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Consultation on the review of the Prospectus Directive

Dear Mrs. Fabregas,

We take pleasure in submitting the response of EUSIPA, the European Structured Investment Products Association, to the European Commission's Consultation on the review of the EU Prospectus Directive as was published 18 February 2015 (the "**Consultation Document**").

EUSIPA represents the issuers of note-based and listed Structured Investment Products to retail customers. Structured Investment Products, also called certificates in some markets, are securitised debt papers for which the issuer, usually a bank, takes the debtor position. The products are called structured because the pay-out to the investor depends on several clearly defined, or "constructed", conditions. These conditions mainly relate to price changes of an underlying asset over a certain timespan. Per Q4 2012 the product landscape in the European main markets provided for a volume (called open interest) of around 450bn Euro.

Our members are national industry associations from Austria, France, Germany, Italy, Sweden, Switzerland and The Netherlands. Members of these national associations are major banking institutions such as, for example, BNP Paribas, Citi, Commerzbank, Deutsche Bank, Société Générale and HVB-Unicredit.

We hope you find our attached contribution a useful contribution to the further discussion and are available to elaborate on any of the raised items.

Sincerely,

Thomas Wulf
Secretary General, EUSIPA

Nikolaus D. Neundörfer
Chair Legal Committee, EUSIPA

RESPONSE
TO
CONSULTATION DOCUMENT OF THE EU COMMISSION
ON THE REVIEW OF THE PROSPECTUS DIRECTIVE

Introduction / Conceptual Questions

The Consultation Document published by the European Commission on 18 February 2015 as part of the Capital Markets Union Review rightly raises fundamental questions in connection with the concepts underlying the Directive 2003/71/EC (as amended, including by Directive 2010/73/EU) (PD), such as the question if a public offer and the admission of securities to trading on a regulated market should continue to be used as the trigger for the requirement to produce and publish a security prospectus. In our view, these questions can only be answered on the basis of a thorough determination of the appropriate conceptual foundation, taking into account the entire relevant EU legislation.

In a nutshell, the overall topic justifying the existence of prospectuses is investor or client information aiming to allow the investor an "informed investment decision". Historically, going back until the 19th century, prospectuses were the only medium designated by legislators to provide investors with the required information to allow for an informed investment decision, and originally only in the case of an exchange listing. The restriction of prospectuses to "transferable securities", as well as the general format of prospectuses and the publication requirements, also follows from this historical background. However, this traditional "Primary Market" information concept has, over the last decades, been supplemented by a "Point of Sale" disclosure concept. Within EU legislation, this concept has been in existence since the Investment Services Directive (the predecessor of the Markets in Financial Instruments Directive (MiFID)), and has recently been further developed by the Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs Regulation), coming into force at the end of 2016.

Thus, as regards information/disclosure, two different and partly overlapping "trigger" concepts are currently in force: exchange listing and public offer (under the PD) versus sale or offer to (individual) (retail) investors (PRIIPs / MiFID).

Consequently, one of the Conceptual Questions that should be looked at is the relationship between these two concepts: Does it make sense to apply both informational requirements independently of each other, or could/should they be integrated into one "wholesome" approach?
Also, do the requirements on both sides currently lead to conflicting practical results – especially for security related information (as opposed to information on the issuer, which is not or only partly in scope of the point of sale information)? The existence of the current prospectus exemptions could also be seen in this context.

Another question following from the mentioned historical background of the current prospectus rules that we think should also be looked at can be put as follows: Does the overall rather abstract and formal prospectus format still make sense compared to "individual"/“point-of-sale” investor information (as required under PRIIPs /MiFID)? On the same basis, potential further questions could be asked on whether the following items still make sense in the current legal framework:

- The prospectus publication requirements (in light of the technical progress),
- The requirement for prospectus approval, which is always in danger of being misunderstood by authorities as a substantive "product approval" requirement, by competent authorities as well as retail investors (notion of a "quality label") with the result of an unequal treatment compared to other financial instruments, that are not subject to such requirement, and, whether
- The prospectus liability concepts currently existing under national law, as opposed to liability for other relevant investor information.

A further overlap with other security related informational requirements results from the traditional differentiation between primary market information, secondary market information and accounting rules, together with the "sectorial" (as opposed to codification-based) approach of EU legislation as a whole. As a result, particularly the ongoing informational requirements under the PD are currently not harmonised with "secondary market" information prescribed under the Transparency Directive (TD) and the Market Abuse Directive (MAD), and with accounting rules.

Once again, in our view many of the specific questions raised in the Consultation Document can only be answered following a comprehensive mapping exercise including all informational requirements currently in force under EU law together with the underlying concepts, and decisions about the appropriate concepts for the future.

On a very preliminary basis, one conceivable alternative concept as the basis for informational requirements could include a stronger differentiation between issuer related information on the one hand, and security related information on the other (to some extent, this would be a further evolvement of the tripartite prospectus concept). Such alternative concept could include the following elements:

Issuer related information:

- Could be integrated into a coherent set of issuer related information rules (including ongoing information requirements), based upon (and including) accounting requirements

- possible triggers for application of the respective requirements:
  - As currently under the TD for the periodic issuer related informational requirements, but with an additional "initial requirement" when the first application for admission to trading on a regulated market is made,
  - In these cases, enhanced ongoing disclosure requirements (going beyond general accounting rules) would apply,
  - In case of ongoing disclosure a consent to use the prospectus should no longer be necessary.

- Potential additional trigger (instead of a public offer): when a key information document ("**KID**") is required (or would be required for bonds / shares); in this case, a requirement to update should however only apply when a sale / offer to a retail investor is made in cooperation with the issuer; alternatively – if the decision would be, for security related information (see below), to keep the prospectus format, a public offer could still be a trigger

- Finally, central information storage of all issuer related information would be helpful for investors (similar to the US EDGAR database).

Security related information:

- Such information could be integrated into the existing PRIIPs / MiFID informational requirements; potentially the KID could function as the central part (where existing), together with terms and conditions of the respective security / possibly further information document(s), all to be made available to investors

- For bonds / shares, possibly "mini KID" (due to the product characteristics, on a static / generic level)

- Alternatively, if a total abolition of prospectuses is regarded as too radical, the prospectus format could be kept – with amendments – just for security related information.

Response to single questions:

Question (1)
Is the principle, whereby a prospectus is required whenever securities are admitted to trading on a regulated market or offered to the public, still valid? In principle, should a prospectus be necessary for:
- **admission to trading on a regulated market**
- **an offer of securities to the public?**

Should a different treatment should be granted to the two purposes (i.e. different types of prospectus for an admission to trading and an offer to the public). If yes, please give details.

The decreasing importance of a prospectus as the main source of information for investors becomes in particular apparent in case of the admission of securities to trading on a regulated market.

It is not only investors' behaviour which has changed, who now also use alternative information sources, as e.g. newspapers, internet or the KIDs which marginalises the concept of a prospectus, but also the increasing legal obligations of issuers whose securities are admitted to trading on a regulated market. These issuers are in accordance with the Transparency Directive in particular required to publish their annual and half-yearly financial reports. Any significant financial news must be immediately disclosed. Any such periodic or ongoing information requirement has been introduced by the European legislator "to lead to a high level of investor protection" (cf. recital (5) of the Transparency Directive).

In light of this financial transparency of the relevant issuer, investors are, as a consequence, able to make an informed investment decision based on the combination of the issuer's financial reporting under the Transparency Directive with any security related information contained, where available, in the KID.

In EUSIPA's view, the prospectus has lost its importance as the main source of information for investors in the context of the admission of securities to trading on a regulated market. EUSIPA hence proposes to use the revision of the Prospectus Directive to waive the obligation to publish a listing prospectus or, if adhered to, to strictly limit its content to the essential characteristics of, and risks associated with, the security.

Question (2)
In order to better understand the costs implied by the prospectus regime for issuers:
a) Please estimate the cost of producing the following prospectus
- equity prospectus
- non-equity prospectus
- base prospectus
- initial public offer (IPO) prospectus

b) What is the share, in per cent, of the following in the total costs of a prospectus:
- Issuer's internal costs: [enter figure]%
- Audit costs: [enter figure]%
- Legal fees: [enter figure]%
- Competent authorities' fees: [enter figure]%
- Other costs (please specify which): [enter figure]%

What fraction of the costs indicated above would be incurred by an issuer anyway, when offering securities to the public or having them admitted to trading on a regulated market, even if there were no prospectus requirements, under both EU and national law?

Legal fees
Legal fees for preparing a prospectus may vary depending on the type of prospectus and the jurisdiction. As an example, in one major jurisdiction, a low estimate for a standard base prospectus amounted to between EUR 40.000 and EUR 50.000, depending on the range of pay-offs to be covered. In other jurisdictions the estimates were rather at around EUR 200.000.

As concerns the breakdown, though, estimates vary. Depending on specific circumstances the following estimate may be provided:
- Issuer's internal costs: 30 %
- Audit costs: 20 %
- Legal fees: 40 %
- Competent authorities' fees: 5%
- Other costs: translations costs 5 %

Depending on the single case, issuer internal cost and legal fees could be reduced by 50%, translation cost by 100%. Costs of producing the prospectus would ultimately be reduced by 40 %.

Note however, that the figures above (competent authorities' fees: 5%) are obviously an average estimate which does not take into account exceptions observed in certain jurisdictions (e.g. in Italy) where such fees are significantly higher and are charged not on a prospectus basis but relate to the number of securities issued under a prospectus (e.g. Euro 1,985 for each ISIN issued by a non-Italian Issuer).

Question (3)
Bearing in mind that the prospectus, once approved by the home competent authority, enables an issuer to raise financing across all EU capital markets simultaneously, are the additional costs of preparing a prospectus in conformity with EU rules and getting it approved by the competent authority are outweighed by the benefit of the passport attached to it?

All of the issuers behind the EUSIPA members have established various issuance programmes, either for use within their own jurisdiction or with a view to pass-porting into other EU Member States.

In most jurisdictions the current "pass-porting" regime operates to the satisfaction of the issuers assembled under the roof of EUSIPA and its member associations. As set-out in the Prospectus Directive, following the approval of the prospectus by the competent authority of the home member state, non-exempt offers of the securities can be made to investors and/or a listing of the securities can take place on a regulated market in one or more additional EEA member states (as host member states).

When the pass-porting process operates well, the host member states may require a translation of the summary section of the prospectus into the national language of such state, though the competent authorities of host member states may not undertake any approval or administrative procedures relating to prospectuses and may not require any additional disclosure.

It must however be pointed out that, at least for one major jurisdiction in Europe, single EUSIPA members have reported difficulties in their use of the pass-porting option. In this jurisdiction, their plans to make an offering of structured products to retail investors have been made conditional by the local authority upon the establishment of a full new issuing programme in the said jurisdiction under the direct supervision of this national authority.

However, for most jurisdictions, where pan-European pass-porting is indeed a reality, the additional costs in relation to this pass-porting (e.g. translation of the summary section of the prospectus) are clearly outweighed by the benefit of the passport regime.

Question (4)
The exemption thresholds in Articles 1(2)(h) and (j), 3(2)(b), (c) and (d), respectively, were initially designed to strike an appropriate balance between investor protection and alleviating the administrative burden on small issuers and small offers. Should these thresholds be adjusted again so that a larger number of offers can be carried out without a prospectus? If yes, to which levels? Please provide reasoning for your answer.
a) the EUR 5 000 000 threshold of Article 1(2)(h):
- Yes, from EUR 5 000 000 to EUR [enter monetary figure]
- No
- Don't know/no opinion
Textbox: [justification]

b) the EUR 75 000 000 threshold of Article 1(2)(j):
- Yes, from EUR 75 000 000 to EUR [enter monetary figure]
- No
- Don't know/no opinion
Textbox: [justification]

c) the 150 persons threshold of Article 3(2)(b)
- Yes, from 150 persons to [300] persons
- No;
- Don't know/no opinion
Textbox: [justification]

d) the EUR 100 000 threshold of Article 3(2)(c) & (d)
- Yes, from EUR 100 000 to EUR [enter monetary figure]
- No
- Don't know/no opinion

EUSIPA and its members have a vital interest in the proper functioning of the pan-European markets for retail structured products, while ensuring a high level of retail investors. As such, we appreciate in particular the above exemption thresholds, which manifest the European legislator's intention to strike an appropriate balance between investor protection and the administrative burden on issuers.

As regards a possible extension of existing thresholds, views may vary among EUSIPA members.

However, it is also interesting to note that fundamental differences may be observed in the characteristics of the various offerings depending on the securities concerned.

As an example, the current 150 persons threshold may be perceived as sufficient for an equity offering as the number of investors concerned (when the transaction is not intended to be an offer to the public) is generally less than 150. The situation is quite different when it comes to the distribution of structured products (other than to the public) which generally concerns a much larger number of investors.

For that reason, some EUSIPA members would favour a rise of such threshold to 300. They note that this figure of 300 was used, quite satisfactorily, in at least one major jurisdiction prior to the entry into force of the PD.

Question (5)
Would more harmonisation be beneficial in areas currently left to Member States discretion, such as the flexibility given to Member States to require a prospectus for offers of securities with a total consideration below EUR 5 000 000?
Yes
No
Other areas:
Don't know/no opinion X

As described above, EUSIPA and its members have a vital interest in the harmonisation and the proper functioning of the markets across all EU Member States.
Due to its particular focus on structured debt securities for retail investors, however, EUSIPA has no specific views on the flexibility given to Member States to require a prospectus for offers of securities with a total consideration below EUR 5,000,000.

Question (6)
Do you see a need for including a wider range of securities in the scope of the Directive than transferable securities as defined in Article 2(1)(a)? Please state your reasons.
Yes
No X
Don't know/no opinion

EUSIPA, which has a focus on structured securities has not identified a specific rationale for an extension of the scope of securities concerned by the Directive other than transferable securities.

Question (7)
Can you identify any other area where the scope of the Directive should be revised and if so how? Could other types of offers and admissions to trading be carried out without a prospectus without reducing consumer protection?
Yes []
No X
Other areas:
Don't know/no opinion
Textbox: [justification]

Besides EUSIPA's conceptual questions and the proposal to use the review of the Prospectus Directive to strictly evaluate the need for a prospectus, in particular where admissions to trading on a regulated market is sought (cf. the section "Introduction / Conceptual Questions" and our response to Question 1 above), EUSIPA is not aware of any specific other area where the scope of the Prospectus Directive should be revised.

In this context, however, and balancing investor protection and administrative burden on the issuers, we are of the strong view that the current requirement of a prospectus should in any case not be extended to, e.g. also cover non-public offerings, listed on an unregulated market only.

Question (8)
Do you agree that while an initial public offer of securities requires a full-blown prospectus, the obligation to draw up a prospectus could be mitigated or lifted for any subsequent secondary issuances of the same securities, providing relevant information updates are made available by the issuer?
Yes X
No
Don't know/no opinion

EUSIPA agrees that an initial public offer of securities requires a full Prospectus Directive complaint prospectus. Following such initial public offer, however, we consider any obligation to prepare (additional) prospectuses for subsequent secondary issuances of the same securities as being excessive for the issuers. Investors do not need (the questionable protection by) a new prospectus, since they are able to make an informed investment decision by combining the existing prospectus prepared for the initial public offer as regards security related information with any issuer related information published, e.g., in accordance with the Transparency Directive and/or the Market Abuse Directive, and any security related information contained, where available, in the KID.

The obligation to draw up a prospectus should be lifted for any subsequent secondary issuance of the same (i.e. fungible) securities. The amendment should not be limited to an initial public offering of shares or other equity related securities but apply to all types of securities subject to the Prospectus Directive.

For these purposes, it should in our view be clarified that (A) no additional prospectus is required in case of a public offering of securities provided that a Prospectus Directive compliant prospectus has already been approved and that (B) any offering of securities to the public started on the basis of a valid prospectus may be continued even after the validity of the prospectus has expired (please see our responses to Questions 10 and 49 below).

Question (9)
How should Article 4(2)(a) be amended in order to achieve this objective ? Please state your reasons.
The 10% threshold should be raised to [enter figure]%
The exemption should apply to all secondary issuances of fungible securities, regardless of their proportion with respect to those already issued
No amendment
Don't know/no opinion
Textbox: [justification]

Due to its particular focus on structured debt securities for retail investors, EUSIPA has no specific views on how Article 4(2)(a) should be amended. However, it should be noted that the exemptions in Article 4(2) of the PD covering categories of securities other than shares have not achieved their objectives. National Competent Authorities ("NCAs") have taken different views as to whether a secondary issuance of fungible securities (a 'tap issue') following the initial admission to trading triggers the obligation to publish a prospectus creating an non-level playing field between different jurisdictions.

One or more exemptions should apply to all secondary issuances of fungible securities. Such exemptions should cover secondary issuances being admitted to trading on the same regulated market where the initial issuance of securities has already been admitted to trading and should also address situations where a dual or replacing admission to trading relates to another regulated market.

Question (10)
If the exemption for secondary issuances were to be made conditional to a full-blown prospectus having been approved within a certain period of time, which timeframe would be appropriate?
[ ] years
There should be no timeframe (i.e. the exemption should still apply if a prospectus was approved ten years ago) X
Don't know/no opinion

As outlined in our response to Question 8 above, even investors do not need the information contained in a new prospectus, since they are able to make an informed investment decision by combining the (updated) prospectus prepared for the initial public offer with any issuer related information published, e.g. in accordance with the Transparency Directive, and any security related information contained in the KID.

EUSIPA is, consequently, of the view that there should be no timeframe stipulated in relation to the prospectus (used for the initial public offer in the revised Prospectus Directive).

Question (11)
Do you think that a prospectus should be required when securities are admitted to trading on an MTF? Please state your reasons.
Yes, on all MTFs
Yes, but only on those MTFs registered as SME growth markets
No X
Don't know/no opinion

In the view of EUSIPA, no prospectus should be required when securities are admitted to trading on a multilateral trading facility (MTF). In fact, any obligation to prepare a prospectus in the context of a listing should be strictly limited to the admission to trading on a regulated market of a stock exchange.

Any such regulated market is subject to public supervision, which does not only ensure the price formation processes, but also includes the supervision of the market participants admitted to exchange trading, the investigation of violations of exchange regulations and the development of preventive measures and supervision of proper trading of the exchange bodies. The exchange supervisory authority is typically supported by a trading surveillance authority, which acts as an independent exchange body and monitors exchange trading and exchange settlements conducting the necessary investigations in the event of any violations of exchange regulations.

Based on this supervision, regulated markets of stock exchanges traditionally enjoy the specific trust of investors. It is in our view precisely this reliance of investors on market integrity and investor

protection created by any regulated markets of stock exchanges, which justifies the obligation to prepare a "Prospectus Directive"-compliant prospectus for any admission to trading on such regulated market, but which reversely also clearly differentiates these regulated markets from MTFs.

As a consequence, and since any admission to trading on an MTF does typically, from an investor's perspective, not enjoy the above specific trust of investors, we are of the view that no prospectus should be required when securities are admitted to trading on an MTF.

Question (12)
Were the scope of the Directive extended to the admission of securities to trading on MTFs, do you think that the proportionate disclosure regime (either amended or unamended) should apply? Please state your reasons.
Yes, the amended regime should apply to all MTFs
Yes, the unamended regime should apply to all MTFs
Yes, the amended regime should apply but not to those MTFs registered as SME growth markets
Yes, the unamended regime should apply but not to those MTFs registered as SME growth markets
Yes, the amended regime should apply but only to those MTFs registered as SME growth markets
Yes, the unamended regime should apply but only to those MTFs registered as SME growth markets
No
Don't know/no opinion X

Please see our response to Question 11 above. In any case, should the scope of the Directive be extended to the admission of securities to trading on MTFs, the regime should be as light as possible where there a no public offer. We reiterate that we are opposed to such a principle of extension.

Question (13)
Should future European long term investment funds (ELTIF), as well as certain European social entrepreneurship funds (EuSEF) and European venture capital funds (EuVECA) of the closed-ended type and marketed to non-professional investors, be exempted from the obligation to prepare a prospectus under the Directive, while remaining subject to the bespoke disclosure requirements under their sectorial legislation and to the PRIIPS key information document? Please state your reasoning, if necessary by drawing comparisons between the different sets of disclosure requirements which cumulate for these funds.
Yes, such an exemption would not affect investor/consumer protection in a significant way
No, such an exemption would affect investor/consumer protection
Don't know/no opinion X

Due to its particular focus on structured debt securities for retail investors, EUSIPA has no specific views on any exemptions for ELTIFs, EuSEFs or EuVECAs under the future PD regime.

Question (14)
Is there a need to extend the scope of the exemption provided to employee shares schemes in Article 4(1)(e) to non-EU, private companies ? Please explain and provide supporting evidence.
Yes
No
Don't know/no opinion X

Due to its particular focus on structured debt securities for retail investors, the EUSIPA has no specific views on any need to extend the scope of the exemption provided to employee shares schemes.

Question (15)
Do you consider that the system of exemptions granted to issuers of debt securities above a denomination per unit of EUR 100 000 under the Prospectus and Transparency Directives may be detrimental to liquidity in corporate bond markets? If so, what targeted changes could be made to address this without reducing investor protection?
Yes
No
Don't know/no opinion

If you have answered yes, do you think that:
(a) the EUR100 000 threshold should be lowered?
- Yes, to EUR [enter monetary figure]
- No X
- Don't know/no opinion
- Textbox: [justification]
(b) some or all of the favourable treatments granted to the above issuers should be removed?
- Yes, please indicate to what extent : [ ]
- No X
- Don't know/no opinion
- Textbox: [justification]
(c) the EUR 100 000 threshold should be removed altogether and the current exemptions should be granted to all debt issuers, regardless of the denomination per unit of their debt securities?
- Yes
- No X
- Don't know/no opinion

The above exemption thresholds, which manifest the European legislator's intention to strike an appropriate balance between investor protection and administrative burden on issuers, are appreciated by EUSIPA members.

Question (16)
In your view, has the proportionate disclosure regime (Article 7(2)(e) and (g)) met its original purpose to improve efficiency and to take account of the size of issuers? If not, why?
Yes
No
Don't know/no opinion X

Due to its particular focus on structured debt securities for retail investors, the EUSIPA has no specific views on the proportionate disclosure regime.

Question (17)
Is the proportionate disclosure regime used in practice, and if not what are the reasons? Please specify your answers according to the type of disclosure regime.
a) Proportionate regime for rights issues
- Yes
- No
- Don't know/no opinion X
b) Proportionate regime for small and medium-sized enterprises and companies with reduced market capitalisation
- Yes
- No
- Don't know/no opinion X
-
c) Proportionate regime for issues by credit institutions referred to in Article 1(2)(j) of Directive 2003/71/EC
- Yes
- No
- Don't know/no opinion X

Please see our response to Question 16 above.

Question (18)
Should the proportionate disclosure regime be modified to improve its efficiency, and how? Please specify your answers according to the type of disclosure regime.
a) Proportionate regime for rights issues
b) Proportionate regime for small and medium-sized enterprises and companies with reduced market capitalisation
c) Proportionate regime for issues by credit institutions referred to in Article 1(2)(j) of Directive 2003/71/EC

Please see our response to Question 16 above.

Question (19)
If the proportionate disclosure regime were to be extended, to whom should it be extended?
To types of issuers or issues not yet covered? Please specify: [text box]
To admissions of securities to trading on an MTF, supposing those are brought into the scope of the Directive? Please specify:
Other. Please specify:
Don't know/no opinion X

Please see our response to Question 16 above.

Question (20)
Should the definition of "company with reduced market capitalisation" (Article 2(1)(t)) be aligned with the definition of SME under Article 4(1)(13) of Directive 2014/65/EU by raising the capitalisation limit to EUR 200 000 000?
Yes
No
Don't know/no opinion X

Due to its particular focus on structured debt securities for retail investors, EUSIPA has no specific views on amending the definition of "company with reduced market capitalisation".

Question (21)
Would you support the creation of a simplified prospectus for SMEs and companies with reduced market capitalisation admitted to trading on an SME growth market, in order to facilitate their access to capital market financing?
Yes
No, the higher risk profile of SMEs and companies with reduced market capitalisation justifies disclosure standards that are as high as for issuers listed on regulated markets.
Don't know/no opinion X

Due to its particular focus on structured debt securities for retail investors, EUSIPA has no specific views on the creation of a simplified prospectus for SMEs and companies with reduced market capitalisation.

Question (22)
Please describe the minimum elements needed of the simplified prospectus for SMEs and companies with reduced market capitalisation admitted to trading on an SME growth market.

Please see our response to Question 21 above.

Question (23)
Should the provision of Article 11 (incorporation by reference) be recalibrated in order to achieve more flexibility? If yes, please indicate how this could be achieved (in particular, indicate which documents should be allowed to be incorporated by reference)?
Yes X
No
Don't know/no opinion

The scope of the documents which could be incorporated by reference should be extended, to cover any and all regulatory filings made in accordance with the PD or the TD and Member States' relevant implementing measures. This would of course include documents approved by or filed with one or several NCAs other than the NCA which is due to approve the prospectus. This however implies necessarily that article 12.3 of PD is being modified to make it compatible with the new system (with no-ex ante approval for regular issuers) which could be adopted.

EUSIPA strongly supports the revision of Article 11 (incorporation by reference) to allow for more flexibility.

While the opportunity to allow issuers incorporating information by reference (into a prospectus) has been introduced by the European legislator to "facilitate the procedure of drawing up a prospectus and lower the costs for the issuers without endangering investor protection" (cf. recital (29) of the Prospectus Directive), we feel that full flexibility has not yet been reached (resulting in inefficiencies for issuers).

For these purposes, and in particular to avoid any significant overlapping with (the issuer-related information required by) the Transparency Directive, it should in our view be made clear in the revision of the Prospectus Directive that any issuer related information published in accordance with the Transparency Directive, e.g. financial reporting of the issuer, is no longer subject to incorporation by reference into the prospectus (i.e. neither by way of a substantial repetition of substance nor by a reference to the documents included in the prospectus). In fact, any such information is easily available for investors on the basis of public data (cf. national company registers).

Moreover, it should in our view be clarified that also final terms (under a base prospectus) may be incorporated by reference. This would allow issuer to continue the related public offering even after the validity of the original base prospectus has expired (please see our response to Question 8 above).

A recalibrated regime for incorporation by reference, i.e. focusing on information which is not proposed to be exempted from the obligation to be included in the prospectus, should be designed exclusively on the following fundamental principles:

i. Maximum flexibility for issuers wishing to incorporate information by reference;

ii. NCAs' access to the information to be incorporated by reference; and

iii. Investors' access to the information which has been incorporated by reference.

Provided that the two latter principles are protected, there is no apparent rationale to limit the sources for incorporation by reference to any particular category of document or nature of document. Consequently, the first principle can be achieved without impairing the other principles.

The prospectus can but does not have to be contained in a single physical document. Essentially, a prospectus is a compilation of information and not a single physical document. The issuer shall prepare a prospectus to meet the criteria in Article 5 of the PD, allowing investors to make an informed investment decision. NCAs shall vet the prospectus to see if the prospectus meets the criteria regarding comprehensibility and the minimum information requirements stipulated in the applicable provisions in the PD and the PR. Following the NCAs' approval, the prospectus shall be published in the required manner. Any parts of a prospectus which have not already been published must be published following approval of the prospectus.

Information which has been published and is available to NCAs and potential investors when a prospectus is published following approval, (a) allows NCAs to duly consider such information for the purpose of their review and approval processes and (b) allows investors to read and duly consider the incorporated information when forming an investment decision. The same applies for information which has not previously been filed and/or published but which is made available to the NCAs for the purposes of their review and approval process regarding the relevant prospectus, provided that such incorporated information is published not later than simultaneously with the publication of the main prospectus document following the approval. Again, this allows both NCAs and investors full access to the relevant information in sufficient time.

There is no investor detriment stemming from the nature of the document in which the incorporated information is contained. Provided NCAs and investors have access to such information at the relevant moment in time and that NCAs have concluded that the prospectus meets the criteria regarding comprehensibility among other things, we see no justification for limiting the mechanism to only certain categories of documents from which information may be incorporated. Any such limit would by necessity limit the flexibility of the mechanism. Any concerns relating to potential investor detriment appear to be based on the existence of the mechanism as such rather than the category of sources from where information is incorporated.

Last but not least, it would in our view be helpful to clarify that also translations of documents, which have been approved by or filed with the competent authority of the home Member State may be used for incorporation by reference purposes. It should, e.g. be possible to incorporate by reference the information contained in an (certified) English language translation of a registration document, which has been drawn up and approved in the French language.

Question (24)
(a) Should documents which were already published/filed under the Transparency Directive no longer need to be subject to incorporation by reference in the prospectus (i.e. neither a substantial repetition of substance nor a reference to the document would need to be included in the prospectus as it would be assumed that potential investors have anyhow access and thus knowledge of the content of these documents)? Please provide reasons.
Yes X
No
Don't know/No opinion

Please see our response to Question 23 above.

Question (24)
(b) Do you see any other possibilities to better streamline the disclosure requirements of the Prospectus Directive and the Transparency Directive?
Yes
No
Don't know/No opinion X

Question (25)
Article 6(1) Market Abuse Directive obliges issuers of financial instruments to inform the public as soon as possible of inside information which directly concerns the said issuers; the inside information has to be made public by the issuer in a manner which enables fast access and complete, correct and timely assessment of the information by the public. Could this obligation substitute the requirement in the Prospectus Directive to publish a supplement according to Article 17 without jeopardising investor protection in order to streamline the disclosure requirements between Market Abuse Directive and Prospectus Directive?
Yes X
No
Don't know/No opinion

Following our conceptual understanding that, due to the significant overlapping with the Transparency Directive, any issuer related information published in accordance with the Transparency Directive will not have to be repeated in the prospectus (please see our response to Question 23 above), EUSIPA is of the view that a supplement to the prospectus will not be necessary in case of an ad-hoc publication in accordance with Article 6(1) of the Market Abuse Directive.

EUSIPA, consequently, supports the European Commission's consideration that any ad-hoc publication in accordance with Article 6(1) of the Market Abuse Directive shall substitute the requirement in the Prospectus Directive to publish a supplement without jeopardising investor protection.

If the European Commission, nevertheless, considers a supplement still being necessary, it will be important from the EUSIPA's perspective to waive any approval process in relation to this supplement in order to not jeopardise its ad-hoc character.

Question (26)
Do you see any other possibility to better streamline the disclosure requirements of the Market Abuse Directive and the Prospectus Directive?
Yes X
No
Don't know/No opinion

Please see our response to Question 25 above. The EUSIPA and its members generally appreciate the European Commission's intention to streamline the disclosure requirements of the Market Abuse Directive and the Prospectus Directive. Thoughts should, however, be also given to the different concepts underlying these directives and the related ratios of the relevant disclosure requirements.

Question (27)
Is there a need to reassess the rules regarding the summary of the prospectus? (Please provide suggestions in each of the fields you find relevant)
a) Yes, regarding the concept of key information and its usefulness for retail investors X
b) Yes, regarding the comparability of the summaries of similar securities X
c) Yes, regarding the interaction with final terms in base prospectuses X
d) No.
e) Don't know/no opinion

EUSIPA is of the strong view that rules regarding the summary of the prospectus should be strongly evaluated against the PRIIPs Regulation. The PRIIPs Regulation will introduce a pan-European, pre-contractual disclosure document for packaged retail products and insurance based investment products. The purpose of the KID is to help retail investors to understand, compare and use information that is made available to them about different investment products. The PRIIPs Regulation will therefore require the provision of basic information about investment products, the risk and return that can be expected, as well as the overall aggregate cost that will arise from making the investment.

Consequently, any security related information in a summary of a prospectus is in our view redundant, since it should already be included in the KID. In fact, investors will be able to make an informed investment decision when combining the product information as contained in the KID with the prospectus and any issuer related information published in accordance with the Transparency Directive (please see our response to Question 23 above). This holds in particular true since the KID will be drawn-up in the local language. As a consequence, EUSIPA strongly supports the consideration to eliminate the prospectus summary, where a KID is produced in accordance with the PRIIPs Regulation.

In any case, EUSIPA does not see any benefit for investors in duplicating information already contained in the KID again in the summary and, consequently, strongly recommends that a summary, if adhered to, should be strictly limited to the essential characteristics of, and risks associated with, the issuer.

Balancing investor protection and administrative burden on the issuers, EUSIPA considers in the context of base prospectuses the concept of two summaries, i.e. the summary included in the base prospectuses and the summary of the individual issue annexed to the final terms, as being rather excessive burdens on issuers. This holds in particular true since, in case the host member state requires

a translation of the summary, both summaries need to translated, without this duplication of translation work adding any value for investors.

EUSIPA proposes to use the revision of the Prospectus Directive to either waive, where a KID is produced in accordance with the PRIIPs Regulation, the concept of a summary of the individual issue annexed to the final terms or to amend the current concept so that the host member states may only require a translation of the summary of the individual issue.

Question (28)
For those securities falling under the scope of both the packaged retail and insurance-based investment products (PRIIPS) Regulation, how should the overlap of information required to be disclosed in the key investor document (KID) and in the prospectus summary, be addressed?
a) By providing that information already featured in the KID need not be duplicated in the prospectus summary. Please indicate which redundant information would be concerned : [textbox]
b) By eliminating the prospectus summary for those securities X.
c) By aligning the format and content of the prospectus summary with those of the KID required under the PRIIPS Regulation, in order to minimise costs and promote comparability of products
d) Other: [textbox]
e) Don't know/no opinion

As outlined in the response to Question 27 above, EUSIPA strongly supports the consideration to eliminate the prospectus summary, where a KID is produced in accordance with the PRIIPs Regulation. In any case, however, a summary, if adhered to, should be strictly limited to the essential characteristics of, and risks associated with, the issuer.

Question (29)
Would you support introducing a maximum length to the prospectus? If so, how should such a limit be defined?
Yes, it should be defined by a maximum number of pages and the maximum should be [figure] pages
Yes, it should be defined using other criteria, for instance: [textbox]
No X
Don't know/no opinion

In accordance with art. 5 of the Prospectus Directive, any prospectus shall contain all information which, according to the particular nature of the issuer and of the securities, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analysable and comprehensible form.

Introducing a maximum length to the prospectus would, as a consequence, either limit the information and explanations contained in a prospectus for investors or result in rather condensed and complex information. Either way would in the EUSIPA's view clearly jeopardise investor protection.

Instead of taking a quantitative approach, EUSIPA proposes to use qualitative criteria in order to enhance analysability and comprehensibility of prospectuses. For these purposes, EUSIPA is of the view that the revision of the Prospectus Directive should be used to individually challenge the need of each piece of so-called minimum information to be contained in a prospectus.

Following, e.g. EUSIPA's conceptual approach that, due to the significant overlapping with the Transparency Directive, the Market Abuse Directive and the PRIIPs Regulation, issuer related information and (parts of) the summary are redundant, the European Commission might conclude to factually limit excessive length of prospectuses and to enhance analysability and comprehensibility of prospectuses by reducing the prescribed information to be included in a prospectus, thereby avoiding duplication of information.

Question (30)
Alternatively, are there specific sections of the prospectus which could be made subject to rules limiting excessive lengths? How should such limitations be spelled out?

Please see our response to Question 29 above.

Question (31)
Do you believe the liability and sanctions regimes the Directive provides for are adequate? If not, how could they be improved?

	Yes	No	No opinion
the overall civil liability regime of Article 6		X	
the specific civil liability regime for prospectus summaries of Article 5(2)(d) and Article 6(2)		X	
the sanctions regime of Article 25		X	

The Prospectus Directive does in EUSIPA's view not provide for a liability and sanctions regime. This is in particular supported by the work undertaken by ESMA in the context of the "Report - Comparison of liability regimes in Member States in relation to the Prospectus Directive" (ESMA/2013/619– the "**Report on Liability Regimes**")[1], published on 30 May 2013. The Report on Liability Regimes provides "a comparison of liability regimes covering the EEA – comprising the 27 EU Member States along with Iceland and Norway and is aimed at providing clarity for market participants about the different regimes in place."

Issuers assembled in EUSIPA's members associations, having established various issuance programmes for retail structured products targeting not only the national but also markets in other EU Member States, would nevertheless highly appreciate a common framework to address administrative, criminal, civil and governmental liability, which provides clarity to market participants (including investors) about the different regimes in place on liabilities.
This common framework does, however, in EUSIPA's view not require a full harmonisation of existing liability and sanctions regimes. In fact, and since any prospectus related administrative, criminal, civil and governmental liability is deeply embedded in the legal system of each Member State and closely

[1] Available under http://www.esma.europa.eu/content/Comparison-liability-regimes-Member-States-relation-Prospectus-Directive.

interacts with other procedural, liability, sanctions and enforcement regimes etc., a full harmonisation would imply a disproportionate interference with the national legal system.

In particular in compliance with the principle of proportionality, clarity about the different regimes in place regarding rules on liabilities could be provided to market participants (including investors) by specifying that any liability attached to a prospectus follows the laws of the Member State, the competent authority of which has approved (and pass-ported) the prospectus. This simple rule, which creates legal certainty for investors and issuers, would, e.g. in case of a prospects approved by the German BaFin result in the German prospectus liability rules being applicable as law governing the relevant securities offered under this prospectus.

Question (32)
Have you identified problems relating to multi-jurisdiction (cross-border) liability with regards to the Directive? If yes, please give details.
Yes X
No
Don't know/no opinion
Textbox: [justification]

Please see our response to Question 31 above.

Question (33)
Are you aware of material differences in the way national competent authorities assess the completeness, consistency and comprehensibility of the draft prospectuses that are submitted to them for approval? Please provide examples/evidence.
Yes X
No
Don't know/no opinion
Textbox: [justification]

EUSIPA highly appreciates the work undertaken by ESMA in the context of the "Prospectus Directive: Peer Review Report on good practices in the approval process" (ESMA/2012/300 – the "**Peer Review**")[2], published in 2012, and the EUSIPA and its members share ESMA's finding that material differences still exist in the way national competent authorities assess the completeness, consistency and comprehensibility of the draft prospectuses.

While some competent authorities take a rather formalistic approach, other competent authorities, in consideration of the investor protection objective of the Prospectus Directive, take a more pragmatic and practical approach.

In doing so, some competent authorities, for instance, even allow to include debt securities with a maturity of less than 365 days in a base prospectus. As a result, also investors in these securities benefit from an approved prospect as source of information, while investors in EU Member States, where the competent authority takes a formalistic approach, do not receive any offering documentation.

2 Available under http://www.esma.europa.eu/system/files/2012-300.pdf.

Consequently, we still feel that the six good practices described in the Peer Review as being crucial from an issuer's, but also from an investor's perspective:

- Similar Comments
- Four eyes principle
- Financial information
- Consistency of the Prospectus document
- Comprehensibility
- Structure of the prospectus document

Summarising, EUSIPA strongly believes that a pragmatic and practical approach by the national competent authorities when assessing the completeness, consistency and comprehensibility of a prospectuses is important, in particular to achieve the objectives of the Prospectus Directive. Failing to apply such approach tends to result in bureaucracy rather than achieving investor protection.

Recent experience of our members includes the following examples of differences in approach by different NCAs:

Choice of Home Member State

- Varying approaches of NCA(s) to the determination of Home Member State under Article 2.1(m) in the context of derivative securities
- Secondary issuances
- Varying approaches of NCA(s) as to whether or not admission to trading of a tap offer and/or admission to trading on a dual or replacing regulated market require publication of a prospectus/final terms

Summaries

- Varying approaches of NCA(s) in whether or not to allow base prospectus summary sections to defer to information in final terms
- Varying approaches of NCA(s) in whether or not to insist on issue-specific summaries to be attached to final terms where exempt offers (>100,000 EUR) are made under base prospectuses that also allow for non-exempt offers
- Varying approaches of NCA(s) in whether or not to have "base prospectus level" summary disclosure

Incorporation by reference

- Varying approaches of NCA(s) in whether or not to allow entire documents to be incorporated by reference, and whether or not to allow so-called "daisy-chaining"
- Certain NCA(s) insisting that interim financial reports are attached to prospectus supplements rather than to be incorporated by reference
- Certain NCA(s) not allowing incorporation of a registration document into base prospectus despite the statements to the contrary within ESMA's recent opinion regarding the use of tri-partite regime in base prospectuses

Supplements

- Varying approaches of NCA(s) in whether or not to allow prospectus supplements whether there is not an obligation to prepare a supplement under article 16 of the PD
- Member state(s) stipulating withdrawal rights also in the context of supplements in the event of a prospectus solely for the admission to trading
- Certain NCA(s) insisting on disclosure of the authority's matter number on prospectus supplement front page

Languages

- Certain NCA(s) introducing varying numerical limits to the number of languages used in a prospectus
- Certain NCA(s) not allowing parts of a prospectus, e.g. financial reports, in the official language of the relevant NCA's member state where other parts prospectus has been drafted in a language customary in the sphere of international finance
- NCA(s) taking varying approaches to the permissibility to use a language customary in the sphere of international finance where offers to the public and/or admission to trading is to take place within more than one Member State

Content / comprehensibility

- NCA(s) not allowing information to be included unless is not mandatory pursuant to PD and PR with reference to the provisions in the Prospectus Regulation regarding the order in which mandatory information must be presented
- NCA(s) not allowing selling restrictions and other important information required in other jurisdictions to be included before the table of content with reference to the provisions in the Prospectus Regulation regarding the order in which mandatory information must be presented
- NCA(s) insisting newly established special purpose issuers include audited financial statements in accordance with IFRS despite such not being required pursuant to paragraph 136 of ESMA's Prospectus Guidelines (ESMA/2013/319)
- Varying approaches of NCA(s) in whether or not allow drafting notes in pro forma final terms in the base prospectus
- "Gold-plating" approach of certain NCA's as to their particular interpretation of comprehensibility – e.g. UKLA Technical Note 632.1 as "Worked Examples" section and retail navigation aids

Question (34)
Do you see a need for further streamlining of the scrutiny and approval procedures of prospectuses by NCAs? If yes, please specify in which regard.
Yes
No X
Don't know/no opinion
Textbox: [justification]

As described in the response to Question 33 above, EUSIPA strongly believes that a pragmatic and practical approach by the national competent authorities is important, in particular to achieve the investor protection objective of the Prospectus Directive. Any further streamlining of the scrutiny and approval procedures of prospectuses, i.e. taking an even more formalistic approach, would in our view jeopardise flexibility and investor protection.

In fact, even the Prospectus Directive allows the relevant competent authority to authorise the omission from the prospectus of certain information, if it considers that "such information is of minor importance only for a specific offer or admission to trading on a regulated market and is not such as will influence the assessment of the financial position and prospects of the issuer, offeror or guarantor, if any" (cf. Art. 8 para. 2 (c) of the Prospectus Directive).

Question (35)
Should the scrutiny and approval procedure be made more transparent to the public? If yes, please indicate how this should be achieved.
Yes
No X
Don't know/no opinion
Textbox: [justification]

In EUSIPA's view and in particular in consideration of investor protection, there is no benefit in making the scrutiny and approval procedure more transparent to the public.

Question (36)
Would it be conceivable to allow marketing activities by the issuer in the period between the first submission of a draft prospectus and the approval of its final version, under the premise that no legally binding purchase or subscription would take place until the prospectus is approved? If yes, please provide details on how this could be achieved.
Yes X
No
Don't know/no opinion
Textbox: [justification]

EUSIPA and its members highly appreciate the European Commission's consideration to allow marketing activities by the issuer in the period between the first submission of a draft prospectus and the approval of its final version provided that no legally binding purchase or subscription would take place until the prospectus is approved. Being able to already market a specific product after the first submission of a draft prospectus would allow issuers to quickly react on market opportunities as well as investors' demands and to swiftly offer versatile products reflecting current market demands and resulting investors' expectations.

Question (37)
What should be the involvement of NCAs in relation to prospectuses? Should NCAs:
a) review all prospectuses ex ante (i.e. before the offer or the admission to trading takes place)
b) review only a sample of prospectuses ex ante (risk-based approach) X
c) review all prospectuses ex post (i.e. after the offer or the admission to trading has commenced)
d) review only a sample of prospectuses ex post (risk-based approach) X
e) Other
f) Don't know/no opinion
Please describe the possible consequences of your favoured approach, in particular in terms of market efficiency and invest protection.
Textbox: [justification]

Balancing administrative burdens for issuers and national competent authorities with the investor and consumer protection, EUSIPA is of the view that a risk-based approach (as described in b) and d) above) should be taken when determining the involvement of national competent authorities in relation to prospectuses.

In particular where standard product classifications have been developed by market participants[3], the review of a sample of prospectuses (in relation to a product classification) by national competent authorities is in EUSIPA's view appropriate to create market efficiency, while still ensuring a high investor protection level. In any case, however, the issuer shall also have the right to initiate an approval process in relation to a specific prospectus and to have it approved.

Following the European Commission's consideration of a review of "a sample of prospectuses ex post", it would be important to clarify that in a scenario where a prospectus is ex post challenged by the competent authority, any ongoing offerings under this prospectus must be stopped without undue delay, but that any prior transactions remain valid and legally binding. Any challenge of a prospectus would, hence, have effect in futurum (ex nunc).

Moreover, and applying the "applicable liability" rule described in our response to Question 31, it should also be clarified that any liability attached to this prospectus follows the laws of the EU Member state, the competent authority of which has approved (and pass-ported) the sample prospectus.

Question (38)
Should the decision to admit securities to trading on a regulated market (including, where applicable, to the official listing as currently provided under the Listing Directive), be more closely aligned with the approval of the prospectus and the right to passport? Please explain your reasoning, and the benefits (if any) this could bring to issuers.
Yes
No
Don't know/no opinion X
Textbox: [justification]

As outlined in our response to Question 1 above, the prospectus has in the context of the admission of securities to trading on a regulated market lost its importance as the main source of information for investors and EUSIPA proposes to use the revision of the Prospectus Directive to waive the obligation to publish a listing prospectus (cf. the section "Introduction / Conceptual Questions" and our response to Question 1 above).

National disclosure requirements in the context of an admission of securities to trading on a regulated market may, nevertheless, apply.

Question (39)
(a)
Is the EU pass-porting mechanism of prospectuses functioning in an efficient way? What improvements could be made?
Yes
No X
Don't know/no opinion
Textbox: [justification]

Based on its members' experiences, EUSIPA considers the pass-porting mechanism of prospectuses basically functioning in an efficient way. It should in EUSIPA's view nevertheless be clarified in the

[3] Cf., e.g. the standard product classification for derivatives developed by EUSIPA under www.eusipa.org/categorization

revision of the Prospectus Directive that national competent authorities shall, in line with art. 17, para. 1 of the Prospectus Directive ("Competent authorities of host Member States shall not undertake any approval or administrative procedures relating to prospectuses.") have no right to challenge the certificate of approval or the approved prospectus.

Moreover, to fully achieve the objective of a single passport valid throughout the internal market, it should also be clarified that competent authorities of host Member States shall not only undertake any approval or administrative procedures relating to prospectuses, but also in relation to the offering itself. In EUSIPA's view, any additional administrative procedures related to the offering of securities in the relevant host Member States, e.g. the requirement of the Oesterreichische Kontrollbank AG (OeKB) to file a prior notification, does in practice jeopardize the efficiency of a single passport.

Question (39)
(b)
Could the notification procedure set out in Article 18, between NCAs of home and host Member States be simplified (e.g. limited to the issuer merely stipulating in which Member States the offer should be valid, without any involvement from NCAs), without compromising investor protection?
Yes X
No
Don't know/no opinion
Textbox: [justification]

EUSIPA strongly agrees that the notification procedure between national competent authorities of home and host Member States as set out in Article 18 should be simplified. To fully achieve the objective of an efficient (single) passport valid throughout the community, it should be allowed that an issuer simply indicates vis-a-vis the competent authority of its home Member States in which other EU Member State the securities shall be publicly offered, with no competent authorities of any host Member States being involved.

To implement such simplification, EUSIPA proposes to establish an integrated EU filing system/central information storage supervised by ESMA. Any prospectus related information, e.g. the prospectus itself, the certificate of approval and any effected pass-porting will have to be reported by the national competent authority to ESMA and fed into the data base . Such central information storage, similar to the US EDGAR database, would not only be helpful for investors, but would enable the relevant (host) Member States to monitor any pass-porting of (base) prospectuses into their jurisdictions and to access any related information.

Question (40)
Please indicate if you would support the following changes or clarifications to the base prospectus facility. Please explain your reasoning and provide supporting arguments:

I support **I do not support** **Justify**

a) The use of the base prospectus facility should be allowed for all types of issuers and issues and the limitations of Article 5(4)(a) and (b) should be removed [yes] [n/a] EUSIPA cannot see any investor protection reason for the limitations of Article 5(4)(a) and (b). EUSIPA and its members, hence, support the consideration to allow the use of the base prospectus should be allowed for all types of issuers and issues

b) The validity of the base prospectus should be extended beyond one year[yes]
Please indicate the appropriate validity length: [24 months**]** [n/a]
Please see our response to Question 49 below.

c) The Directive should clarify that issuers are allowed to draw up a base prospectus as separate documents (i.e. as a tripartite prospectus), in cases where a registration document has already been filed and approved by the NCA [yes] [n/a] Please see our response to Question 41 below.

d) Assuming that a base prospectus may be drawn up as separate documents (i.e. as a tripartite prospectus), it should be possible for its components to be approved by different NCAs [yes] [n/a] Please see our response to Question 41 below.

e) The base prospectus facility should remain unchanged [yes] [n/a] EUSIPA cannot see any reason to change the base prospectus facility other than as described in this response to the Consultation Paper.

f) Other (please specify) **[textbox]**

Question (41)
How is the "tripartite regime" (Articles 5 (3) and 12) used in practice and how could it be improved to offer more flexibility to issuers?
Textbox: [ ]

Whilst a substantial number of market participants expressly welcomed the possibility, (apparently) introduced by the European Parliament[4] in the last review of the Prospectus Directive in 2012, to prepare a base prospectus as a tripartite document, it turned out that ESMA[5] in December 2013 formed its view that the overall prospectus regime does not provide for the necessary legal framework for the possibility of a tripartite prospectus. As a consequence, a base prospectus may under the current regime of the Prospectus Directive not be drawn-up as a tripartite document.

The position taken by ESMA and the European Commission does, in the EUSIPA's view, clearly contradict the explicit intention of the European Parliament to extend the possibility to use a tripartite document to the base prospectus.

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4 *Cf.* Amendment 41 "***The possibility to use a tripartite document should be extended to the base prospectus**. This is made clearer if we delete the reference "subject to paragraph 4" at the beginning of Article 5 (3).*", *cf.* European Parliament / Session Document, 26 March 2010 (A7-0102/2010).

5 *Cf.* ESMA's opinion on the format of the base prospectus and consistent application of Article 26 (4) of the Prospectus Regulation dated 17 December 2013.

The possibility for a tripartite prospectus, comprising the registration document (describing the issuer of the securities), the securities note (describing the securities) and the summary, was created to ensure that frequent issuers of securities had the possibility of the highest levels of efficiency in their prospectus obligations.

However, according to the interpretation of the current text of the Prospectus Directive by the European Commission and ESMA, only standalone prospectuses can be prepared on the basis of a tripartite prospectus. Thus, issuers engaged in multiple issuance programmes using the base prospectus, which practically are the most frequent issuers of securities, have no possibility to make use of the tripartite format.

Not allowing a base prospectus being prepared as tripartite document, hence, leads to significant inefficiencies for issuers. The current position regarding the tripartite document does also seem to be in conflict a fundamental principle of the Prospectus Directive: a reference to 'prospectus' in the Prospectus Directive is a reference to any type of prospectus, including base prospectuses. Only where particular provisions are required for base prospectuses do the provisions make reference to 'base prospectuses' as a matter of lex specialis. Conversely, the use of 'prospectus' in the provisions is not a reference excluding base prospectuses. Please see Recital 21 of the Prospectus Regulation.
EUSIPA hence strongly supports the concept of a tripartite prospectus and recommends clarifying that also a base prospectus may be prepared as tripartite document - even if the registration document and the securities note were approved by different national competent authorities.

Question (42)
Should the dual regime for the determination of the home Member State for non-equity securities featured in Article 2(1)(m)(ii) be amended? If so, how?
a) No, status quo should be maintained.
b) Yes, issuers should be allowed to choose their home Member State even for non-equity securities with a denomination per unit below EUR 1 000. X
c) Yes, the freedom to choose the home Member State for non-equity securities with a denomination per unit above EUR 1 000 (and for certain non-equity hybrid securities) should be revoked.
Textbox: [justification]

EUSIPA sees a clear benefit in issuers being able, notably with regard to low denominations, to choose the most experienced competent authority in the Member States, where the securities are offered, by choosing the relevant home Member State accordingly - all the more so because the denomination threshold per unit of EUR 1.000 seems to us as being determined at random.

In particular since investor protection may not be jeopardized, the EUSIPA and its member are of the strong view that issuers should be allowed to choose their home Member State even for non-equity securities with a denomination per unit below EUR 1.000.

Consequently, the following amendments should be considered:

1. Removal of the EUR 1.000 threshold: There is no evidence that any investor detriment would result from a removal of this limitation. Should the limitation be retained nonetheless, a recalibration is required in the context of derivative securities for the purposes of enhancing harmonisation. Given the absence of investor detriment any recalibrated regime should aim for maximum flexibility for issuers;

2. Home Member State for non-EEA issuers: art 2(m)(iii) to be amended so that – including for securities described in art 2(m)(ii) - the non-EEA issuer may elect as home Member State one of the jurisdictions where the offer is being made and/or where the securities are being listed or where the first offering and/or admission was made; and

3. Transfer of authority under art 13(5): for multi-issuer bases prospectuses, competent authorities should be obliged to delegate (unconditionally) to the NCA of the jurisdiction selected by the issuer, provided that such jurisdiction corresponds to the home Member State of at least one such issuer under art 2(m).

Question (43
Should the options to publish a prospectus in a printed form and by insertion in a newspaper be suppressed (deletion of Article 14(2)(a) and (b), while retaining Article 14(7), i.e. a paper version could still be obtained upon request and free of charge)?
Yes X
No
Don't know/no opinion
Textbox: [justification]

EUSIPA is of the view that the options to publish a prospectus in a printed form and by insertion in a newspaper should be suppressed in the revision of the Prospectus Directive, since both options are only rarely used in practice and have lost their practical relevance.

Question (44)
Should a single, integrated EU filing system for all prospectuses produced in the EU be created? Please give your views on the main benefits (added value for issuers and investors) and drawbacks (costs)?
Yes X
No
Don't know/no opinion
Textbox: [justification]

EUSIPA sees a clear benefit in a single, integrated EU filing system for all prospectuses produced in the EU. A central information storage of all issuer related information, would enhance transparency around prospectus and the approval / pass-porting process as well as the accessibility for investors to any related information (e.g. prospectuses, issuer related information etc.), thereby enhancing investor protection (through information).

In addition and as outlined in our response to Question 39 (b), an integrated EU filing system/central information storage would also ensure that EU Member States have access to relevant information and data, enabling, e.g. a relevant (host) Member State to closely monitor any pass-porting of (base) prospectuses into its jurisdiction.

Last, not least, and following a concept, where relevant information is fed into the data base directly by an issuer, the European Commission should also consider treating any such filing of documents by an issuer as publication for the purposes of the Prospectus Directive.

Question (45)
What should be the essential features of such a filing system to ensure its success?
Textbox: [ ]

Please see our response to Question 44 above.

Question (46)
Would you support the creation of an equivalence regime in the Union for third country prospectus regimes? Please describe on which essential principles it should be based.
Yes X
No
Don't know/no opinion
Textbox: [justification]

EUSIPA and its members support the creation of an equivalence regime in the internal market for third country prospectus regimes, provided that the relevant third country prospectus regime consider the European prospectus regime as being equivalent to their relevant standards and requirements.

Question (47)
Assuming the prospectus regime of a third country is declared equivalent to the EU regime, how should a prospectus prepared by a third country issuer in accordance with its legislation be handled by the competent authority of the Home Member State defined in Article 2(1)(m)(iii)?
a) Such a prospectus should not need approval and the involvement of the Home Member State should be limited to the processing of notifications to host Member States under Article 18
b) Such a prospectus should be approved by the Home Member State under Article 13
c) Don't know/no opinion X
Textbox: [justification]

EUSIPA has no view on how a prospectus prepared by a third country issuer in accordance with its legislation should be handled by the competent authority of the Home Member State.

Question (48)
Is there a need for the following terms to be (better) defined, and if so, how:
a) "offer of securities to the public"
Yes
No
Don't know/no opinion X
Textbox: [justification]
b) "primary market" and "secondary market"?
Yes
No
Don't know/no opinion X
Textbox: [justification]

EUSIPA and its member do not have a strong view on the need for the terms "offer of securities to the public" as well as "primary market" and "secondary market" to be (better) defined. EUSIPA,

nevertheless, feels that stricter definitions will be difficult to agree upon, given varying concepts of distributions/offers of securities as well as of "primary market" and "secondary market" across the EU Member States.

Question (49)
Are there other areas or concepts in the Directive that would benefit from further clarification?
No, legal certainty is ensured
Yes, the following should be clarified: [validity, supplements, profit estimates]
Don't know/no opinion
Textbox: [justification]

EUSIPA and its members have, further to its conceptual questions (cf. the section "Introduction/ Conceptual Questions" and our response to Question 1 above) identified the following other areas or concepts in the Prospectus Directive that would benefit from further clarification:

Validity of a Base prospectus / continued offers

Under the current regime of the Prospectus Directive, a (base) prospectus shall be valid for 12 months after its approval for offers to the public or admissions to trading on a regulated market, provided that the (base) prospectus is completed by any supplements required pursuant to Article 16 of the Prospectus Directive.

As a consequence, securities issued thereunder may only be offered to the public until expiry of such base prospectus.

This leads to the (hardly practicable) situation, where securities issued under a base prospectus shortly after its approval date can be offered to the public over a long period of time (almost one year), while securities issued shortly before the expiration of a base prospectus may only be offered for a short period of time. To put it pointedly, in case, e.g. that an offer is started one day prior to the expiration of the base prospectus, the securities may on be offered for such single day. Furthermore the existing regime leads to the unsatisfactory result that securities issued under a base prospectus shortly before the expiration of a base prospectus could only be publicly offered for a very short period of time whereas the very same securities issued under a stand-alone prospectus could be publicly offered for a period of one year.

Limiting the public offer of securities to the lifetime of a base prospectus leads in practice to an increasing number of base prospectuses to be approved in intervals even shorter than one year and results in disproportionate administrative burdens of both, issuers and the competent authorities, without enhancing investor protection.

The existing time limit gives rise to two main problems for issuers and investors:

Offers to the public and/or admission to trading are scheduled to accommodate for the expiry and replacement of a base prospectus with a new base prospectus. This means that issuance and investment activities are not undertaken at the moment in time when issuers' and investors' interests coincide given ever changing market conditions. Instead, the issuers' issuances and, consequently, also the investors' investments are planned with reference to the anniversary of the relevant base

prospectuses. From a pure issuance and investment perspective such date is irrelevant and arbitrary; and practical problems may, despite well-considered planning, occur due to a wide range of factors, e.g. delays caused by market disruptions, operational risks, delayed payments by investors, delay in obtaining approvals from listing authorities and/or clearing systems etc. Where such delays occur in close proximity of the anniversary of the relevant base prospectus, practical difficulties result from the inability to straddle the anniversary.

EUSIPA, consequently, strongly supports that the review of the Prospectus Directive should also address the deficiencies in terms of continued offers to the public.

Rather than setting up a single time limit for the base prospectus (and any registration document), EUSIPA recommends to clarify that any offers of securities started on the basis of a valid base prospectus may be continued even if the period of validity of such base prospectus lapses afterwards. This would allow issuer to continue the related public offering even after the validity of the original base prospectus has expired (please see our response to Question 8 above). For this effect, it should also be clarified that even a base prospectus, the period of validity has lapsed, may be supplement, where necessary, to ensure investor protection. If this proposal would not be adopted, at least a mechanism should be introduced to accommodate for offers to the public and admission to trading to extend across the anniversary of the base prospectus validity. In order to ensure the level of investor protection is not impaired such mechanism could entail withdrawal rights for investors in scenarios where a withdrawal right would otherwise have been triggered pursuant to article 16 of the PD. For example, a mechanism could be introduced to allow issuers to supplement the 'expiring' base prospectus for a limited period of time with the new issuer disclosure published in the new base prospectus. Alternatively, issuers could be allowed to designate 'ongoing offers' to be covered by the new base prospectus (possibly combined with withdrawal rights being triggered for the investors who have already subscribed in such 'ongoing offers' at the time of the anniversary).

Stressing our conceptual understanding that, due to the significant overlapping with the Transparency Directive, any issuer related information published in accordance with the Transparency Directive will not have to be repeated in the prospectus and that, as a consequence, any investor protection rationale underlying the limitation of the validity of the base prospectus is likely to lose its practical relevance, it may even be considered not to limit the period of validity of a base prospectus at all.

In any case, EUSIPA is of the strong view that the period of validity of the base prospectus should be extended to 24 months to at least reduce the administrative burden on issuers.

Concept of Supplements

Supplements and product innovation. The current wording of Art 16 (1) of the Prospectus Directive provides that "every significant new factor, material mistake or inaccuracy 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." Based on a literal interpretation, some national competent authorities take the view that a supplement may not modify existing or add additional pay-offs to an approved base prospectus, since such supplement would not relate to a "significant new factor, material mistake or inaccuracy relating to the information included in the prospectus".

In EUSIPA's view the revision of the Prospectus Directive should be used to introduce the possibility to modify existing pay-offs in or add additional pay-offs to an approved base prospectus by way of a supplement.

The possibility to modify existing pay-offs in or add additional pay-offs to an approved base prospectus by way of a supplement would in particular allow frequent issuers of securities to reflect product innovations and changing investors' demands to the product range covered by a base prospectus, e.g. by a minimum repayment or a cap to the pay-off. The absence of the possibility to introduce such modifications by way of supplements leads to significant numbers of base prospectuses and resulting inefficiencies for issuers.

Last, not least, since each supplement is to be approved by the competent authority, investor protection would not be jeopardised.

Issuer related Information. Following our conceptual understanding that, due to the significant overlapping with the Transparency Directive, any issuer related information published in accordance with the Transparency Directive will not have to be repeated in the prospectus, EUSIPA is of the view that a supplement to the prospectus will not be necessary in case of an ad-hoc publication in accordance with Article 6(1) of the Market Abuse Directive (cf. our response to Question 25 above).

Investor's right to withdrawal. Following the practical experience of our members, the EUSIPA is of the view that the investor's right to withdrawal is rarely used only and should, providing clarity for all market participants, be waived in the revision of the Prospectus Directive. In any case, the current wording of Art 16 (2) of the Prospectus Directive is in EUSIPA's view too strict as it does not limit the investor's right to withdrawal to cases where the information detrimentally affects the assessment of the issuer and the securities. Consequently, investors could also (mis-)use events positively affecting the issuer's and the securities' assessment, like results which are better than expected by the markets (e.g. as published in quarterly financial reports), or the modification of existing pay-offs in an approved base prospectus for future issuances, to withdraw for reasons completely unrelated to the information constituting the object of the supplement.

In EUSIPA's view the revision of the Prospectus Directive should, consequently, be also used to clarify that investors shall only have the right to withdraw their acceptances "provided that the information contained in the supplement is detrimental to the assessment of the issuer and the securities".

Profit estimate

Conceptual Considerations. EUSIPA is of the view that it should be considered in the context of the revision of the Prospectus Directive to waive the requirement for a report prepared by independent accountants or auditors for a profit estimate, stating that in the opinion of the independent accountants or auditors the estimate has been properly compiled on the basis stated, and that the basis of accounting used for the profit estimate is consistent with the accounting policies of the issuer (cf. item 8.2. of Annex XI of the Prospectus Regulation (Minimum Disclosure Requirements for the Banks Registration Document (schedule)).

The added value of such report is, however, in EUSIPA's view usually rather limited (for investors) and the EUSIPA considers a confirmation given by the issuer (being responsible for drawing-up the prospectus) for these purposes as being generally sufficient. This holds in particular true since profit estimates are by nature more certain than profit forecasts. EUSIPA, consequently, considers the

requirement for a report prepared by independent accountants or auditors for a profit estimate as being excessive on the issuers, while not enhancing the investor protection level.

Clarification. In the context of the above considerations, it should be clarified that the publication of unaudited financial information does not constitute a "profit estimate" and the definition of a profit estimate (cf. Art. 2 para. 11 of the Prospectus Regulation) should be revised accordingly. Alternatively, and following EUSIPA's conceptual approach that, due to the significant overlapping with the Transparency Directive and the Market Abuse Directive, issuer related information, in particular financial information, is redundant in a prospectus, the European Commission might conclude that item 8.2. subparagraph 2 of Annex XI of the Prospectus Regulation (Minimum Disclosure Requirements for the Banks Registration Document (schedule)) and corresponding requirements in other Annexes should not apply to issuers having already securities admitted to trading on a regulated market.

Question (50)
Can you identify any modification to the Directive, apart from those addressed above, which could add flexibility to the prospectus framework and facilitate the raising of equity or debt by companies on capital markets, whilst maintaining effective investor protection? Please explain your reasoning and provide supporting arguments.
Yes X
No
Don't know/no opinion
Textbox: [justification]

Please see our response to Question 49 above.

Question (51)
Can you identify any incoherence in the current Directive's provisions which may cause the prospectus framework to insufficiently protect investors? Please explain your reasoning and provide supporting arguments.
Yes X
No
Don't know/no opinion
Textbox: [justification]

EUSIPA and its members have, further to its conceptual questions (cf. the section "Introduction / Conceptual Questions" and our response to Question 1 above) identified the following incoherence in the current Prospectus Directive's provisions which may cause the prospectus framework to insufficiently protect investors:

Limitation on Content of Final Terms / Repetitions
The issuer, the offeror or the person asking for admission to trading on a regulated market may in accordance with Article 26 para. 5 of the Prospectus Regulation only include any of the following additional information in the final terms (cf. Annex XXI of the Prospectus Regulation)

- Example(s) of complex derivatives securities as referred to in recital 18 of the Prospectus Regulation

- Additional provisions, not required by the relevant securities note, relating to the underlying

- Country(ies) where the offer(s) to the public takes place
- Country(ies) where admission to trading on the regulated market(s) is being sought
- Country(ies) into which the relevant base prospectus has been notified
- Series Number
- Tranche Number

EUSIPA and its members would also appreciate if it could be considered in the context of the revision of the Prospectus Directive to allow that information contained in the base prospectus may be repeated in the final terms or that further information may be given in the final terms. This would enable issuers to in particular properly address peculiarities in national market standards and (retail) investors' expectations.

Categorisation and Terms and Conditions
EUSIPA and its members would also appreciate if it could be clarified in the context of the revision of the Prospectus Directive that – notwithstanding the categories set out in Annex XX of the Prospectus Regulation, which determine the degree of flexibility by which the information can be given in the base prospectus or the final terms (cf. Article 2a of the Prospectus Regulation) – issuers may decide to fully reproduce the relevant terms and conditions in the final terms.

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