Consultation Paper of the ESMA on its technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU

Reply of the European Federation of Financial Services Users (EuroFinuse)

20 August 2012

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EuroFinuse has experts participating in the Securities & Markets, the Banking and the Pensions Stakeholder Groups of the European Supervisory Authorities, and the EC Financial Services User Group. Its national members also participate in the national financial regulators and supervisors bodies when allowed. For further details please see our website: www.eurofinuse.org.

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The European Federation of Financial Services Users

76, rue du Lombard, 1000 Bruxelles - Belgium
Tel. (32) 2 514 37 77 - Fax. (32) 2 514 36 66
e-mail: info@eurofinuse.org - http://www.eurofinuse.org

Preliminary comments

We welcome this consultation from ESMA on the Prospectus Regulation. However, this is a very specific consultation concentrating on often very legal matters.

We 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 as explained in more detail in EuroFinuse's positions on the PRIPs initiatives. We 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.

We would like to take this opportunity to ask ESMA if it has integrated the lessons learned from the extensive and extremely misleading Bankia IPO (Initial Public Offering) from 2011 that currently results in huge losses for millions of Spanish individual savers. According to the Prospectus Regulation 809/2004/EC, issuers must include information on its audited accounts from the last three years in their Prospectus. Indeed, the Bankia Prospectus included information on its accounts but it has not been approved by auditors yet. However, certain provisions on the Prospectus Directive exempted the obligation of having audited the accounts as published in the Prospectus, a prerogative of which Bankia Board took advantage. After having launched the IPO it was discovered that auditors refused to approve Bankia accounts, and that the 2011 fiscal year ended up actually with a loss instead of the publicly advertised profit.

We would still like to answer specifically to the following questions raised by ESMA for the sake of individual investors.

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, we agree 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. We believe that the minimum disclosure requirements as established in item 4.2.2 of

Annex XII is appropriate for this kind of shares. EuroFinuse 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.

We believe Annex XIV is a good benchmark to consider for regulating third party shares not admitted to trading on a regulated market.

We believe as well that 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. In our opinion, the disclosure of links between the issuer and the 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.

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.

N/A

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.

N/A

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.

We believe 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.

In any case, we 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?

N/A

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. We 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?

We agree on the disclosure requirements as laid down in Article 7.2(g) of the Directive 2010/73/EU, which we believe 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.