

**Jonathan Faull
Director-General
DG MARKT
European Commission
Rue de la Loi 200
1040 Brussels
Belgium**

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

Dear Mr Faull,

On 20 of January 2011 ESMA received a formal request (the Mandate) from the European Commission to provide technical advice to the Commission on possible delegated acts concerning the Prospectus Directive as amended by the Amending Prospectus Directive.

The mandate was split into three parts as regards the prioritisation of work and delivery of the technical advice:

Part I:

- section 3.1: Format of the final terms to a base prospectus (Article 5(5))
- section 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))
- section 3.3: Proportionate Disclosure Regime (pre-emptive 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)).

Part II:

- section 3.5: The consent to use a prospectus in a retail cascade (Articles 3 and 7)
- section 4: Review of the provisions of the prospectus Regulation (Articles 5 and 7)

Part III

- section 3.4: Equivalence of third-country financial markets (Article 4(1)).
- section 5: Comparative table of the liability regimes applied by the Member States in relation to the Prospectus Directive.



- section 6: ESMA received a letter from the Commission extending the scope of the Mandate to also include convertible bonds

Part I – sections 3.1, 3.2 and 3.3 of the Mandate

Part I was delivered to the Commission and published on 5 October 2011 (Ref. ESMA/2011/141).

Taking into account the objection period for the European Parliament and the Council to the formal adoption by the Commission of the delegated acts and thereafter the end of the transposition period for the Amending Prospectus Directive (Directive 2010/73/EU) on the 1st of July 2012, the Commission allowed ESMA to focus in the second part of the Mandate on sections 3.5 and 4 as these are regarded to be more important and leave section 3.4, 5 and the issue of convertible bonds for a later stage (part III of the Mandate) after delivering the final report on technical advice on the previous mentioned sections. The Commission has confirmed its agreement on this approach in a letter dated 14 November 2011.

In the Mandate the deadline set to ESMA to deliver the technical advice is 29 February 2012 for the sections 3.5 and 4.

I am pleased to submit to you ESMA's final technical advice on Part II (Ref. ESMA/2012- 137) of the mandate. It was published for consultation on 13 December 2012 (Ref. ESMA/2011-444), and covers the areas set out below.

i) Section 3.5: The consent to use a prospectus in a retail cascade

Considering that Article 3.2.3 of the Amended Prospectus Directive requires the issuer to consent to the use of the prospectus by means of a written agreement, the proposed approach seeks to develop a solution which accommodates market practice, but takes also into account the rationale and legal requirements of the amended Prospectus Directive and the objectives of the Commission's Mandate.

The Technical Advice concludes with a view to transparency, legal certainty, investor protection and the regulatory needs of competent authorities as regards market supervision, that the consent to use a prospectus needs to be public and shall be included in the prospectus or base prospectus/final terms.

In order to take into account the current market practices where the issuer's ability to identify all financial intermediaries in the prospectus or final terms might be limited, ESMA proposes a two type consent approach consisting of 1) an individual consent approach when financial intermediaries are known to the issuer or 2) a general consent approach when the financial intermediaries are unknown to the issuer. In



situations where the issuer knows the identity of only some of the financial intermediaries at the time of approval of the prospectus these are to be included regardless of the use of a general consent approach.

The general consent approach allows the issuer to include in the prospectus a broad consent to any financial intermediary it may concern, whereby the issuer consents to the use of the prospectus in writing and the financial intermediary using the prospectus accepts this offer, thereby closing the agreement with the intermediary. In terms of market transparency and investor protection, it is necessary that any financial intermediary relying on a prospectus previously approved on the basis of a general consent shall make public on its own website that it relies for its offer on the prospectus with the consent of the issuer or the person responsible for drawing up the prospectus.

The Technical Advice sets out the principles which need to be respected by issuers or persons responsible for the drawing up the prospectus and financial intermediaries, as well as specifying the minimum content of the general consent and any conditions attached thereto.

At a later stage ESMA may provide further guidance with regard to the principles and content of the general consent approach.

ii) Section 4: Review of the provisions of the prospectus Regulation

The Technical Advice gives consideration to alleviation of burdens for issuers, retaining a high level of investor protection, increasing legal clarity as well as efficiency in the prospectus regime.

Tax regime: The rationale of ESMA's FAQ no. 45 provides for a very narrow interpretation of the current requirement of the Prospectus Regulation on tax information whereby investors may be deprived of tax information in certain jurisdictions where an issuer is actively making a public offer. ESMA therefore proposes to keep the current requirement of the Prospectus Regulation but revise its FAQ no 45 to reflect that such information shall be included in the prospectus.

Indices: ESMA is of the view that, among all indices, there is a clear conflict of interest in the case of proprietary indices. Although disclosure on conflicts of interest is already required, a description of the index in the prospectus would provide additional transparency on the issue, ensure that the respective competent authorities have the possibility to scrutinize the description and ensure comprehensibility of the prospectus. The description is required if the index is composed by the issuer and/or any entity belonging to the same group as the issuer. In addition, with regard to an index composed by an entity acting in association with, or on behalf of, the issuer, there is a presumption of a conflict of interest. If the issuer is able to controvert this presumption by including in the prospectus certain statements the description would not be required.

Auditor's report on profit forecasts and estimates: The Technical Advice proposes to keep the current requirement of an auditor's report on profit forecasts and estimates as it believes that reports prepared by independent accountants or auditors provide investors with confidence in and ensures a certain quality of the profit forecasts or estimates being prepared on the basis of the underlying assumptions.

With regard to market announcements concerning figures to be published in the next annual audited financial statements in relation to the financial year that has expired, ESMA considers that a report is not required if certain criteria are met to ensure the figures are non-misleading and the investor is aware of the nature of the included figures.

Audited historical financial information: ESMA proposes to keep the current regime of including three years of audited historical financial information. A reduction of the disclosure requirement would result in less extensive information on which an investor is to base the investment decision. In addition this can be viewed as inappropriate in the context of the current volatility of stock markets world-wide resulting from a weakening global economy. Furthermore, a reduction would result in there being no relaxation for SMEs and companies with reduced market capitalisation under the proportionate disclosure regime as proposed in Part I of the Technical Advice.

ESMA will provide further guidance on a number of issues in the part II of the Mandate at a later stage such as revision of ESMA's FAQs and the content of a description of an index to be included in the prospectus.

Part III – sections 3.4, 5 and 6 of the Mandate

Currently, ESMA is starting the work on the third part of the mandate. The timing of the submission of the third part of the Mandate is still to be precisely defined.

For section 3.4 of the Mandate (Equivalence of third-country financial markets (Article 4.1)) the Commission has expressed to ESMA on 17 February 2012 that considering the proposals adopted on 20 October 2011 on the review of the Market Abuse Directive (MAD) and on 25 October 2011 on the review of the Transparency Directive the Commission considers that the issue in section 3.4 is postponed until a later stage.

Meanwhile for section 5 of the Mandate (Comparative table of liability regimes applied by the Member States in relation to the Prospectus Directive) the Commission is not under a legal obligation to adopt delegated acts; as such, the Commission invited ESMA to assist in compiling this comparative table.



For Section 6 of the Mandate (the issue of convertible bonds) ESMA received a letter from the Commission extending the scope of the Mandate to also include the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities. A tentative deadline for this work has been suggested by the Commission to be December 2012.

Should you have any questions on this letter, please do not hesitate to contact either myself or Verena Ross, Executive Director of ESMA.

I am copying this letter to Mrs Sharon Bowles.

Yours sincerely,

Steven Maijoor
Chair ESMA

c.c. Sharon Bowles, MEP