EACB position on the Consultation Paper by the European Securities and Markets Authority on the Prospectus Directive (PD)

Ref.: ESMA 2011/141

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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 4.200 locally operating banks and 63.000 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 160 million customers, mainly consumers, retailers and communities. The co-operative banks in Europe represent 50 million members and 750.000 employees and have a total average market share of about 20%.

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.eurocoopbanks.coop • e-mail : secretariat@eurocoopbanks.coop

General Remarks

The members of the European Association of Cooperative Banks (EACB) are pleased to comment on ESMA's technical advice on possible delegated acts concerning the Prospectus Directive of June 2011 (Ref.: ESMA 2011/141).

The EACB has always been in favour of the review of the Prospectus Directive, as it aims to increase legal certainty and efficiency in the prospectus regime and to reduce disproportionate and administrative burdens for issuers and intermediaries. Before we give you our detailed comments on the individual questions, it is worthwhile to highlight some issues.

With regards to the Supplement to the base prospectus (Part 3.IV) we disagree with the ESMA proposal to require the regulator's approval of a supplement or a new prospectus for "all" the information that is not allowed by this document. As it will not be possible for issuers to include all the information necessary at the time of the base prospectus' approval, the issuer will then have to file for numerous supplements at a later stage, therefore ultimately increasing the issuers' costs.

We are of the opinion that summaries (Part 4.V – Format and Contents of Summaries) should contain only the key information and it should be - for reasons of comprehensibility by the investor – kept short. We believe that the content of summaries proposed could maybe become too detailed.

You can find our detailed comments on the individual questions outlined in the consultation paper below. We trust that you will give them due consideration.

List of questions

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

Q1: Do you consider the list of "Additional Information" in Annex B complete? If not, please indicate what type of information could be classified as "Additional Information" and to what item they would belong to (CAT A, CAT B or CAT C, as defined in Part 3.III). Please add your justifications.

We believe a more flexible approach would be more justified. The issuer should be allowed to freely add "additional information" which might not be required by law, but is necessary to explain for example the issuance process in more detail. We therefore believe that the proposal to only allow certain supplements would be counterproductive.

Nonetheless, based on the general approach proposed in the Consultation, at least the following information would need to be added as "Additional Information":

- *Country specific information*: In some cases additional information is provided in the Final Terms regarding information relevant to the offer of the particular securities in a specific country. One example is information on the tax situation of the investor beyond the general tax situation required within the relevant annexes to the Prospectus Regulation. Given the variety of possible information, this should be classified as "CAT C".

- *Inducements*: In some countries, many issuers choose to disclose the inducements paid to distributors, to further enhance transparency for investors. This information would have to be classified as "CAT C".

- *Issuing volume*: The increase of the issuing volume should still be possible. Arrangements with the investor relating to such an increase ("bridge clauses") should still be possible ("CAT C").

- *Details to the issuance process*: Including for example issuance restrictions, specific tax provisions (TEFRA D / C), etc.

Q2: As for the "additional provisions, not required by the relevant securities note, relating to the underlying", please provide the information which could fall under this item.

With regards to point 30 of the Consultation Paper, we would like to express the following:

Banning the – in some European markets well-established – practice to include the integrated form of the terms and conditions of the securities in the final terms ("integrated conditions" style of final terms) would not only contradict the proposed Directive's intention to further increase the transparency and comprehensibility of securities prospectuses. It is also justified with an interpretation of the Prospectus Regulation which is in our view incorrect.

The draft paper refers to Art. 26 (5) of the Regulation and argues that this provision allows the replication of some, but not all of the information which has been included in the base prospectus according to the relevant securities note schedule. However, the mentioned provision, according to its clear wording ("In the case that the final terms are included in a separate document …") only applies in the first of the two alternatives

mentioned in the previous sentence of Art. 26 (5) ("The final terms … shall be presented in the form of a separate document containing only the final terms …"), whereas the second alternative specified there allows the final terms to be fully included into the base prospectus.

As regards the further reference to the amended Prospectus Directive itself, Recital 17 must be read together with Art. 5(4) 3rd subparagraph of the Directive and clearly only pertains to the delimitation with regard to information that requires a supplement to the Base Prospectus. An interpretation to the effect that the word "only" would prohibit the reproduction of the relevant parts of the Base Prospectus is not covered by the context.

Even apart from such legal considerations, the claim that the "integrated conditions" style of final terms would be rendered unnecessary by the summary as the latter would give "a full picture to investors" is not convincing. The summary focuses on key information (Recital 15 and Art. 5(2) of the Amended Prospectus Directive). If the summary were to provide "a full picture" there would be no reason for explicitly excluding that the summary as such triggers prospectus liability (Recital 16 of the Amended Prospectus Directive). Therefore, the retail investor is legally expected to read a Base Prospectus of several hundred pages plus the relevant supplements thereto so as to get a full picture of a derivative product he is interested to acquire with the help of "election sheet" style final terms, i.e., do the work that is currently done for him by the issuer.

Therefore, the proposed prohibition of the integrated conditions style of final terms should, in our view, not be upheld.

Q3: Under "CAT. B" items, is the list of details which can be filled out in the final terms complete? If not, please indicate with your justifications what elements should be added.

With regards to paragraph 44 of the Consultation Paper, instead of the enumerative listing of items eligible for inclusion in the final terms proposed, permission should be given to add any kind of specific detailed information such as amounts, currencies etc. which is neither a legal rule nor a formula. Otherwise, there would be high risk – also from the authorities' point of view – to exclude information and only fill out the general information contained in the base prospectus. Just one example for such detailed information not covered by the proposal in the Consultation Paper is alternative assets – for example certain shares – sometimes specified for the determination of the pay-out or delivery amount in case of a market disruption.

With regards to paragraph 49 of the Consultation Paper, we would like to express the following:

In our view this paragraph should be considered in the relevant future delegated acts in respect of payment formulas and/or description of the payment condition. It would be practically impossible in the final terms to only include information in numerical form, confirm a pre-existing option or to fill in dates. It should also be possible to include in the final terms new sentences and even paragraphs or new algebraic formulas – otherwise the regulation will be too restrictive and prevent any further development of terms and conditions which may be necessary due to changing market conditions. As a minimum, issuers should be entitled to make in the final terms small or technical amendments and additions to the pre-existing options or formulae included in the base prospectus without a requirement for a supplement.

Q4: Based on the instructions given in this document, could you please estimate the increase of the number of supplements to be approved in per cent?

At this stage, we are not in the position to provide any estimate. However we believe that the rigid instructions given in the consultation paper could lead to a large increase of the

number of supplements to be approved by the competent supervisory Authorities. We therefore disagree with the ESMA proposal to require the approval of a supplement or a new prospectus for "all" the information that is not allowed by this document.

Q5: Based on the instructions given in this document, could you estimate the increase of the relevant costs?

As already stated beforehand, it is hard to empirically gauge the future impact of these requirements. We would nonetheless roughly estimate a 10% increase of additional costs; we conclude that this will lead to significant further costs for the issuer.

Q6: Do you agree with the proposed mechanism of combining the summary with the final terms? If not, please provide your reasons and an alternative suggestion.

We consider the proposal of requiring a summary for each individual issue under the same base prospectus critical. It would particularly lead to duplicate information and documents to be provided to investors for the same issuance. The financial instrument would itself increase in costs for the issuers and we do not believe that this increase be balanced out in terms of comprehensibility of the products' characteristics to the investor. We would have preferred a "top-down" approach as practised in UCITS IV Directive for the UCIT-Key Investor Information (KIID), as this approach leaves more flexibility.

Q7: Please estimate any possible costs that this mechanism would imply for issuers. 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))

With relation to paragraph 68 we would expect additional costs to increase by around 1.000 to 2.000 Euros per issuance.

Q8: Do you agree with our modular approach?

We believe that it might be preferable not to base the required content of summaries on the information items within the different annexes to the Prospectus Regulation. Such a "bottom up" approach (in difference to UCITS IV "top-down" approach) entails a high risk of making the summary too long, as a result of basing this on the single information items within the annexes. The proposed rigid requirements would not allow tailoring the summary to certain specific characters of the individual securities, for which information could be relevant, but is not included in the general template, or for which a different order could make the summary easier understandable for investors.

It furthermore has to be determined what the issuer's responsibility is regarding the summary. If the investor can make the investment decision based on the summary and doesn't have to read the actual prospectus, the issuer's responsibility regarding the summary might become too burdensome. In case of a possible limited length for the summary, it might – in some situations – be challenging to include all the necessary information in the summary.

Lastly, there should not be two different summary requirements with diverging format requirements for products falling under the Package Retail Investment Products (PRIPS KIID) measure and those falling under the Prospectus Regulation. The connection between these two legislations should be thought through very carefully.

Q9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?

Even though we tend to agree on the selected approach to identify the mandatory key information to be contained in the summary within five sections, it would nonetheless be preferable to select the required summary content "top down" (see Q8): The required content points should be determined abstractly, and this should be done independently of

the security classification system underlying the annexes to the Regulation. They should also just take account of the items defined as key information by the amended Prospectus Directive, but not just mirror these points.

The development of the summary template(s) could be modelled on the creation of the Key Investor Information document introduced in the UCITS IV Directive, which also functions as a summary to a full (fund) prospectus. This would, at the same time, also ensure a close alignment with the likely content of a future Key Investor Information Document (KIID) for securities.

Q10: Do you agree that we have provided sufficient flexibility for issuers and their advisers in drafting summaries – whilst ensuring that summaries are brief and provide the reader with the necessary comparability between prospectuses?

This flexibility can – in certain situations at least – be insufficient if the comparability element is overemphasized. This should also be kept in mind when limiting the actual length of the summary. Descriptions of the issuer, for instance, may require more lines in case the issuer's group structure is complex or unusual.

There should maybe not be a strict order of the suggested points within the proposed sections. Whilst aiming to ensure maximum comparability between different securities, such order would on the contrary severely impair the summary's readability, as it would prevent to place the information where it makes most sense for the security in question. For the UCITS KIID, the aim of ensuring comparability has not prevented providing freedom for the drafting of this document on the level of the individual information items (which are of rather high level nature).

Q11a: Do you agree that our approach adequately limits the length of summaries?

We are in favour of providing mandatory key information for an investor with adequate preciseness. We nevertheless see a realistic chance that, given the proposed content requirements, summaries would in many cases become too long.

Q11b: What is "short" for a summary for: (i) an issuer; & (ii) an investor?

Please refer to our next answer.

Q11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?

No, we do not think that there should be numeric limit on the length of summaries. In our view, the question if a summary is "short" always depends on the circumstances of the individual prospectus. Accordingly, there should not be a numeric limit to the length of summaries. At least in some cases, a limit would force issuers to leave information out of the summary which they regard as substantial to investors, and therefore both impair both compliance with the general objective behind the summary, and create legal risk. A numeric limit would also not be congruent with the proposed detailed rules for the content of the summary.

Q12a: Do you agree with our proposed content and format for summaries?

We do not agree with the proposal that no additional information may be given in addition to the items contained in the proposed sections A to E. For the summary, principally the same considerations apply regarding additional information not foreseen in the applicable Annexes to the Prospectus Regulation as for final terms part of the full prospectus, provided such additional information also passes the specific materiality test applicable for the summary. For example, additional provisions relating to the underlying may constitute relevant information for the summary as well.

Q12b: Are there other pieces of information which should appear in summaries? And are there disclosure requirements in our tables which are not needed for summaries?

With reference to the content of the scheme reported in Part 4.V of the consultation paper we believe no additional information should be included in the summary.

It is possible to limit the length of the summary to include only information of the specific instrument and not the issuer (whose information is already disclosed in the registration document; profit forecasts should also not be included in the summary).

Furthermore, we propose to delete points B.6, B.7, B.15, B.25, B.55, B.56, B.57, E.1, E.2, E.6 and E.7.

Q13: Is there a need to augment Point B.9 with additional disclosure requirements, such as key assumptions, or to state that the forecast is reported on in the main body of the prospectus?

We do not believe it to be prudent to augment certain aspects with additional disclosure requirements.

Q14: Do you agree with our proposal for amending Article 3, 3rd paragraph, Prospectus Regulation?

We have no comments regarding this question.

Q15: Could you estimate the change in costs that will arise from the proposals in this document for summaries?

Please let us partially refer to our answer in question 4. It is difficult to readily estimate the rise in costs, but we believe that the issuance process will be significantly extended This is due to the fact that it will simple be not possible to describe all products at the time of the drafting of the base prospectus.

This situation will lead to an increase in costs and more time requirements for the approval of a larger number of prospectuses (which also have to be constantly updated).

Proportionate disclosure regime (Article 7)

Proportionate disclosure regime regarding rights issues (Q16-37)

We do not agree with the ESMA proposal with regards to Q17, Q18, Q20, and Q22.

We would like to point out that in the final version of the document, the disclosure regime should be related more clearly only to the issuers of listed shares and it should not be related to the issuers of bonds admitted to trading on MTFs because in some Member State the competent financial regulator has laid down that credit institutions should trade own issued bonds at least on MTF in order to guarantee their liquidity for investors. If the ESMA proposal were to be extended to bonds it could discourage the trading of bonds on MTFs and the above mentioned guarantee.

Proportionate disclosure regime regarding SMEs and issuers with reduced market capitalisation

General Remarks on the proportionate disclosure regime regarding SMEs and issuers with reduced market capitalisation (Q37-45)

We have any no specific comments regarding questions 37 to 45.

Proportionate disclosure regime regarding credit institutions and other issuers.

Q46: Do you agree with the proposal to require historical financial information covering only the last financial year for credit institutions issuing securities referred to in Article 1(2)(j) of the Prospectus Directive?

Yes, we agree with the proposal put forward.

Q47: "In performing its work on the proportionate disclosure regime, ESMA has sought to identify all possible omissions with regards to content of prospectuses as part of this Consultation Paper, however do you believe that further omissions are possible particularly with respect to the areas indicated in the request for advice by the Commission?"

We have no specific suggestions, but we are not against any justifiable further omissions.

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 Consumer Affairs, Payments and Financial Markets
(m.vanberkel@eurocoopbanks.coop)

Mr. Andreas STEPNITZKA
Adviser for Financial Markets
(a.stepnitzka@eurocoopbanks.coop)