BG, CZ, HU, PT, RO and SE).

3.3.4 Degree of fault

101. In 17 countries the law requires that the offence has been committed intentionally (AT, DE, CZ, EE, EL, ES, FR, IE, IT, LU, LV, MT, PL, PT, RO, SI and SK).

102. In 11 countries for some criminal offences related to prospectus gross negligence or negligence would be sufficient (BE, BG, CY, DK, FI, HU, IS, NL, NO, SE and UK).

3.3.5 Type of sanctions

103. All the countries that have got a prospectus criminal liability regime (see paragraph 93-96) provide for differing penalties (imprisonment and a fine) depending on how serious the offence is deemed to be. As a general rule, the offence considered more serious in terms of penalties is the dissemination in the prospectus of false or misleading information.

104. In one country national law provides for the application of only a fine (LU) and in another country only imprisonment is envisaged (IT).

3.3.6 Interaction between administrative and criminal proceedings when the violation concerns the same fact

105. In 12 countries a previous administrative sanction can be taken into account by the judge when determining the criminal sanction (e.g. the amount of the fine) (BE, CY⁵⁵, DE, DK, EL, FR, IE, IS, MT, PL, SE and UK). In six jurisdictions a previous administrative sanction rules out the criminal sanction (AT, CZ, FI⁵⁶, LU, NL⁵⁷ and NO). In ten countries a previous administrative sanction has no bearing on a criminal proceeding (BG, EE, ES, HU, IT, LV, PT, RO, SI and SK).

106. Furthermore, in 18 countries criminal proceedings exclude or impact the possibility for a competent authority to impose administrative sanctions (AT, BG, CZ, DE, DK, EE, ES, FI, HU, IE, IS, IT, LU, LV, NL, NO, RO and SI).

3.3.7 Prescription

107. A fixed time limit has been set out in 16 countries: two years (NO), three years (FR), five years (AT, BE, BG, DE, DK, EE, IS and MT), six years (IT) and ten years (LU, PL, SE, SI and SK).

108. In nine countries the time limits range between a minimum and maximum depending on the seriousness of the offence: from three to five years (RO), from three to 12 years (NL) or to 15 years (CZ), from five to ten years (ES, LV, PT and FI) or to 15 years (EL), and from three years to the highest penalties prescribed by the law for the relevant offence (HU).

109. In three countries there is no time limit (CY, IE⁵⁸ and UK).

⁵⁵ Please note that in CY this is a matter which is at the discretion of judge in a proceeding, as there is no specific reference to this in the law itself.

⁵⁶ In FI, this has not been explicitly stated in legislation, but is based on recent case law.

⁵⁷ In NL, if a criminal sanction has been imposed, no other punitive administrative sanction (the administrative fine) can be imposed for the same offence and vice versa.

⁵⁸ However, in IE it has been provided a six month time limit for offences related to prospectus subject to a summary trial.

3.4 Governmental liability regimes

3.4.1 Investor's Right to Restitution

110. In the majority of countries (BE, BG, CZ, DK, EE, EL, ES, FI, FR, HU, IS, IT, LT, LU, LV, NL, NO, PL, PT, SE, SK and UK) legislation provides investors with the right to obtain restitution from the government and/or the competent authority for losses in case the authority responsible for the approval of the prospectus does not perform its duties in accordance with the PD framework. In some jurisdictions (AT, CY, DE, IE, IS, MT, RO and SI) investors have no such right.
111. In all countries which provide investors with the right to obtain restitution from the government and/or the competent authority for losses, this right is based on general rules for governmental liability and/or civil liability. No jurisdiction provides a specific liability regime of the government or competent authorities in the context of the approval of prospectuses.
112. Moreover, two competent authorities (NL and UK) noted that legislation provides a complaints scheme. If, through the complaints scheme, an investor's complaint is assessed to be well-founded, the competent authority may *inter alia* offer compensation.

3.4.2 Person entitled to sue for damages

113. In the majority of jurisdictions, which provide investors with the right to obtain restitution from the government and/or the competent authority for losses, any person who claims to have suffered damages is entitled to sue for damages (BE, BG, CZ, DK, EE, EL, ES, IS, FI, FR, IT, LT, LU, LV, NL, NO, PL, PT, SE and SK). This includes both persons who purchased securities during the public offer (i.e. original purchasers in the primary market) and those who purchased the securities on the secondary market. In HU only the original purchaser in the primary market is entitled to sue for damages. In UK, most grievances are handled through an independent complaints scheme whereby the investigator may recommend to the Competent Authority to pay compensatory damages. Direct court action for damages is only available in cases of bad faith, or where the Human Rights Act is engaged.

3.4.3 Circumstances which must be proven by the plaintiff and the possibilities to avoid liability

114. The most common circumstances to be proven by the plaintiff are (i) the existence of an action or omission of the competent authority, (ii) which was unlawful (i.e. violation of PD framework), (iii) (gross) negligence or intent, (iv) damage suffered by investor, (v) causal link between the damage and the action or omission.
115. In order to avoid liability, the defendant (i.e. the government and/or the competent authority) typically has to prove any fact which has the effect of contradicting the facts alleged by the plaintiff (e.g. its actions were in full compliance with the law) or demonstrate the lack of proof of any of the elements of liability presented by the plaintiff.

3.4.4 Damages

116. In all countries which provide investors with the right to obtain restitution for losses from the government and/or the competent authority, material damages are recoverable.

117. In addition, 11 countries have mentioned that the court could consider also the loss of opportunity (which includes loss of income and loss of profit) to be compensated (BG, CZ, EE, EL, FR, HU, IT, LU, NL, PL and SK).
118. Moreover, in NL and SK it is possible to claim compensation also for non-pecuniary damages.

3.4.5 Time limit to file a claim and the beginning of the prescription

119. In all countries which provide investors with the right to obtain restitution from the government and/or the competent authority for losses, a time limit for initiating proceedings does exist (with the exception of HU).
120. The general time limit can be ranged in three categories:
- up to five years (included): BE , BG, CZ , DK, EE, EL, ES, FI, FR, IT, LT, NL, NO, PL⁵⁹, PT, SK and UK;
 - from five to ten years (included): LV and SE;
 - more than ten years: LU (the prescription is 30 years).
121. As a general rule, the prescription period begins with knowledge /occurrence of the damage.

3.4.6 Recourse Action against Employees

122. In most countries which provide investors with the right to obtain restitution from the government and/or the competent authority for losses, the government and/or competent authority may bring an action against their own employees for compensation paid to investors due to government liability (BE, BG, CZ, EE, EL, ES, FI, FR, IS, IT, LT, LV, NL, NO, PL, PT, SE, SK and UK). In most of these countries employees will only be liable if they acted with intent or gross negligence.
123. In contrast, in DK and HU a recourse action against employees is not feasible. In LU the matter is still under reserve due to unsettled case law.

3.4.7 Class action suits

124. Defining a class action as a possibility to bring a claim on behalf of a more or less determined (or yet unknown) group of plaintiffs against a defendant or a group of defendants it is possible to conclude that in some countries (BG, DK, HU, IS, LT, NL, NO, PL, SE and SK⁶⁰), which provide investors with the right to obtain restitution from the government and/or the competent authority for losses, a class action is available in the context of government liability.

⁵⁹ The general provision in the Polish Civil Code (applicable to the liability for torts related with prospectus and public offerings) states that the time-limit to file a claim is three years from the date when the person who suffered the damage learned about it and learned about the person liable to redress, but not later than ten years from the date when the event that caused the damage occurred.

⁶⁰ SK has noted that respective legislation should become effective in 2013.

4. Conclusions

125. On the basis of the responses received it is possible to conclude that generally all EEA States apply either entirely general provisions or a combination of specific provisions supported by general provisions to address the four liability areas, i.e. civil, administrative, criminal and governmental liability, under the Prospectus Directive. Only within the area of governmental liability does there seem to exist a common approach, among the EEA States (with the exception of one) which provide investors with the right to obtain restitution from government, which consists of applying only general rules (either general governmental or civil rules) for allocating such liability.
126. There is no uniform manner of setting out the persons subject to the different liability regimes as this depends on the specific regime one is faced with. However, there are similarities as a vast majority of the EEA States have indicated in their legislation the specific persons that are subject to civil and administrative liability. A small number of EEA States have opted to apply a general reference to persons who may be subject to liability, i.e. no specific/individual persons are indicated, therefore identification of the exact persons subject to liability requires further reading of the specific EEA States' legislation. The contrary applies to the criminal liability regimes where, in the majority of cases, the legislation does not specify the individual persons that could be/are liable (meaning that a potentially wider pool of persons may be found liable).
127. With regard to the degree of fault that must exist in order to trigger liability, the majority of EEA States display a similar approach in all four areas, i.e. civil, administrative, criminal and governmental liability regimes, where at least some form of negligence is required. There are variations within the negligence requirement, but by comparison the criminal liability regime shows a more divergent approach between the requirement of either negligence or intent. Furthermore, strict liability provisions seem to be more present in the administrative liability regime than in the other regimes.
128. Infringements regarding the inclusion in a prospectus of false or incomplete information are subject to both civil and criminal liability in all EEA States. The breach consisting of making a public offer without an approved prospectus is generally subject to civil liability and administrative liability. These infringements are generally considered as being the most serious of the possible breaches. Further types of breaches are mentioned, however, it is difficult to draw general conclusions from the responses.
129. On the issue of sanctions, the vast majority of EEA States apply both fines and/or imprisonment in the criminal liability regime, whereas fines and/or other measures are applied in the administrative regime. Other measures applied in most of the EEA States include publication by the competent authority of the sanction that has been imposed as well as the identity of the responsible person. Common grounds for non-publication across the jurisdictions include concerns of disproportionality or disruption of the financial markets.
130. Although sanctions in the form of fines are applied by the vast majority in both the criminal and administrative liability regimes, the responses show that the ranges of the fine amounts vary to a large degree across the jurisdictions. While such an administrative fine is subject to appeal to the courts in all jurisdictions, a similar approach does not exist with regard to whether this right of appeal is contingent on a prior administrative appeal process.

131. With regard to whether interaction between particular liability regimes such as the administrative and criminal regimes exists, the answers are very diverse and do not provide an easily analysable picture.
132. On the issue of prescription periods, it was difficult to draw conclusions, due to the differences in regimes analysed within each country (both with regard to type, i.e. civil, administrative, criminal and governmental; and within each of those there might also be further variations, e.g. contractual, tort, civil liability etc.) as well as the differences of approach between countries.
133. The exercise has shown that the majority of the EEA States provide investors with the right to obtain restitution from the government and/or the competent authority for losses suffered. Equally interesting is the fact that the government and/or competent authority may, in the majority of such jurisdictions, bring an action against their own employees for compensation paid to investors. Very few jurisdictions exclude such a recourse possibility.
134. ESMA understands a class action suit as the possibility to bring a claim on behalf of a group of plaintiffs against a defendant or a group of defendants. On this basis, the comparison shows that a third of the EEA States permit class action suits both in the civil and governmental liability regimes (almost the same states in both regimes). It is also worth noting that, despite not permitting class action suits as defined by ESMA, several of the EEA States provide for associations or groups of investors to act together in civil liability claims. Plaintiffs are provided with the possibility of grouping together in one manner or the other to bring a claim in approximately half of the EEA States.
135. ESMA concludes that there are areas of commonalities between the jurisdictions with regard to civil, administrative, criminal and governmental liability regimes under the Prospectus Directive. On the other hand, the report and comparative table of responses from the EEA States also show that there is a wide range of possible manners in which one can address the liability aspects under the prospectus regime, none of which are more or less correct than the other.
136. Moreover, an investor can seek compensation and the issuer, offeror or person responsible for drawing up the prospectus or seeking admission to trading on a regulated market could be held liable in more than one jurisdiction as well as possibly in accordance with more than one liability regime. However, particularly in case of cross-border transactions, the diversity in the different jurisdictions could make it difficult for market participants to assess their risks and rights in accordance with the applicable prospectus liability regimes. ESMA has not analysed the underlying reasons for the differences between the national regimes as the mandate did not request ESMA to undertake such investigation, which, in any case would require significant further work covering also cultural, political and historical aspects of the EEA States and would prejudice the conclusion of the assigned task within a reasonable deadline.

Annex I: Commission mandate to provide information

The section related to compilation of comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive is in Part III of the Mandate below.

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**"),⁶¹ the Regulation of the European Parliament and the Council establishing a European Securities and Markets Authority (the "**ESMA Regulation**"),⁶² and the Framework Agreement on Relations between the European Parliament and the European Commission (the "**Framework Agreement**").⁶³

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**").⁶⁴

- 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.

⁶¹ Communication of 9.12.2009. COM(2009) 673 final.

⁶² 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.

⁶³ OJ L304/47, 20.11.2010, p.47.

⁶⁴ Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. OJ L327/1, 11.12.2010, p.1.

Part II

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

Part III

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

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

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

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

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

1. Context.

1.1 Scope.

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

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

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

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

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

1.2 Principles that ESMA should take into account.

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

- It should take account of the principles set out in the de Larosière Report, the Lamfalussy Report and mentioned in the Stockholm Resolution of 23 March 2001.
- The high level of investor protection that is the guiding principle of the Prospectus Directive.
- The principle of proportionality: the technical advice should not go beyond what is necessary to achieve the objective of the Amended Directive. It should be simple and avoid creating excessive administrative or procedural burdens for issuers, in particular SMEs, and the national competent authorities.
- ESMA should respond efficiently by providing comprehensive advice on all subject matters covered by Parts I and II of the mandate regarding the delegated powers included in the Amended Directive.
- While preparing its advice, ESMA should seek coherence within the regulatory framework of the Union.
- In accordance with the ESMA Regulation, ESMA should not feel confined in its reflection to elements that it considers should be addressed by the delegated acts but, if it finds it appropriate, it may indicate guidelines and recommendations that it believes should accompany the delegated acts to better ensure their effectiveness. Moreover, where relevant it may indicate how the delegated acts should relate to technical standards to be developed in areas where empowerments for technical standards are given by the legislative act.⁶⁵
- 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

⁶⁵ 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.

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

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

2 Procedure.

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

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

According to Article 19 of the ESMA Regulation, ESMA should serve as an independent advisory body to the Commission, and may, upon a request from the Commission or on its own initiative provide opinions to the Commission on all issues related to its area of competence. Moreover, according to Article 6 (1)(g) of the ESMA Regulation, ESMA shall take over, as appropriate, all existing and ongoing tasks from CESR⁶⁶.

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.

⁶⁶ Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators, OJ L25, 29.1.2009, p.18.

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

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

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

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

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

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

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

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

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

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

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

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

- An introduction stating the purpose of the summary document.
- A short description of the essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position. This section should briefly and clearly summarize at least the "Information about the issuer" and the guarantor, the "Business overview," and the "Financial information concerning assets and liabilities, financial position, and profits and losses," as described in the Regulation (EC) 809/2004 (the "**Prospectus Regulation**").⁶⁷
- 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.⁶⁸ 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.

⁶⁷ Commission Regulation (EC) 809/2004 of 29 April 2004. OJ L215, 16.6.2004, p.3.
⁶⁸ SEC (2009) 1223 of September 23, 2009, p. 4.

3.3 Proportionate disclosure regime (Article 7).

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

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

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

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

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

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

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

- the Commission adopt an equivalence decision stating whether the regulatory (legal and supervisory) framework of that third country ensures that that market is authorized in that third-country, it complies with legally binding requirements which are, for the purpose of the application of this exemption, equivalent to the requirements resulting from the Market Abuse Directive,⁶⁹ from Title III of the MiFID,⁷⁰ and from the Transparency Directive,⁷¹ 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:

69 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.

70 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.

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

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

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

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

Measures 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 outmost 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	<p><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.</p> <p>The Commission will provide the European Parliament with full information and documentation on those meetings. If so requested by Parliament, the Commission may also invite Parliament's experts to attend those meetings.</p>
End of December 2011	<p><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.</p>
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 II: Comparative table of responses from EEA States

See separate Annex II for this information.



Annex III: Individual responses from EEA States

See separate Annex III for this information.

Annex IV: Euro foreign exchange reference rates as at 11 February 2013

Euro foreign exchange reference rates as at 11 February 2013

BGN	Bulgarian lev	1.9558
CZK	Czech koruna	25.240
DKK	Danish krone	7.4617
GBP	Pound sterling	0.85350
HUF	Hungarian forint	291.72
LTL	Lithuanian litas	3.4528
LVL	Latvian lats	0.6995
PLN	Polish zloty	4.1537
RON	New Romanian leu	4.4003
SEK	Swedish Krona	8.5754
NOK	Norwegian Krone	7.3795