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Consultation Paper

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

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General remarks submitted by:

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Introduction

Beleggersvereniging VEB (*the Dutch Investors' Association*) was founded in 1924 with an objective to represent the interests of retail and institutional investors. Nowadays, VEB is the largest association representing investors in the Benelux. VEB is also a founding member of EuroInvestors (now: EuroFinuse) and EuroShareholders, pan-European organisations which represent retail investors and shareholders.

1. General remarks

VEB welcomes the consultation paper prepared by ESMA on Prospectus Regulation. However, this ESMA consultation focusses on legal matters concerning the prospectus and summary prospectus. Hence, VEB will only answer questions that affect retail investors directly. VEB has a few related issues on which ESMA policy can be of great value for retail investors.

Across Europe there are several examples of misleading prospectus and other statements that cause substantial damages for investors. For example, in the Netherlands there was the World Online IPO in 2000; In Belgium the Fortis IPO in 2007; In Spain the Bankia IPO in 2011. Absent regulation on IPO's and investor protection as well as lacking possibilities for regulators to enforce issuers to be transparent and to publish complete and audited information, are important reasons for these fiascos.

VEB is pleased that one of the main objectives of ESMA is to maintain investor protection. Retail investors have their first "contact" with companies, investment firms and credit institutions when they consider investing in these companies or funds. Mostly, that will be an initial offering. Especially retail investors have to rely on the prospectus when they consider buying newly issued shares or other securities. They lack the ability to question the management of the issuer directly, as institutional investors do regularly in these situations. That's why a clear and reliable prospectus is so important. A prospectus has to offer sufficient information for retail investors to make informed investment decisions.

Therefore, the VEB persists that all financial and legal information has to be clear, reliable and understandable for retail investors. The Summary Prospectus, as proposed by the Directive 2010/73/EU, can also be useful by making the investment decision. In that perspective it is necessary that the summary prospectus highlights key elements of the issued securities and redirects investors to the specific pages in the prospectus for high risk financial and legal factors. Next to this, the prospectus and summary prospectus has to address the question for which investor the issued securities are too complex, too risky and/or if they are (not) suitable for specific types of investors. These issues could be addressed in ESMA guidelines or level 3 regulation.



Not to mention the European and National regulators who will face the enormous task to make sure all the transparency and market rules will be obeyed.

Early in 2008, VEB advocates to the European Commission that securities issued outside the scope of the Amendment Prospectus Directive but within the European Union, should have the mandatory duty to mention this to all investors. VEB refers to it as a 'Wild West'-sign. As a result of such obligation, all securities issued within the European Union have a clear sign for investor. Either the prospectus has been supervised by Regulators and complies with the Prospectus Directive, or the prospectus does not. VEB advised this 'Wild West'-sign on similar legislation as PRIP's and MiFID. Regrettably, the new Prospectus does not include such an obligation. We would like ESMA to consider this new obligation and suggests the European Commission to create this obligation on an European level or suggests national regulators to incorporate such an obligation in their national regulation. If all national regulators follow ESMA suggestion there will be no breach of maximum harmonization in the field of prospectus disclosure requirements and the proper functioning of the passport procedures regarding prospectuses.

Together with our pan-European organisation Euroshareholders, VEB would like ESMA to focus also on other key disclosure issues raised by the implementation of the Prospectus directive and Regulation, in particular the very poor quality of the Summary Prospectuses, for debt securities. VEB and Euroshareholders strongly regret the exclusion of securities from the scope of the PRIPs Regulation proposal, and we would urge ESMA to ensure that the disclosure requirements for securities are at par with those for other "substitute" investment products accessible to individual investors.



2. Questions and answers

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

Yes, VEB agrees on the amendment of the Prospectus Regulation because the categories from Annex XVIII do not refer explicitly to such kind of shares. It would be necessary to include the category “underlying shares already admitted to trading on a regulated market” in Annex XVIII. VEB believes that the minimum disclosure requirements as established in item 4.2.2 of Annex XII is appropriate for this kind of shares. VEB advocates the availability of sufficient and relevant information for investors.

Q2. In your experience, what information is included in prospectuses relating to debt securities convertible or exchangeable into third party shares not admitted to trading on a regulated market with regard to the underlying shares? Do you believe that in such a case Annex XIV, except item 2, should be applied relating to third party shares not admitted to trading on a regulated market? If not, please state your reasons.

VEB believes Annex XIV is a good benchmark to consider for regulating third party shares not admitted to trading on a regulated market. It would be positive to introduce the requirement of disclosure of inducements (financial compensation from the third party issuers to the seller of the debt securities) in order to disclose possible conflict of interests, in the same way as it is currently discussed for the review of the Market in Financial Investments Directive. The disclosure of links between the issuer and the (re)seller is for the purchaser as important as information on the financial product itself. Disclosing inducements is a good way to act against conflicts of interest. For shares not admitted to trading on a regulated market, where investors do not count on stock market price to make their investment decisions, it would help them in their decision making to know about existing links between the issuer and the seller, as well as any other kind of inducement or dependent arrangements.

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

VEB agrees with ESMA that this should be clarified. Financial information published by different entities, which belong to the same group of entities or companies, has a possible impact on pricing of other – more or less related and/or traded on regulated markets - securities. It is possible that retail investors invest in securities that are not traded on regulated markets with a possible link or influence on other securities traded on regulated markets.

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

VEB agrees with ESMA that this should be clarified in favour of well-functioning financial markets and an up-to-date legal framework. However, VEB has no reasons to believe that retail investors will invest regularly in these types of securities.

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

N/A

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

VEB believes that items 3.1 and 3.2 should not be restricted to 12 months but to a longer period as some issuers consider long-term financing strategies for periods longer than one year. Markets practices show a term of three to five years. VEB suggests taking a maximum of 5 years as the restricted period. In any case, it should take into account that item 3.1 is an "opinion" from the issuer on the possibility of needing extra capital, and it is not a statement from an external auditor, so the regulatory burden is likely to be very low. In addition, the expected future necessities of capital seem necessary information for investors to know, especially for non-listed shares.



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

VEB has neither written nor published such a statement or update. In the consideration of interests between costs for issuers and transparency at the financial markets, VEB favours a higher level of transparency. Therefore, if ESMA considers proposing an exclusion of particular obligation only because of the higher costs for issuers, VEB will oppose these proposals.

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

It is correct to assume that exchangeable debt securities may not be considered within the scope of the Second Directive, taking into account the description from the Art. 29.6 from the Second Directive, and the concrete examples provided by ESMA on exchangeable debt securities that would fall outside the scope of that article. All parties have to consider, due to financial innovation, a whole range of financial products which were not considered in the Second Directive (which dates back from 1976).

Q9. Do you agree with ESMA's view to consider rights issues of debt securities convertible into issuer's shares within the scope of Article 7.2(g) of the Prospectus Directive and by consequence be able to take advantage of the new provisions of the Delegated Regulation relating to the proportionate disclosure regime, provided that conditions envisaged by the above article are fulfilled? If not, please provide the reasoning behind your position?

VEB agrees on the disclosure requirements as laid down in Article 7.2(g) of the Directive 2010/73/EU, which VEB believes is appropriate to apply to the rights issues of debt securities convertible into issuers' shares. It would be necessary to specify, however, what the "proportionate disclosure regime" is. Further technical guidance on this issue should be proposed by ESMA.