



*European Association of Co-operative Banks
Groupement Européen des Banques Coopératives
Europäische Vereinigung der Genossenschaftsbanken*

EACB responds to the ESMA consultation on draft RTS on prospectus related issues under the Omnibus II Directive

19 December 2014

The **European Association of Co-operative Banks** (EACB) is the voice of the co-operative banks in Europe. It represents, promotes and defends the common interests of its 28 member institutions and of co-operative banks in general. Co-operative banks form decentralised networks which are subject to banking as well as co-operative legislation. Democracy, transparency and proximity are the three key characteristics of the co-operative banks' business model. With 3.700 locally operating banks and 71.000 outlets co-operative banks are widely represented throughout the enlarged European Union, playing a major role in the financial and economic system. They have a long tradition in serving 215 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 56 million members and 850.000 employees and have a total average market share of about 20%.

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The voice of 3.700 local and retail banks, 56 million members, 215 million customers

EACB AISBL – Secretariat • Rue de l'Industrie 26-38 • B-1040 Brussels

Tel: (+32 2) 230 11 24 • Fax (+32 2) 230 06 49 • Enterprise 0896.081.149 • lobbying register 4172526951-19

www.eacb.coop • e-mail : secretariat@eacb.coop



Introduction

The EACB welcomes the opportunity to contribute to the Consultation on draft Regulatory Technical Standards (RTS) on prospectus related issues under the Omnibus II Directive.

The EACB has always supported the aims of the Prospectus Directive, namely increase legal certainty and efficiency in the prospectus regime and to reduce disproportionate and administrative burdens for issuers and intermediaries.

At this juncture, the EACB would only like to respond to a few specific questions of particular concern. However, the very targeted response of EACB should not be regarded as an unconditional consent on the other areas of the advice.

Please find below the EACB response to specific questions of the relevant Consultation:

Response to the specific Questions

Question 1: Is there any information that should be added or removed from the list in the proposed Article 2(2)?

N/A

Question 2: Do you believe that the requirement to submit all versions of the prospectus at a minimum in searchable electronic format will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

First of all, we consider that what constitutes "searchable electronic format" should be defined / specified.

Question 3: Do you consider that there are any other aspects of the approval process that should be dealt with by the RTS?

No, we do not consider that there are any other aspects of the approval process that should be dealt with by the RTS.

Question 4: Do you agree that the three above mentioned documents constitute the documents which comply with the requirement of being approved or filed in accordance with the Prospectus Directive and from which information can be incorporated by reference? If not, please provide your reasoning.

Yes, the members of EACB agree that the mentioned documents comply with the requirement of being approved or filed in accordance with the Prospectus Directive and from which information can be incorporated by reference.

However, we would propose that the information which may be incorporated by reference also explicitly includes "historical financial information" as defined in the Prospectus Regulation.

Moreover, we would note that in practice, the final offer price and the amount of securities per se will not be subject of incorporation by reference.

Having said that we do not believe that an exhaustive list makes sense either from an investor protection perspective or for reasons of effectiveness. Rather, we believe that it should be possible to incorporate in the prospectus by reference any information that has been filed with the NCA or

approved by the NCA, irrespective of whether it has been filed by virtue of a legal obligation or voluntarily. We cannot agree with ESMA's extremely rigid interpretation of both the Prospectus Directive and the Transparency Directive. We believe that this also runs counter to the intention of Article 11 and Recital 29 of Directive 2003/71/EC as laid down in Level 1.

Equally, repeating information in the prospectus that has already been filed does not enhance transparency and it does not increase investor protection. Rather, incorporation by reference allows investors to access all the relevant information and base their decision on it.

Question 5: Do you believe that specifying the documents which are considered approved or filed in accordance with the Prospectus Directive as proposed in paragraph 87 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

It is difficult to provide an estimate of these costs at the moment.

Question 6: Do you agree that the above mentioned information constitutes the information which complies with the requirement of being filed in accordance with the TD? If not, please provide your reasoning.

No, the members of the EACB do not agree with the proposal of ESMA.

Article 11 of the Prospectus Directive (PD)¹ sets out requirements for issuers when incorporating information into a prospectus by reference. In particular, Article 11 (1) states that "Member States shall allow information to be incorporated in the prospectus by reference to one or more previously or simultaneously published documents that have been approved by the competent authority of the home Member State or filed with it in accordance with this Directive or Directive 2004/109/EC".

ESMA has been asked to identify the information that meets the condition for "incorporation by reference". In this context, it proposes to limit the possibility to incorporate by reference the annual or interim financial information only if these fall within the definition of "regulated information" under Transparency Directive (TD)².

The EACB does not agree with this proposal for the following reasons:

- First, we understand that only listed issuers will be able to use this mechanism for financial information, while others – non-listed and smaller issuers – will have to report whole sections of financial information in the prospectus. This is even more unfair in the case of banks, as they are supervised entities by National Competent Authorities (NCAs) and their financial information is audited.
- Second, we believe this proposal is in contradiction to:
 - The technical advice from August 2003, the Committee of European Securities Regulators (CESR) suggested that information contained – among others – in the annual and interim financial information could be incorporated by reference in a

¹ 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/ECs, as amended by Directive 2010/73/EU and currently stands.

² Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (as amended by Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013).

prospectus³. This proposal was incorporated in Article 28(1) of Prospectus Regulation (PR)⁴.

- And, more importantly, will not contribute to facilitating “*the procedure of drawing up a prospectus and lower the cost for issuers*” as it is foreseen in para. 71 of the consultation document which refers to Recital 29 of the PD.

The EACB believes the proposal to be disproportionate, burdensome, and contrary to the principle of proportionality and contradictory to the objective of the idea to refer to incorporation by reference, which is to simplify and reduce the costs of drafting a prospectus.

We note that, as non-listed institutions, cooperative banks would be directly impacted by such a burdensome obligation. In our experience, Prospectuses are documents which -for a regulated entity such as banks- do not offer new information to investors, as banks main information is publicly available, and audited. This is why, in our view, prospectuses should be simpler and allow for the provision of information 'by reference'. This would in practice improve investor protection as they will be able to access all relevant information without the need to assess a complicated (and full with sections from other documents) prospectus.

With this in mind, we believe it necessary to maintain the possibility for banks, even those not listed, to incorporate by reference, at least, the annual and interim financial information and audit report and the financial statements. We do not see any reason why this possibility would endanger investor protection in terms of comprehensibility and accessibility of the information.

Moreover, we would suggest that apart from half-yearly financial reports also quarterly Report should be included in the relevant list.

Finally, please also refer to suggestion in our response to Question 4.

Question 7: Do you believe that specifying the information which is considered filed in accordance with the TD as proposed in paragraph 92 will impose costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

Yes, and in particular non-listed and smaller issuers. Please refer to our response above. However, it is difficult to provide an estimate of these costs at the moment.

Question 8: Do you consider that there are any other documents that could meet the criteria of being “simultaneously published” from which information could be incorporated by reference?

Please refer to our response to Question 4 and 6 above.

Question 9: Do you agree that it is sufficiently clear from PD Article 14 that the issuer, offeror or person asking for admission to trading can delegate the task of publication but not the responsibility? If not, please state your reasoning.

N/A.

³CESR's Advice on Level 2 Implementing Measures for the Prospectus Directive (CESR/03-208), <http://www.esma.europa.eu/system/files/83.pdf>

⁴ 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.

Question 10: Do you agree that the obligation to publish the prospectus electronically should also apply to the publication of final terms? If not, please provide your reasoning.

N/A

Question 11: Do you agree that the method for publishing final terms should be the same as the method used for publication of the base prospectus? If not, please state your reasoning.

N/A

Question 12: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provisions were to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

N/A

Question 13: Do you consider there are any other impediments to a prospectus being considered available to the public?

N/A

Question 14: Do you agree that the obligation to make the prospectus available to the public free of charge also applies to prospectuses that are published electronically? If not, please provide your reasoning.

N/A

Question 15: Would the issuer, offeror or person asking for admission to trading incur costs if the above mentioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

N/A

Question 16: Do you believe the proposed measures will enhance the accessibility of electronically published prospectuses? If not, please provide reasoning and/or alternative measures.

N/A.

Question 17: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

N/A.

Question 18: Do you agree that the issuer, offeror or person asking for admission to trading should be required to ensure that the hyperlink is active for a minimum period of 12 months?

No, we would not agree since sometimes this is not technically possible.

Question 19: Would the issuer, offeror or person asking for admission to trading incur costs if the abovementioned provision was to be adopted? If so, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

It would be difficult to provide an estimate of the costs at the moment.

Question 20: Do you agree that all information incorporated by reference in a prospectus should be electronically published? If not, please state your reasoning.

N/A

Question 21: Would issuers, offerors or persons asking for admission to trading incur costs if required to publish all information incorporated by reference electronically? If so,

please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

N/A

Question 22: Do you consider that there are additional means of dissemination of advertisements not covered by the four categories above? If yes, please specify.

No, we do not consider that there are additional means of dissemination of advertisements not covered by the four categories above.

Question 23: Do you agree that advertisements which contain inaccurate or misleading information should be amended in the manner proposed? If not, please provide your reasoning.

No, the EACB totally disagrees with this proposal. In practice, it is a question of who will assess whether information is considered to be inaccurate, misleading etc. and who will take the responsibility for such assessment and also bear the costs for any such assessment and/or a (possible) correction.

If the issuer / offeror becomes aware of any mistake it will be – of course – in its own interest to amend it. Nevertheless, the issuer will have to bear any legal consequences stemming from incorrect information.

Question 24: Will the suggested rule impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

We fear that the suggested rule will not only entail high costs but at the same time will create an unclear situation / procedure. Please refer to our response to Question 23 above.

Question 25: Do you agree with the requirements suggested for Article 13(1) of the RTS? If not, please provide your reasoning.

For the reasons set above the EACB would only agree with the proposed 13 (1) of the draft RTS.

Question 26: Do you believe that the inclusion of numerical performance measures in information disclosed about the offer or admission to trading, which are not contained in the prospectus, should be prohibited?

No, the EACB would consider that consistency with MIFID / PRIIPS / KIID etc. should be ensured.

Question 27: Do you agree that the issuer, offeror or person asking for admission to trading should be obliged to provide the investor with the information disclosed in durable format, free of charge, upon his request? If not, please provide your reasoning.

No. The issuer / offerors should decide on the dissemination of advertisements. Advertisement should not have the same status as legally required minimum disclosure documents.

Question 28: Will the proposed provision impose costs on the issuer, offeror or person asking for admission to trading? If yes, please specify the nature of such costs, including whether they are one-off or on-going, and quantify them.

It would be difficult to provide an estimate of the costs at the moment.

Additional statement with respect to page 34 / Chapter 138 /1. (1), 2, and 3:

For legal reasons i.e. provisions US law and other foreign jurisdictions (e.g. Japan etc.) it must be ensured, that issuers / offerors etc. are allowed to set up blockers / disclaimers to limit the availability of electronic documents.

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Contact:

The EACB trusts that its comments will be taken into account.

For further information or questions on this paper, please contact:

- Ms Marieke van Berkel, Head of Department (m.vanberkel@eacb.coop)
- Ms Ilektra Zarzoura, Adviser, Financial markets (i.zarzoura@eacb.coop)