

For the attn. of Mr Michel Barnier
Commissioner Internal Market and
Services
Per e-mail to
Michel.Barnier@ec.europa.eu

10 November 2011

Dear Commissioner Barnier,

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

INTRODUCTION

EuropeanIssuers is concerned that [ESMA's technical advice on the Prospectus Directive](#) will make raising equity and debt more difficult for issuers, rather than simplifying and making the process more efficient and effective, as originally intended in the amending Directive.

We note that the consultative working group that advise ESMA in producing the technical advice only had one issuer on it; we would argue that for such a Directive that affects all listed companies, that issuers should have been the main group consulted with.

The result of this has been that much of ESMA's technical advice reads as if it was written for other stakeholders, thus complicating the requirements for issuers who are trying to raise finance to grow and create employment throughout Europe. We have outlined the key issues with the technical advice below:

Summary and final terms

- **“Mini-prospectuses” under a base prospectus regime**

The most important instrument for companies to take advantage of good market conditions and special investor demand when making debt issuances is the base prospectus. We are concerned that ESMA's technical advice seems to demand a “mini-prospectus” for each issue under a base prospectus because a summary shall be fully completed for the individual issue and be annexed to the final terms.

- **Limitation of what can be inserted in final terms**

The proposals for the format of the final terms would lead to a major limitation of the use of base prospectuses, especially in the context of multi issuer debt programmes. Simple variations of debt products, even if they are not material and may therefore be covered by a general description in the base prospectus and its summary, may according to ESMA's technical advice no longer be included in final terms.

- **Summaries for each individual issue under a base prospectus**

ESMA's technical advice calls for fully updated, aggregated summaries for each issue under a base prospectus to enhance readability for investors. However, it does not allow aggregated terms and conditions in the final terms. This is an inherent contradiction.

The current market practice shows that aggregated summaries for each issue under a base prospectus is not necessary as it leads to the production of 'mini-prospectuses' and additional effort including legal consultation. However, ESMA could allow such updated summaries.

We also propose that issuers should be able to produce aggregated terms and conditions in the final terms. Terms and conditions are the legal basis for the issue, far more complicated than a summary, and may have to be changed at numerous points, thus making it more relevant to keep up-to-date and comprehensive. Due to national law terms and conditions may have to be transparent and be published in one document. Why should issuers not be able to make use of the final terms to fulfil this national legal requirement but publish yet another document? We do not understand ESMA's concerns and simple reference to national levels in order to "solve the civil law problems" (paragraph 30 of ESMA's technical advice).

- **Supplements in general/special problems arising for multi issuer debt programmes**

ESMA's technical advice has a strict view on what can be inserted in a supplement. Article 16.1 of the amending Directive (2010/73/EC) requires:

"Every significant new factor [...] relating to the information included in the prospectus which is capable of affecting the assessment of the securities [...] shall be mentioned in a supplement to the prospectus."

However, ESMA's technical advice notes that if something is *not* significant it cannot be supplemented. Instead a new prospectus would be necessary or issuers "may publish a notice" or an announcement to the market (paragraph 125 of ESMA's technical advice). In our opinion, this is highly risky as this seems to be out of the prospectus regime.

Overall, ESMA's technical advice indicates that more information should be included in base prospectuses and less in final terms - this will result in more need to supplement base prospectuses. As some supplements will only be relating to one individual issue under a multi-product base prospectus, this could lead to the right to withdraw for investors of other issues under the base prospectus. ESMA has seen this problem and proposes that such supplement applies only to the individual issue. As this is not in line with the Directive, ESMA proposes an amendment to Article 22 (7) of the amending Directive. This shows the inconsistency of the whole approach. ESMA was asked to specify situations where a significant new factor, material

mistake or inaccuracy require a supplement to the prospectus as in article 16 (3) of the amending Directive. It would have been helpful here if ESMA had at least stated that such new information must only be supplemented if it is capable of affecting the assessment of the securities in a negative way. If the information is capable of having a positive effect, there is no need to give investors the right to withdraw to the detriment of issuers or offerors.

The proportionate disclosure regime for pre-emptive offers

- **Excluding open offers from the proportionate disclosure regime**

We support ESMA's approach taken in defining "near identical rights" to allow the proportionate disclosure regime for pre-emptive offers. However, the regime has been restricted to rights issues, to the exclusion of other types of pre-emptive offers, such as open offers, which will make the proportionate regime much less effective for all issuers.

We would suggest that adjusting the level of information required for a rights issue, and not for other types of pre-emptive offers, is not fulfilling the policy objective of the amending Directive to make raising funds from existing shareholders more efficient and to ensure investors are protected by providing an appropriate and proportionate level of information. Issuers should not choose one method of pre-emptive offer over another, solely based on the availability of reduced disclosure. Instead, an issuer should choose the most appropriate means of raising funds to meet its business objectives and deliver shareholder value.

We would note that the second Company Law Directive does not require a pre-emptive offer to include a renounceable right of allotment, nor a requirement for a sale of rights.

We call on the European Commission to reconsider ESMA's technical advice in this area and to include open offers in this regime.

The proportionate disclosure regime for SMEs and companies with reduced market capitalisations

- **The lack of availability of the proportionate disclosure regime for IPOs or admission to regulated markets**

We believe that ESMA has not fully carried out its mandate to provide appropriate technical advice on the proportionate disclosure regime for SMEs and companies with reduced market capitalisations, especially given its previous stated objections to the proportionate disclosure regime for SMEs and companies with reduced market capitalisations (paragraph 141 of [ESMA's consultation paper](#)).

ESMA's technical advice would exclude SMEs and Small Caps seeking an IPO and admission to regulated markets from using the proportionate disclosure regime. Therefore, the proportionate disclosure regime would only be available for subsequent offers on regulated markets by SMEs and Small Caps and for all offers by SMEs on MTFs. We feel strongly that the potential benefits of this regime would be heavily diluted by this two tiered approach.

We would highlight that regulators have already taken different approaches on regulated markets and in many European markets there are varying listing requirements and on-going disclosure requirements for different types of companies on regulated markets and MTFs.

In the current economic climate, many SMEs need to access finance to grow and create employment, and may turn to the public markets to do so, given the lack of lending from banks. Not allowing them to provide proportionate disclosure for admission to regulated markets effectively cuts off the options available to them for seeking finance, as the exercise of raising public equity becomes too costly.

We call on the Commission to reconsider ESMA's view that the proportionate disclosure regime is not available for IPOs and admissions to regulated markets for SMEs and companies with reduced market capitalisations.

- **Lack of substantial cost saving with the proportionate prospectus regime**

ESMA's technical advice on the proportionate disclosure regime for SMEs and companies with reduced market capitalisation does not fulfil the mandate given by the Commission. The technical advice in this area does not adjust the requirements in the annexes of the Prospectus Directive in order to make a public offer for a SME and Small Cap sufficiently cost effective and less burdensome, as originally intended in the Level I amending Directive. By way of illustration, in March 2009, we estimated that a fundraising of €5 million where a full prospectus is required could cost €600, 000, which represents well over 10 per cent of the amount raised. ESMA's proposals will not change this situation.

We call on the European Commission to re-examine what further information could be removed, without compromising investor protection, in order to produce a meaningful and cost-saving proportionate disclosure regime for SMEs and companies with reduced market capitalisations.

Yours sincerely,



Kate Jalbert
Chair of EuropeanIssuers' Prospectus Working Group
Kate.Jalbert@theqca.com
+ 442076003745

EuropeanIssuers was set up to represent the interests of publicly traded companies in Europe, which are subject to complex rules on issues such as shareholder rights, corporate governance and reporting and market regulations. We seek well functioning European financial markets which serve the interests of their users, as well as good corporate governance and responsible share ownership. More information can be found at www.europeanissuers.eu