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# RESPONSE TO ESMA'S CONSULTATION ON FORMAT AND CONTENT OF PROSPECTUS LEVEL II MEASURES

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## SUMMARY

While welcoming the measures to make prospectuses less burdensome proposed by ESMA, we consider there is additional scope for further alleviation of disclosure requirements. Moreover, we are concerned about introduction of certain new requirements, some of which in our view run counter to the objective of simplification and go below Level 1. Our main concerns are:

- **Flexibility & cover note:** Issuers should have the flexibility whether to include a cover note and to choose the order of presentation of the different sections, including where to place the risk factors.
- **Compliance statement with TD & MAR:** The requirement to provide a compliance statement with the publication obligations of the Transparency Directive and Market Abuse Regulation to benefit from the secondary issuance regime runs against Level 1 and we question whether it offers any benefit to investors that should not already be provided through the TD and MAR ongoing obligations themselves.
- **Complex financial history:** we do not support the amendment to enable NCAs to request more than the financial information in case of complex financial history.
- **Risk factors:**
  - We support the harmonisation of practices among NCAs and consider that ESMA should focus on convergence and helping NCAs to improve their practices.
  - We call for flexibility regarding categories of risk factors with a non-exhaustive and non-binding list that could be adapted to allow an alignment with the Accounting Directive.
  - Regarding prioritization of risk factors, we have concerns regarding identification of the most important risk factors in each category and regarding the requirement for a supplement when the order of risk factors within one category changes.
- **Additional scope for prospectus alleviation**: we believe there is room to further alleviate the share registration document both for primary and secondary offers at Level 2.

## INTRODUCTION

We welcome ESMA's consultation on the Level 2 measures of the new Prospectus Regulation adopted on 30 June 2017 (the Regulation). The proposals put forward by ESMA bring some improvements to the existing disclosure requirements which can still be inappropriate and burdensome, especially for smaller companies. In particular, EuropeanIssuers supports ESMA's initiative to streamline and reduce the number of schedules and to carry forward some provisions of Regulation (EC) N°809/2004 to ensure a smooth transition between the existing and the new regime and an efficient regulatory framework (operational provisions similar to articles 4 to 20 of Regulation 809/2004 and the principles regarding the information that can be provided by issuers and requested by NCAs).

While welcoming the measures to make prospectuses less burdensome proposed by ESMA, we consider there is additional scope for further alleviation of disclosure requirements. Moreover, we are concerned about introduction of certain new requirements, some of which in our view run counter to the objective of simplification and go below Level 1.

Our main concerns are:

- **Flexibility & cover note**

Issuers are best placed to determine how to tell their "equity story" and deliver meaningful information. While the nature and extent of the information to be disclosed in a prospectus are legitimately set by the EU legislation, issuers should not be subject to excessive constraints regarding how such information is to be presented. We believe that ESMA's proposal to mandate the disclosure of a cover note runs counter to the stated aim of simplification and goes beyond the Level 1 text. Issuers should have the flexibility whether to include a cover note and to choose the order of presentation of the different sections, including where to place the risk factors.

- **Compliance statement with TD & MAR**

We are against the requirement to provide a compliance statement with the publication obligations of the Transparency Directive and Market Abuse Regulation to benefit from the secondary issuance regime. We consider therefore that there is no legal basis for ESMA to require such a compliance statement as it goes beyond Level 1 requirements. For more explanations see our response to Q74.

- **Risk factors**

ESMA indicates in the consultation paper that "The required contents of the risk factors section will be further elaborated through ESMA guidelines".

Level 1 (articles 16.4 and 16.5 of the Regulation) mandates:

- ESMA to develop guidelines to assist authorities in the review of the specificity and materiality of risk factors and of their presentation across categories, and
- empowers the Commission to adopt delegated acts to specify the criteria for the assessment of the specificity and materiality and for the presentation of risk factors.

We support the harmonisation of practices among NCAs and consider that ESMA should focus on convergence and helping NCAs to improve their practices. We would like to see more supervisory convergence of administrative practices of NCAs when addressing risk factors. Whilst some NCAs allow

or even encourage issuers to disclose risk mitigating techniques alongside their risk factors, other NCAs prohibit issuers from doing so. This is a key issue to avoid diverging approaches on risk factors. The preferred approach regarding in particular the categories of risk factors should be flexible with a non-exhaustive and non-binding list that could be adapted where necessary to allow an alignment with the risk disclosure requirements under the Accounting Directive. Consequently, risk factors published in the management report mandated by the Accounting Directive could be incorporated in the prospectus, possibly completed by any additional risk factors.

Regarding prioritization of risk factors, we have concerns regarding identification of the most important risk factors in each category and regarding the requirement for a supplement when the order of risk factors within one category changes.

As regards the Commission's empowerment to develop delegated acts, we understood that the Commission will not envisage adopting any legislation on risk factors in the short term. Issuers already have measures in place to assess and mitigate the risks they face and have developed internal control environment either compliant with national or international frameworks (e.g.: COSO) as well as reporting processes. Against this backdrop, we don't see the added value in guidelines or any additional legislation would bring.

- **Complex financial history**

Regarding the provisions concerning complex financial history, we do not support the amendment to enable NCAs to request more than the financial information in case of complex financial history.

- **Additional scope for prospectus alleviation**:

In addition to the proposed simplification, we believe there is still room for manoeuvre at Level 2 to substantially alleviate the share registration document both for primary and secondary offers.

For the primary offers it would be useful to:

- achieve full alignment of the Operating and Financial Review requirement with the management report required under the Accounting Directive;
- remove the Strategy and Objectives disclosure requirement.

For the secondary offers, we would suggest, for instance, to:

- remove the requirement for report by an independent accountant or auditor on profit forecast or estimate;
- abandon the disclosure requirement concerning property, plants and equipment, material contracts, operating and financial review except in case of rescue situations, corporate governance information unless a major material change occurred, i.e. a merger or an acquisition).

## RESPONSE TO QUESTIONS / SPECIFIC COMMENTS

**Question 1: Do you agree with the proposal that cover notes be limited to 3 pages? If not, what do you consider to be an appropriate length limit for the cover note? Could you please explain your reasoning, especially in terms of the costs and benefits implied?**

We do not support ESMA's proposal to make mandatory a cover note of 3 pages maximum. The introduction of a mandatory cover note is not required by the Regulation and the information displayed on such a cover note and mentioned by ESMA in the consultation paper (name of issuer, amount of the offer…) would already be included in the prospectus. The introduction of this new requirement would be totally contradictory with the objective to simplify the prospectus regime. There is furthermore no rationale for turning a Level 3 guidance into a more stringent obligation. Providing a cover note should rather remain a market practice and should not be prescribed.

**Question 2: Would a short section on "how to use the prospectus" make the base prospectus more accessible to retail investors? If so, should it be limited to base prospectuses? Would this imply any material cost for issuers? If yes, please provide an estimate of such cost.**

We don't see the added value of this new "how to use the prospectus" section which seems contradictory to the objective to simplify the prospectus regime. Given the requirement to provide the summary of the prospectus and a table of content, we do not see what would be the value added of such additional section substantially delivering the same information.

We would like to point out that the key issue in terms of investor protection regarding offers of non-equity securities to retail investors is the monitoring of advertisements. From our experience, retail investors base their investment decisions on advertisements which can take many forms. The Regulation increases the powers of NCAs in this regard. We don't see the need for any additional disclosure requirement in the prospectus.

**Question 3: Should the location of risk factors in a prospectus be prescribed in legislation or should issuers be free to determine this? If it should be set out in legislation, what positioning would make it most meaningful?**

Issuers should be able to choose the order of the sections including where to place the risk factors. When the activities of the issuer are simple (e.g.: retailer, manufacturer) reading the risk factors before the description of the business does not raise any particular issue. But when the issuer has more complex activities (e.g..: Biotech, Medtech or Fintech companies) or for certain risks that require a full understanding of the issuer's business, it is essential for (retail) investors to first understand the company's business before dealing with risk factors. Since it would not make sense to have different regimes depending on the nature of the activities, we would strongly advocate for maximum flexibility. Flexibility is key in avoiding redundancies while not impairing the comprehensibility of prospectuses as long as a detailed table of content is included.

**Question 4: Should the URD benefit from a more flexible order of information than a prospectus?**

Issuers should be able to choose the order of information when drafting a prospectus and an URD. The URD can include the annual financial report published under the Transparency Directive and even more, in accordance with the principle that issuers can decide to provide additional information. Issuers should therefore have the flexibility to organise the order of the disclosures to provide investors with the most useful experience possible.

**Question 5: Would a standalone and prominent use of proceeds section be welcome for investors?**

We agree that in some cases the use of proceeds is important to investors. However, ESMA's intention is not very clear. If the objective is to amend the relevant schedules to include a specific section regarding the reasons for the offer and the use of proceeds – which at the time being is a sub-section of section 3 of the share securities note schedule – we don't see the added value of such an amendment. If ESMA's intention is to require more detailed information including as mentioned in the consultation paper a "precise breakdown of how funds will be employed", we would not support this overly prescriptive requirement.

Issuers should not be required to list every line item of proposed use (even if that information is available), but should be able to state general purposes. The correct test to apply for such information is whether it is necessary information which is material to an investor for making an informed assessment; there should be no requirement to include overly granular or immaterial information, even if such information might be available.

**Question 8: What is the overall impact of the above technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that the proposed technical advice will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).**

Generally speaking, EuropeanIssuers supports the intention of ESMA to simplify prospectuses (e.g.: removing the auditors' report on profit forecasts). However, the success of the prospectus reform will be measured by whether producing prospectuses would be simplified and access to capital markets improved. To achieve this objective, the new burdens at Level 1, such as the limitation of the number of risk factors and the risk categorization, must be compensated and further alleviations have to be achieved. In this regard, the draft technical advice adds certain new requirements with no clear benefits to investors while resulting in additional costs to issuers. That is why we oppose the new requirements regarding the cover note, the "how to use" section in base prospectus, removing flexibility to choose the order of the risk factors and requiring more detailed information on the use of proceeds.

**Question 9: Do you agree that the scope of NCA approval should be included in the cover note? If not, please provide your reasoning.**

We consider that the scope of the scrutiny by the Competent Authority is clearly defined be Level 1. In addition, there are new items (e.g.: item 1.5 of annex 1 and 7.4 of annexes 5 and 6) which include that information. There is no need for a new statement.

**Question 10: Do you agree that the requirement for issuers of equity and retail non-equity to include selected financial information in the prospectus can be removed without significantly altering the benefits to investors?**

We agree with ESMA that the requirement for issuers of equity and retail non-equity to include selected financial information can be removed. As pointed out by ESMA, selected or key financial information are mentioned in several different sections of the share registration document of Regulation 809/2004 and maintaining all these sections in the new schedules will not bring any alleviations. Since article 7.6 (b) of the Regulation requires issuers to include in the summary historical key financial information, investor protection will not be lowered.

**Question 11: Do you agree that issuers should be required to include their website address in the prospectus? Do you agree that issuers should be required to make documents on display electronically available? Would these requirements imply any material additional costs to issuers?**

Most public companies have a website (such an obligation is required by other EU legislation). Therefore, including a link to the website and making documents on display electronically available should not raise any issue.

However, ESMA should consider the case where the prospectus is filed by a holding company or a SPV which does not have any securities listed and therefore does not necessarily have a website. The wording of item 5.1.4 of section 5 of Annex 1 should be amended to allow the issuer, in such a case, to provide the website's address of a third party (a subsidiary of the holding company for instance).

**Question 12: Do you consider that a description of material past investments is necessary information for the purpose of the prospectus?**

We consider that it is not necessary to have a specific section in the prospectus regarding the description of material past investments. Such information would be included in the financial statements and in the management report. Therefore, we welcome ESMA's proposal to remove this disclosure requirement.

**Question 13: Do you agree with the proposal to align the OFR requirement with the management reports required under the Accounting Directive? Would this materially reduce costs for issuers?**

We agree with the alignment of the OFR with the management report required under the Accounting Directive. This alignment is explicitly mentioned in the Commission's request to ESMA for technical advice. Issuers can already incorporate the management report published under the Accounting Directive in their prospectuses but the different wording between the Prospectus and Accounting Directives could be confusing and raise questions. Aligning the requirements will constitute a major improvement to the prospectus regime and more generally speaking to the articulation between the various pieces of EU legislation applicable to listed companies that is so far lacking.

However, ESMA is proposing to remove §9.1 (Financial condition) but not §9.2 (Operating results) so the OFR would not be 100% aligned. Considering that all factors and events, including unusual or infrequent events, materially affecting the issuer's operations as well as all significant changes in the financial

statement would be addressed in the management report, the OFR should be fully aligned with the management report.

To align the OFR with the Accounting Directive, the new drafting should be:

***"9 OPERATING AND FINANCIAL REVIEW***

*To the extent not covered elsewhere in the registration document and to the extent necessary for an understanding of the issuer's business as a whole, a fair review of the development and performance of the issuer's business and of its position for each year and interim period for which historical financial information is required, including the causes of material changes.*

*The review shall be a balanced and comprehensive analysis of the development and performance of the issuer's business and of its position, consistent with the size and complexity of the business.*

*To the extent necessary for an understanding of the issuer's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial key performance indicators relevant to the particular business. The analysis shall, where appropriate, include references to, and additional explanations of, amounts reported in the annual financial statements.*

*To the extent not covered elsewhere in the registration document and to the extent necessary for an understanding of the issuer's business as a whole, the review shall also give an indication of:*

*a) the issuer's likely future development;*

*b) activities in the field of research and development.*

*Item 9.1 may be satisfied through the inclusion of the management report referred to in Articles 19 and 29 of Directive 2013/34/EU."*

**Question 14: Do you agree with ESMA's proposal to require outstanding profit forecasts for both equity and non-equity issuance to be included? Do you agree with the deletion of the obligation to include an accountant's or an auditor's report for equity and retail non-equity? Please provide an estimate of the benefits for the issuers arising from the abovementioned proposals. Would these requirements significantly affect the informative value of the prospectus for investors?**

Issuers should have the flexibility whether to include or not an outstanding profit forecast in prospectus, although if the issuer chooses not to include outstanding profit forecasts, an explanation could be included as to why this was decided. We welcome the idea to abandon the requirement to provide the audit /accounting report on profit forecast. This requirement is an unnecessary burden on issuers. Especially the necessary supplements increase this burden considerably. On the other hand, we question whether the audit reports are very useful for investors. The audit statement has no effect on the quality of the profit forecasts and estimates. The issuers themselves have a very high interest in the accuracy of the information.

However, we consider that the removal of the auditors' report should not result in more detailed disclosure requirements regarding the assumptions. In this regard we would like to point out that there is a discrepancy between the explanations given by ESMA in the consultation paper (page 36) and the wording of annex 1 (page 47). ESMA explains that the trade-off is removing the auditors' report against

the disclosure by the issuer of the full assumptions; annex 1 however maintains the current wording and refers to the disclosure of the principal assumptions.

Whilst we accept there are different considerations, we question the rationale for seeking to reduce the regulatory burden for profit forecasts (which we support) by eliminating the requirement for an accountant's report whilst maintaining one for pro forma financial information. Its elimination would not materially change the position in respect of those taking responsibility for the prospectus, and so for investors.

**Question 17: Do you consider that the new requirement to disclose potential material impacts on the corporate governance would provide valuable information to investors?**

ESMA is proposing to add a new item in annex 1 (16.5) regarding "*Potential material impacts on the corporate governance, including future changes in the board and committees' composition (in so far as this has been already decided by the board and/or shareholders meeting)*".

The wording proposed by ESMA is rather unclear. The fact that this new item mentions potential material impacts including future changes in the composition of the board, raises questions about the potential other events that could have material impacts. The current wording calls for clarification and we are not able at this stage to answer to question 17. However, considering that where a change in the corporate governance is considered material it would be disclosed anyway, we don't see the point of this new requirement and would not be in favour of burdening the schedules with such specific items.

**Question 18: Do you agree with the proposal to clarify the requirement for restated financial information?**

We support ESMA's proposal regarding the requirement for restated financial information. The wording of Regulation (EC) N°809/2004 was discussed in the early 2000s before the IFRS Regulation came into application in 2005. We therefore agree with ESMA's interpretation that the requirement to have the last 2 years prepared and presented in a form consistent with the next financial statements was meant to cover the situation of issuers changing their accounting framework from national GAAP to IFRS.

**Question 19: Do you agree with the lighter requirement in relation to replication of the issuer's M&A in the prospectus? Would this significantly affect the informative value of the prospectus for investors?**

Yes, we agree with ESMA's proposal.

**Question 20: Should any further changes be made to the share registration document? Please advise of any costs and benefits implied by the further changes you propose.**

ESMA should also consider the following changes regarding the content of the share registration document:

- Disclosure on strategy and objectives is a new requirement ESMA proposes to introduce in the

share registration document on the ground that information on the issuer's strategy and objectives are important – particularly in the case of IPO – and key for investors and analysts. We disagree with this new requirement as the Business overview section already provides for comparable information.

- Disclosure regarding trend information and significant changes in the issuer's financial position could be merged in one section and streamlined instead of having 2 separate sections.
- Disclosure regarding the Board and Senior management could be reduced to 3 years.
- Disclosure regarding material contract (contracts not entered in the ordinary course of business) should be redrafted because the current wording is very confusing and give rise to diverging interpretations and implementations. Any contract material to the issuer's operations would be mentioned in other parts of the registration document (business overview, risk factors…).
- Disclosure regarding the list of significant subsidiaries and information on holdings could be removed because information will be included in the notes of the financial statements.

**Question 22: Do you consider that the requirement for a working capital statement should be different in the case of credit institutions and insurance companies?**

We consider that this would make sense, as these issuers are different from the others.

**Question 23: Do you agree that issuers should be required to update their capitalisation and indebtedness table if there are material changes within the 90 day period? Would this imply any material additional cost to issuers? If yes, please provide an estimation.**

ESMA explains that there is a discrepancy regarding the age of the information to be included in the capitalisation and indebtedness table between Regulation (EC) N°809/2004 according to which the statement should be made "*as of a date no earlier than 90 days prior to the date of the document*" and ESMA's recommendations which include a sentence stating that "*If any of the information is more than 90 days and there has been a material change since the last published financial information, the issuer should provide additional information to update those figures*."

In order to harmonise diverging practices adopted by NCAs and issuers, ESMA proposes to follow the requirement of Regulation (EC) N°809/2004 that a capitalisation and indebtedness statement should be made at a date no earlier than 90 days prior to the date of the prospectus and to include a requirement to update the statement in the case of material changes within the 90 days.

We would like to remind ESMA that the data used in establishing the capitalisation and indebtedness table are derived from the issuer's financial statements. Where there are significant changes impacting the issuer's financial condition, these changes and their impacts would fall under the "significant changes in the issuer's financial position" section. Therefore, all information useful to assess the issuer's capitalisation and indebtedness would be disclosed in the prospectus. We do not support ESMA's proposal to require updating the statement in the case of material changes within the 90 days.

**Question 26: Do you consider that any further changes be made to the equity securities note? Please advise of any costs and benefits that would be incurred by the further changes you propose.**

We would like to comment on the following changes proposed by ESMA:

- Regarding the information on taxation (new item 4.11 of annex 2): we welcome ESMA's proposal to remove the current requirement and include a warning that tax legislation can have an impact on the income received from the securities. However, we do not support ESMA's proposal to require information when there is a specific tax regime applicable to the investment. The abovementioned warning should suffice.
- Regarding the disclosure of price in case of admission, we do not support ESMA's proposal. In case of admission, the only relevant and therefore material information for potential investors on the secondary market would be the first quoted price.

**Question 28: Do you agree with the proposal to delete disclosure on principal investments and replace this with a requirement to provide details on the issuer's funding structure and borrowing requirements? Would this significantly affect the informative value of the prospectus for investors?**

We agree with ESMA that a specific disclosure on principal investments would not be useful for investors to allow them to take an informed investment decision. Therefore, we support ESMA's proposal to remove this disclosure requirement but we do not consider that it should be replaced by a new disclosure requirement on the issuer's funding structure and borrowing requirements. Information on the funding structure and the borrowing requirements would be included in the financial statements.

**Question 30: Do you agree with the proposal to remove the requirement for profit forecasts and estimates to be reported on? Would this significantly affect the informative value of the prospectus for investors?**

Yes, we support ESMA's proposal to remove the auditors' report on profit forecasts and estimates. In case a profit forecast is included in a prospectus this requirement is an unnecessary burden on issuers. Especially the necessary supplements increase this burden considerably. The audit statement has no effect on the quality of the profit forecasts and estimates. The issuers themselves have a very high interest in the accuracy of the information.

**Question 31: Do you agree with the proposal that outstanding profit forecasts and estimates should be included in the registration document?**

Issuers should have the flexibility whether to include or not an outstanding profit forecast in prospectus, although if the issuer chooses not to include outstanding profit forecasts, an explanation could be included as to why this was decided. We welcome the idea to abandon the requirement to provide the audit /accounting report on profit forecast. Please refer also to our answer to question 14.

**Question 32: Do you agree with the deletion of the disclosure requirement related to board practices? Would this significantly affect the informative value of the prospectus for investors?**

Yes, we agree with the deletion of the disclosure requirement related to board practices.

**Question 33: Do you consider that any further changes should be made to the retail debt and derivatives registration document? Please advise of any costs and benefits that would be incurred by the further changes you propose.**

ESMA should also consider the following changes regarding the content of the retail debt and derivatives registration document:

- Disclosure regarding trend information and significant changes in the issuer's financial position could be merged in one section and streamlined instead of having 2 separate sections.
- Disclosure regarding material contract should be redrafted because wording is very confusing (contracts not entered in the ordinary course of business; material contracts vs contracts including obligation or entitlement material to the group).
- Most public companies have a website (such an obligation is required by other pieces of EU legislation). Therefore, including a link to the website and making documents on display electronically available should not raise any issue. However, ESMA should consider the case where the prospectus is filed by a holding company or a SPV which does not have any securities listed and therefore does not necessarily have a website. The wording of item 5.1.4 of section 5 of Annex 1 should be amended to allow the issuer, in such a case, to provide the website's address of a third party (a subsidiary of the holding company for instance).

**Question 36: Do you consider that any further changes be made to the wholesale debt and derivatives registration document? Please advise of any costs and benefits that would be incurred by the further changes you propose.**

ESMA should also consider the following changes regarding the content of the wholesale debt and derivatives registration document:

- Disclosure regarding trend information and significant changes in the issuer's financial position could be merged in one section and streamlined instead of having 2 separate sections.
- Disclosure regarding material contract should be redrafted because wording is very confusing (contracts not entered in the ordinary course of business; material contracts vs contracts including obligation or entitlement material to the group).
- Most public companies have a website (such an obligation is required by other pieces of EU legislation). Therefore, including a link to the website and making documents on display electronically available should not raise any issue. However, ESMA should consider the case where the prospectus is filed by a holding company or a SPV which does not have any securities listed and therefore does not necessarily have a website. The wording of item 5.1.4 of section 5 of Annex 1 should be amended to allow the issuer, in such a case, to provide the website's address of a third party (a subsidiary of the holding company for instance).
- Moreover, a clearer distinction between the retail and wholesale debt prospectuses should be

made. The wholesale debt prospectus should be much simpler and more straightforward than the retail debt prospectus. As regards the disclosure of non-financial information (e.g. ESG items) there should be no requirement to publish such ESG items in the wholesale prospectuses.

**Question 38: Do you agree with the way in which disclosure on taxation has been reduced? Would this significantly affect the informative value of the prospectus for investors?**

We support ESMA's proposal to reduce the disclosure requirement on taxation and to require a warning that the tax legislation may have an impact on the income received. But we do not support nor understand why information would be required when the investment entails a specific tax regime. **This** requirement is contradictory with the first objective to reduce disclosures on tax because when issuing securities, the issuer is financing its activities and should not be required to advise investors on tax issues. Furthermore, in such cases, companies may have to include a large disclaimer in order to prevent additional liability risks.

**Question 39: Do you consider there are any negative consequences of the requirement to make details on representation of security holders available electronically and free of charge? Would this imply any material additional costs to issuers? If yes, please provide an estimation.**

We do not consider that there would be any negative consequences if this is made electronically; on the contrary, it would be positive and would not involve additional costs.

**Question 40: Do you consider that expenses charged to the purchaser should also include implicit costs i.e. those costs included in the price (item 5.3.1)?**

Investors according to the current regime already get all relevant information: the expected price, method of pricing and all costs and taxes that are specifically charged to him. We don't see the rationale for imposing new burdens to the issuers. Information like costs of the issuers for advisers, bank, …. is not material for an investment decision. We do not support ESMA's proposal.

**Question 44: Do you consider that any further changes be made to the wholesale debt and derivatives securities note? Please advise of any costs and benefits that would be incurred by the further changes you propose.**

ESMA proposes to add a new disclosure requirement on the use of proceeds. There is no such requirement in Annex XIII of Regulation 809/2004 (Minimum Disclosure Requirements for the Securities Note for debt securities with a denomination per unit of at least EUR 100 000) and ESMA does not provide a clear rationale for this new requirement.

Wholesale debt and derivatives securities are placed with institutional investors and the prospectus is only drafted for the admission to trading on a regulated market. This information has no significance for the investors. Many debt securities with a denomination per unit of at least EUR 100 000 are issued for general corporate purpose. We therefore strongly advocate that no such obligation is required.

However, in the event that the financing is to be used for a specific purpose, it could be interesting for investors so it should be possible to include this in the prospectus on a voluntary base.

**Question 48: Do you consider agree with ESMA's proposals to enhance the disclosure in relation to situations where investors may lose all or part of their investment?**

No, we disagree with ESMA's proposal to enhance the disclosure in relation to situations where investors may lose all or part of their investment. Article 7(5) of the Regulation introduces a new warning in the summary that "the investor could lose all or part of the invested capital" and, where the investor's liability is not limited to the amount of the investment, another warning that "the investor could lose more than the invested capital and the extent of such potential loss".

A summary would always be required except for wholesale non-equity prospectuses. Therefore, we consider that retail investors awareness would be sufficiently enhanced in such circumstances and we don't consider that it is necessary to require an additional warning as proposed by ESMA in the risk factors section.

**Question 69: Do you consider that any other types of specialist issuers which should be added? If so, please specify.**

No. We support ESMA's decision to keep the current structure where additional information required for specialist issuers are defined at Level 3. We also support ESMA's proposal to maintain the current list and to replace issuers with less than 3 years of existence by "start-up companies".

**Question 70: Do you agree with ESMA's proposal not to develop a schedule for securities issued by public international bodies and for debt securities guaranteed by a Member State of the OECD?**

We agree with this proposal.

**Question 71: Do you agree that the URD disclosure requirements should be based on the share registration document plus additional disclosure items?**

We agree that the content of the URD should be based on the share registration document. We also agree with the specific additional disclosure requirements applicable to the URD regarding whether the URD has been approved or just filed with the NCA and, when the issuer decides to include its Annual/Half-yearly Financial Report, the responsibility statement required by TD and a cross-reference list.

**Question 72: Should the URD schedule contain any further disclosure requirements?**

Please refer to our answers to question 20 regarding additional alleviations that ESMA could take into consideration when defining the URD schedule. In particular we consider that disclosures required in the OFR are also included in the management report defined by article 19 and 29 of the Accounting Directive. Therefore, we consider that section 9 could be entirely removed from the share registration document and the URD and the OFR fully aligned with the management report.

**Question 74: Do you consider that the proposed disclosure is sufficiently alleviated compared to the full regime? If not, where do you believe that additional simplification can be made? Please advise of any costs and benefits implied by the further changes you propose.**

In our view, the proposed regime for secondary issuances is not sufficiently alleviated to make a substantial change to issuers. Below we elaborate on simplifications that could be made.

**Compliance statement**

ESMA is proposing to require from issuers a statement of compliance with the Transparency Directive and Market Abuse Regulation publication obligations to the NCA as part of the approval process in order to be able to avail itself of the secondary issuance disclosure regime.

We strongly oppose the introduction of such a statement. The conditions to benefit from the secondary issuance regime are set in article 14 of the Regulation and do not include any statement of compliance:

- issuers whose securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue securities fungible;
- issuers whose equity securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue non-equity securities;
- offeror of securities admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months.

We also note that a compliance statement is, as ESMA have noted in the consultation on scrutiny and approval, a requirement under Level 1 for the URD (at Article 9(11)(a)), but it is not a requirement for the secondary issuance disclosure regime. As it is a Level 1 requirement for the frequent issuer status but not the secondary issuance disclosure regime, this indicates that it was not the intention at Level 1 to require such an additional condition to be placed upon the use of that regime, as otherwise a similar provision to Article 9(11)(a) would have been included within Article 14.

We consider therefore that there is no legal basis for ESMA to require such a compliance statement.

Moreover:

- Compliance with applicable obligations under the TD and MAR are a requirement for an issuer that is admitted to trading on the relevant market and enforcement of those ongoing obligations is a separate matter. If an issuer is admitted to trading on such a market, those investors using the market are free to buy and sell its securities based on the information available, relying on the ongoing compliance of the relevant issuer with TD and MAR as applicable. Introducing a new requirement, as well as being contrary to Level 1, would be inconsistent with the normal approach to enforcement and functioning of the markets. If ESMA feels that enforcement of the TD or MAR is insufficient, that is a separate issue that applies to any trading in the relevant issuer's securities and not just secondary issues.
- It would also be very unlikely that an issuer not complying with its TD obligations (i.e. publication of its annual financial report and half-yearly financial report) would dare to tap the

markets (in such a very unlikely case, no bank or investment firm would accept to place the securities).

- Requiring such a confirmation would furthermore be redundant given the MAR summary and the declaration of the persons responsible for the prospectus that there is no significant omission. Combined together, they deliver the same level of comfort.
- Finally, requiring issuers to provide a written confirmation would also raise liability issues as regards the interpretation of this confirmation *ex post* by the Competent Authorities in charge of MAR and TD obligations. In some Member States, these authorities may be different from the Authority approving prospectuses.

**Share secondary issuance**

We agree with ESMA's proposal to delete, from the share registration document for secondary issuance, disclosure requirements regarding Organisational structure, the OFR, Environmental matters, Capital resources, Remuneration and benefits, Board practices and Employees. As for the Additional information section, ESMA is also proposing to remove this item with the exception of disclosures regarding:

- the amount and terms of existing convertible, exchangeable securities and warrants;
- the terms of acquisition rights and/or obligations over authorised but unissued capital or an undertaking to increase the capital;
- where there is more than one class of existing shares, the description of the rights, preferences and restrictions attaching to each class;
- the brief description of any provision of the issuer's articles of association, statutes, charter or bylaws that would have an effect of delaying, deferring or preventing a change in control of the issuer.

We consider that many of these items would also already public: item 3 in the list above, for instance, has to be made public pursuant to the provisions of the Takeover Bid Directive (Directive 2004/25/EC). This directive however is only applicable to issuers listed on regulated markets and companies whose securities are traded on SME Growth Markets will not have to comply with the same requirements. However, we agree with ESMA's proposal not to remove these items considering that when these items are already public, the issuer will be able to incorporate them by reference as long as they meet the conditions of article 19 of the Regulation.

**MAR Summary**

Article 14.3 (c) of the Regulation requires the issuer to include in the simplified prospectus for secondary issuances "*a concise summary of the relevant information disclosed under Regulation (EU) No 596/2014 over the 12 months prior to the approval of the prospectus*".

We agree with ESMA that this provision raises many questions and needs clarification. In this regard, **guidance from ESMA and NCAs in the form of guidelines** could be helpful. However, we don't consider that detailed implementing measures laid down at Level 2 would be useful: this is a new requirement

and a pragmatic and practical approach will best serve issuers and investors. Furthermore **Level 1 does not require information in the summary to be presented in different categories nor does it make any reference to the "evolutions"** of facts and figures, which could be interpreted as a new requirement to update the information.

Therefore, we would be in favour of redrafting section 13 (Regulatory disclosures) of annex 18 in a more neutral and straightforward way:

> "The summary of the relevant information disclosed under Regulation (EU) No596/2014 featured in a simplified prospectus (the "MAR disclosure summary") shall be presented in an easily analysable, concise and comprehensible form. It shall not replicate all information already published under Regulation (EU) No 596/2014 and shall be an intelligible summary of the last relevant information.

**Non-equity securities secondary issuance**

Regarding profit forecasts, although supportive of the removal of the obligation to include a report from the auditors when the issuer chooses to include forecasts in the prospectus, we consider that the non-equity regime should not be aligned with the equity regime : for both retail and wholesale debt issuances, there should not be any obligation to include in the prospectus outstanding profit forecasts previously published and still valid (please refer to our general comments in the introduction).

**Question 75: Should secondary disclosure differ depending on whether the issuer is listed on a regulated market or on an SME Growth Market?**

We agree with ESMA that the secondary disclosure should differ depending on whether the issuer is listed on a regulated market or on an SME Growth Market, especially if the standard regime is to be in the form suggested so that it would not be attractive to SMEs due to the costs of producing such a prospectus. For the SME Growth Market, the regime for secondary issuances should be a proportionate version of the EU Growth Prospectus and not of the full prospectus.

**Question 76: Do you consider that item 9.3 (information on corporate governance) is necessary?**

Please refer to our answer to question 17.

**Question 77: Do you consider that information on material contracts is necessary for secondary issuance?**

We agree with ESMA that in the case of a secondary equity issuance to fund a large acquisition, the issuer will often have entered into material contracts, including an acquisition agreement and agreements relating to bank debt funding. A significant acquisition and such agreements would likely be disclosed in the annual financial report, the risk factors section…or could constitute inside information which would be disclosed under MAR and summarised in the prospectus.

Therefore, we don't see the point in maintaining a disclosure requirement regarding material contracts (not entered in the ordinary course of the issuer's business) in the secondary issuance prospectus.

**Question 78: What is the overall impact of the proposed technical advice, especially in terms of costs to issuers and benefits to investors? If you have indicated that it will pose additional costs for issuers, please provide an estimate and indicate their different type (e.g. extra staff costs, advisor costs, etc.) and nature (one-off vs. ongoing costs).**

In our view, the proposed regime for secondary issuances is not sufficiently alleviated to make a substantial change to issuers. See our response to question 74 for more explanations.

**Question 79: Do you consider that there is further scope for alleviated disclosure in the securities note? Please advise of any costs and benefits implied by the further changes you propose.**

Regarding the requirement to update the capitalisation and indebtedness table in case of material changes, please refer to our answer to Question 23.

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