



Economic and financial affairs

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Answer to ESMA 2012/380 consultation paper: ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU

Disclosure requirements for convertible or exchangeable debt securities

With this consultation paper, ESMA analyses very specific questions of interpretation of the Prospectus regulation. As a generalist business confederation, MEDEF cannot interpret which combination of schedules should apply to each particular type of operation but it would like to express some concerns from a general perspective: MEDEF fears that, with a quite maximalist approach of the relevant disclosures needed for convertible or exchangeable debt securities, ESMA may excessively increase the costs of the prospectus and create counterproductive effects. For those reasons, our comments are specifically dedicated to questions 5 to 7, on which French issuers want to highlight some concerns.

Q.5:

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

Q.6:

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

Q.7:

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

MEDEF does not share ESMA's conclusions regarding the need to apply Annex III to convertible or exchangeable debt securities:

- Annex III is tailored for shares. ESMA does not sufficiently take into account the differences between shares and bonds. The bond's holder may choose to obtain cash at maturity, which is a significant difference with shareholder.

- MEDEF regrets that, after analysing the practices in all Member states, ESMA chooses to adopt the minority position, which corresponds to a maximalist approach of the level of details required in the Prospectus.
- From a cost/benefit balance's perspective, such a requirement is not adequate. Specifically on the requirement of the application of items 3.1 and 3.2 of annex III when convertible or exchangeable debt securities can be converted or exchanged within 12 months since the date of issuance, our members raise the fact that such a conversion is very rare, although legally allowed. The costs of such an obligation would be detrimental to all issuances for a marginal case. Such a requirement would thus correspond to a very theoretical reasoning.

Furthermore, such a decision would lead to inappropriate consequences:

- Issuers stress the fact that the constraints linked to the capitalisation and indebtedness statement, which should not be determined as of a date earlier than 90 days prior to the date of the securities note, would significantly reduce the opportunities to issue those instruments. Such a statement represents significant costs and internal constraints that few issuers would be able to bear during the year except for annual or half-year financial statements. The consequence would be a severe reduction of the issuance "window" for such instruments, which is totally contrary to the market characteristics of equity-linked products.
- MEDEF fears that the requirement of items 3.1 and 3.2 of annex III for convertible and exchangeable bonds could be an incentive for those activities to quit regulated markets. Some MTF would represent an alternative to list those bonds. In that case, no prospectus would be required and the result would be counterproductive regarding the investor's protection.

As a conclusion, MEDEF invites ESMA to take into consideration the general objective of the European Union to strengthen its internal market through a facilitation of fund raising for European companies. Equity-linked products are seen as a way to facilitate access to capital for companies, especially for SMEs and small capitalisations and many Member States are currently working on facilitating their development. In its advices on delegated acts, ESMA must keep that in mind and adapt its requirements, taking into account the weight represented by the addition of all requirements.
