German Derivatives Association · Pariser Platz 3 · 10117 Berlin

European Securities and
Markets Authority (ESMA)
11-13 avenue de Friedland
75008 PARIS
FRANCE

Submitted online via www.esma.europa.eu

ID Ref: 2011/444

6 January 2012

Consultation on ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU

Dear Sir or Madam,

Please find enclosed the formal response of Deutscher Derivate Verband (DDV) to your Consultation on ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU published on 13 December 2011.

We remain at your disposal to provide additional material on these issues and look forward to discussing these matters further in the near future.

Yours sincerely

Dr. Hartmut Knüppel
CEO and Member of
the Board of Directors

Christian Vollmuth
Managing Director

German Derivatives Association

Berlin Office
Pariser Platz 3
10117 Berlin

Phone +49 (30) 4000 475 - 15
Fax +49 (30) 4000 475 - 66

Frankfurt Office
Feldbergstraße 38
60323 Frankfurt a.M.

Phone +49 (69) 244 33 03 - 60
Fax +49 (69) 244 33 03 - 99

politik@derivateverband.de
www.derivateverband.de

Board of Directors
Stefan Armbruster
Dr. Hartmut Knüppel
Jan Krüger
Klaus Oppermann
Rupertus Rothenhäuser

Management
Dr. Hartmut Knüppel
Lars Brandau
Christian Vollmuth

Bank account
HypoVereinsbank
IBAN DE42503201910605846670
Swift-Code: HYVEDEMM430

Deutscher Derivate Verband

RESPONSE

TO

ESMA'S CONSULTATION PAPER DATED 13 DECEMBER 2011

REGARDING THE TECHNICAL ADVICE ON POSSIBLE DELEGATED ACTS CONCERNING THE PROSPECTUS DIRECTIVE AS AMENDED BY THE DIRECTIVE 2010/73/EU

This position paper constitutes the response by the Deutscher Derivate Verband e.V. (DDV) to the European Securities and Markets Authority (ESMA) in connection with the Consultation Paper dated 13 December 2011 regarding ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU (the Amending Directive).

The DDV represents 17 issuers of derivative securities in Germany: Barclays, BNP Paribas, Citigroup, Commerzbank, Deutsche Bank, DZ BANK, Goldman Sachs, HSBC Trinkaus, HypoVereinsbank/Unicredit, JP Morgan, LBBW, Macquarie, Royal Bank of Scotland, Société Générale, UBS, Vontobel and WestLB. It was founded in Frankfurt am Main on 14 February 2008 and has its offices in Frankfurt and Berlin. The DDV is active in both Berlin and Brussels. It aims to promote the market and the acceptance of certificates, warrants and other structured products in Germany. Furthermore, it works towards improving the general understanding of structured products and product transparency in the derivatives market and furthering investor protection. Together with its members, the DDV advocates the establishment of industry standards and self-regulation. As a political advocacy group the DDV is involved in national and European legislative initiatives by issuing position papers and petitions.

DDV members have established various issuance programmes for retail structured products targeting not only the German market, but also many other EU Member States and for which the prospectuses are not only approved by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) as the German competent authority for prospectus approval, but also by other competent authorities within the EU. In terms of the number of base prospectuses approved, final terms filed and passporting requests, the activities of DDV members stand for a significant proportion of the German and potentially also the EU market.

Contact Details:

Deutscher Derivate Verband e.V.
Pariser Platz 3
10117 Berlin
tel: +49 (30) 4000 475 - 0
fax: +49 (30) 4000 475 - 66
e-mail: knueppel@derivateverband.de
e-mail: vollmuth@derivateverband.de

Deutscher Derivate Verband

CONTENTS

EXECUTIVE SUMMARY

DDV appreciates the opportunity to comment on the technical advice which ESMA proposes to provide to the European Commission in connection with the delegated acts stipulated in the Prospectus Directive, as amended by Directive 2010/73/EU.

DDV and its members have an interest in the amended Prospectus Directive and any delegated acts adopted pursuant to it operating in such a way as to ensure maximum investor protection and market efficiency. The efficiency of the regulatory framework under the Prospectus Directive and the functioning of the base prospectus regime are crucial for DDV's members who rely on it for the issuance of retail structured products across the EU member states. In such context, the DDV had expressly welcomed the proposal that there should be a comparative table of the prospectus liability regimes in the different Member States. The DDV now recognises that ESMA had regrettably decided to leave section 5 of its Mandate to a further stage.

In view of the above, DDV is particularly concerned about the following aspects of the Consultation Paper:

- **The consent to use a prospectus in a retail cascade:** The DDV is extremely concerned that ESMA's assumption made for the concept of retail cascades does not recognise the characteristics of a typical retail cascade.

  In contrast to ESMA's assumption that each distributor of particular securities is generally known to the issuer, securities – whether debt and equity securities – are in fact regularly distributed via several "levels" of financial intermediaries. In such distribution cascade, the issuer (or the person responsible for drawing up the prospectus) does generally not have information on the identity of each financial intermediary involved on each of the various levels. As a result, the inclusion of the consent that the prospectus may be used by third parties, in particular the disclosure of the identity of each distributor in a prospectus, as proposed by ESMA, would lead to an obligation of issuers, the compliance with which is – in a standard distribution of securities via a retail cascade – not possible. As a result, the DDV strongly disagrees with ESMA's proposal to include the consent on the use of the prospectus and the identity of each distributor in the prospectus.

  In addition, the DDV is highly concerned about the apparent lack of a thorough assessment by ESMA of the distribution chains used in practice for the different types of securities before the publication of the

Consultation Paper. In the DDV's opinion, the factual basis needs to be clearly determined before the drafting of the new technical rules can be continued.

- **Information on Taxes withheld at source:** The DDV shares ESMA's understanding of taxes withheld at source as shown in ESMA's FAQ No 45, according to which disclosure of information on taxes from the securities withheld at source "refers to information on any amount withheld at source, that is, by the issuer or by any agent appointed by it for the purpose of making payment on the securities". Such understanding is in line with the general interpretation of the Prospectus Regulation in Germany.

  Any broadening of ESMA's (previous) understanding of "taxes from the securities withheld at source" would lead to excessively burdensome tax disclosure to be given by the issuer (or the person responsible for drawing up the prospectus), thereby jeopardising ESMA's mandate to reduce the (administrative) burdens.

- **Index Composed by the Issuer:** In the DDV's view it is a common market practice to issue, under prospectuses prepared for the purpose of the Prospectus Directive, derivative securities linked to an index composed by another issuer. Although the DDV shares ESMA's general approach that specific disclosure may be made in relation to proprietary indices, the DDV proposes to include the relevant description of the proprietary index in the relevant final terms. The DDV considers that there is no reason why indices composed by the issuer should be treated differently from indices composed by external service providers.

  The proposed revision of Item 4.2.2. of Annex XII would lead to a manifestly unfair position where all market participants are free to use an index unrestricted except for its owner and any entity belonging to the same group as the owner.

A. THE CONSENT TO USE A PROSPECTUS IN A RETAIL CASCADE

I. General comments

The DDV appreciates the opportunity to describe the distribution of securities in retail cascades in more detail, in particular since the DDV is extremely concerned that ESMA's assumption made for the concept of retail cascades does not recognise the characteristics of a typical retail cascade.

Distribution of debt and equity securities via a retail cascade – not each financial intermediary known to the issuer

In contrast to ESMA's assumption that each distributor of particular securities is generally known to the issuer, securities are in fact regularly distributed via several "levels" of financial intermediaries. In such distribution cascade, the issuer (or the person responsible for drawing up the prospectus) does generally not have information on the identity of each financial intermediary involved on each of the various levels. As a result, the inclusion of the consent that the prospectus may be used by third parties, in particular the disclosure of the identity of each distributor in a prospectus, as proposed by ESMA, would lead to an obligation of issuers, the compliance with which is – in a standard distribution of securities via a retail cascade – not possible.

Debt and equity securities are regularly distributed via a cascade involving several "levels" of financial intermediaries, where the issuer (or the person responsible for drawing up the prospectus) does not have any contractual relationship with each financial intermediary:

On a **first level**, the securities may be offered and underwritten by financial intermediaries acting in association with the issuer (each an "**Underwriter**"), and then offered to investors on a **second level**. These investors include (i) end-investors (whether retail or institutional investors) and (ii) financial intermediaries, which intend to distribute the securities as *de facto* distributors, i.e. not acting in association with the issuer, to further investors on a **third level**.

In case of an involvement of Underwriters, the investors on the second level purchase the securities from the Underwriter(s) and do not enter into any contractual relationship with the issuer in connection with the distribution of the securities. The issuer (or the person responsible for drawing up the prospectus) does, at the time of drawing up the prospectus and even thereafter, usually not know the identity of these investors on the second level.

The investors on the third level purchase the securities from the relevant financial intermediary – without entering into any contractual relationship with both, the

Underwriter and the issuer. Some of these investors may be retail (end) investors, some may be financial intermediaries themselves, in turn distributing the securities to even further investors.

The above retail cascade structure does not only apply to the distribution of debt securities – whether "classical" bonds or structured securities –, but also to the distribution of equity securities. Equity securities issued e.g. for the purposes of a capital increase, are, typically and on a first level, underwritten by financial intermediaries as underwriters. Once issued, the equity securities are then offered by the underwriters to further investors on a second level. These investors, being retail investors or financial intermediaries themselves (distributing the equity securities even further) purchase the equity securities from the relevant Underwriter are usually not known to the issuer (or the person responsible for drawing up the prospectus) at the time of drawing up the prospectus and even thereafter, in particular in light of the fact that many financial intermediaries offer (equity) securities in the secondary market.

The issuer (or the person responsible for drawing up the prospectus) cannot anticipate the distribution cascade and the actual number of levels of financial intermediary involved. As a result, the issuer (or the person responsible for drawing up the prospectus) does not have any information on the identity of each financial intermediary involved within the distribution cascade.

The inclusion of the consent that the prospectus may be used by third parties, in particular the disclosure of the identity of each distributor in a prospectus as proposed by ESMA would, consequently, lead to an obligation of issuers, the compliance with which is – in a standard distribution of securities via a retail cascade and in particular in relation to *de facto* distributors – not possible.

As a result, the DDV strongly disagrees with ESMA's proposal to include the consent on the use of the prospectus and the identity of each distributor in the prospectus.

In addition, the DDV is highly concerned about the apparent lack of a thorough assessment by ESMA of the distribution chains used in practice for the different types of securities before the publication of the Consultation Paper. In the DDV's opinion, the factual basis needs to be clearly determined before the drafting of the new technical rules can be continued.

"Consent addressed to any distributor it may concern"

If, nevertheless, the consent would have to be included in the prospectus in order to enable financial intermediaries and *de facto* distributors, to offer securities to retail investors in compliance with Article 3.2.3 of the amended Directive, the DDV proposes to explicitly allow for an "open" written consent. Such consent, addressed by the issuer (or the person responsible for drawing up the prospectus) to any distributor it may concern, would omit the identity of each distributor vis-à-vis the investors, but nevertheless allow any distributor in the above retail cascade to rely on the prospectus drawn up by the issuer (or the person responsible for drawing up the prospectus) for these purposes.

II. Responses to questions

Q1: In practice, for what types of securities are retail cascades used? In ESMA FAQ No. 56 it was assumed that retail cascades are only used for distribution of debt securities. However, the regulation introduced by the Amending Directive in Article 3.2 Prospectus Directive does not differentiate between equity securities and debt securities in this regard but applies to all kind of securities.

Response: In DDV's view, retail cascades are not only used for the distribution of debt securities – whether "classical" bonds or structured securities – , but also the distribution of equity securities.

Please see the description of the distribution of debt and equity securities via a retail cascade in the section "General comments" above.

Q2: Please describe situations in which a retail cascade is normally used, how a retail cascade may be structured and the modalities of such retail cascade. What different models of retail cascades are used in practice?

Response: Debt and equity securities are regularly distributed via a cascade involving several "levels" of financial intermediaries, where the issuer (or the person responsible for drawing up the prospectus) does not have any contractual relationship with each financial intermediary:

On a **first level**, the securities – whether debt securities or equity securities – may be offered and underwritten by financial intermediaries acting in association with the issuer (each an "**Underwriter**"), and then offered to investors on a **second level**. These investors include (i) end-investors (whether retail or institutional investors) and (ii) financial intermediaries, which intend to distribute the securities as *de facto* distributors, i.e. not acting in association with the issuer, to further investors on a **third level**.

In case of an involvement of Underwriters, the investors on the second level purchase the securities from the Underwriter(s) and do not enter into any contractual relationship with the issuer in connection with the distribution of the securities. The issuer (or the person responsible for drawing up the prospectus) does, at the time of drawing up the prospectus and even thereafter, usually not know the identity of these investors on the second level.

The investors on the third level purchase the securities from the relevant financial intermediary – without entering into any contractual relationship with both, the Underwriter and the issuer. Some of these investors may be retail (end) investors, some may be financial intermediaries themselves, in turn distributing the securities to even further investors.

Q3: Do you agree with ESMA's understanding of retail cascades and in particular that the terms and conditions of the offer by the intermediaries may not differ from the terms and conditions in the prospectus or final terms? If not, please specify which terms and conditions may differ from those stated in the prospectus or final terms and who would be responsible and liable for such information.

Response: As described above, the DDV does not agree with ESMA's understanding of retail cascades and is extremely concerned that ESMA's assumption made for the concept of retail cascades does not recognise the characteristics of a typical retail cascade.

The issuer (or the person responsible for drawing up the prospectus) does neither have information on each of the financial intermediary involved on the various levels nor on the terms and conditions of the offer made by these intermediaries, in particular made by *de facto* distributors, which are not acting in association with the issuer.

Consequently, and since the issuer (or the person responsible for drawing up the prospectus) is not able to already include information on each of the various levels

within the retail cascade in the prospectus, the terms and conditions of the offer by the intermediaries may, in particular in terms of the identity of the distributor, any allocation and the pricing of the securities, differ from the terms and conditions in the prospectus or final terms prepared by the issuer (or the person responsible for drawing up the prospectus).

In fact, information on the identity of the distributor, any allocation and the pricing of the securities may effectively only be given by the relevant financial intermediary, interfacing with the individual investor and whose client that investor is, at the time of its (sub-)offer. Since this information forms an essential part of the relevant purchase agreement entered into between the distributor and the investor and, consequently, is to be communicated by the distributor, the distributor would be responsible and liable for any such information.

Q4: Can you provide examples of scenarios whereby the price would differ from that set out in the prospectus? Would you deem this to be a change of the terms and conditions?

Response: The DDV agrees with ESMA's understanding that the (market) price of a security, in particular of structured securities, continuously fluctuates in accordance with prevailing market conditions (including the value of the underlying, if any, expected income/dividends from the underlying, if any, as well as general interest rates).

Consequently, the selling price set out in the prospectus is only accurate at the time of the actual pricing of the security or during a specific subscription period. Thereafter, the price of a security continuously fluctuates and, hence, differs from that set out in the prospectus

In line with ESMA, the DDV also considers that adjusting the actual selling price in accordance with prevailing market conditions does not constitute a change of the terms and conditions of the offer.

Q5: What information required according to the Prospectus Regulation cannot be provided in a prospectus or base prospectus/final terms in case of retail cascades but is only provided by the intermediary at the time of the sub-offer? How and when is such information communicated to the investor? Please specify and explain.

Response: As described in our response to Question 4, in particular information on the identity of the distributor, any allocation and the pricing cannot be provided in a prospectus or base prospectus/final terms but is only provided by the intermediary at the time of the sub-offer.

Such information is to be communicated to the investor by the financial intermediary as an essential part of the relevant purchase agreement entered into between the distributor and the investor.

Q6: Do you consider it necessary to clarify in the prospectus who is responsible for information that is provided by the intermediary to the investor?

Response: In the DDV's view it is not necessary to clarify in the prospectus who is responsible for information that is provided by the financial intermediary to the investor.

Whilst the issuer (or the person responsible for drawing up the prospectus) is in accordance with the applicable prospectus liability regime responsible for the contents of the prospectus, the financial intermediary is responsible for any information given by it to the investor. This in particular holds true where the financial intermediary has given investment advice to the investor. Such "duality" of liability (i.e. the liability of issuer on the one hand and the liability of the financial intermediary on the other hand) is obvious to the investor and no clarification in this regard is necessary in the prospectus.

In such context, the DDV had expressly welcomed the proposal that there should be a comparative table of the prospectus liability regimes in the different Member States. The DDV now recognises that ESMA had regrettably decided to leave section 5 of its Mandate to a further stage.

Q7: Do you agree that the period for which consent to use a prospectus may be granted cannot extend beyond the validity of the prospectus and the period in which a supplement is possible according to Article 16 Prospectus Directive? If not, please specify how in particular a standalone prospectus can be kept valid once the period according to which a supplement is possible has lapsed.

Response: The DDV agrees with ESMA's understanding to the extent that the period for which consent to use a prospectus may be granted cannot extend beyond the validity of the prospectus.

The DDV, however, does not agree with ESMA's proposal to additionally limit the period for which consent may be granted to "the period in which a supplement is possible according to Article 16 Prospectus Directive", i.e. to the period between the approval of the prospectus and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later.

In the DDV's view such limitation of the use of a prospectus by further financial intermediaries seems to not only conflict with Article 9 paragraph 1 of the amended Directive (please see our response to Question 8), but would also disproportionately increase potential liability of distributors, relying on the prospectus drawn up by the issuer (or the person responsible for drawing up the prospectus) for these purposes.

In particular *de facto* distributors, which do not enter into a contractual agreement with the issuer for the purposes of distributing the securities, do not know when the issuer intends to finally close its offer to the public or whether a supplement to the prospectus would be necessary. Consequently, ESMA's proposed (additional) limitation to "the period in which a supplement is possible according to Article 16 Prospectus Directive" would result in distributors, in particular *de facto* distributors, not being able to know – and having to assume the resulting liability vis-à-vis the investors – whether they can (still) rely on the existing prospectus, i.e. whether, as proposed by ESMA, a supplement to the prospectus is (still) possible.

Such uncertainty would clearly jeopardise the Amending Directive's and ESMA's intention to entitle financial intermediaries to rely upon the initial prospectus published by the issuer (cf. Recital 10 of the Amending Directive).

Q8: In relation to a standalone prospectus, do you agree that once the offer which is the subject matter of the initial prospectus has been closed, financial intermediaries subsequently offering the securities in a retail cascade should prepare a new prospectus which could incorporate by reference the issuer's initial prospectus?

Response: The DDV does not agree with ESMA's understanding, in particular since such limitation of the use of a prospectus by further financial intermediaries seems to conflict with Article 9 paragraph 1 of the amended Directive.

Pursuant to such Article, "a prospectus shall be valid for 12 months after its approval for offers to the public [...]", thereby explicitly allowing for several offers (and not only to "the offer which is the subject matter of the initial prospectus").

This understanding of the DDV is further supported by Recital 10 of the Amending Directive, explicitly stating that "financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer [...] as long as this is valid and duly supplemented [...]".

Consequently, and as long as the prospectus is valid, financial intermediaries subsequently offering the securities in a retail cascade should be able to rely on the existing prospectus, in particular since the issuer has give its consent for these offers; please see the section "Consent addressed to any distributor it may concern" above.

Q9: Is it the case that the identities of the financial intermediaries, the conditions attaching to the consent and the duration of the consent are generally known at the time of the approval of the prospectus or at the time of filing the final terms? At which stage do you generally determine the precise way of distribution including the decision of which financial intermediaries to use for a specific offer?

Response: As described in the section "General comments" above, the issuer (or the person responsible for drawing up the prospectus) does, at the time of drawing up the prospectus and even thereafter, usually not know the identities of the financial intermediaries involved on each of the various levels of the retail cascade.

Q10: Is it common practice for agreements with financial intermediaries to be finalized following the approval of the prospectus or the filing of final terms? Can you estimate how often this would happen?

Response: In DDV's view, it is common practice for agreements with the financial intermediaries to be finalized following the approval of the prospectus or the filing

of final terms provided that the financial intermediaries distributing the securities are known to the issuer.

As also described in the section "General comments" above, in particular *de facto* distributors do not enter into a contractual agreement with the issuer for the purposes of distributing the securities.

Q11: Given the fact that in a retail cascade the responsibility of the issuer for the content of the prospectus is subject to its consent to use the prospectus such consent is crucial for the whole prospectus responsibility regime. Therefore ESMA believes that the consent to use the prospectus needs to be public, and furthermore, that it should be stated in the prospectus as is also the case for the general responsibility statement. Do you agree with ESMA's approach to include such consent in the prospectus or base prospectus/final terms?

Response: In DDV's view, such publication of the consent should not be mandatory, since the consent is the content of a bilateral agreement between the issuer or the person responsible for drawing up the prospectus and the financial intermediary used by it to distribute the securities.

Since in particular, the written agreement and the consent do not generate an additional liability, the DDV does not consider the consent as crucial for the whole prospectus responsibility regime – neither for reasons of investor protection nor for any public interest.

Such view is supported by Recital 10 of the Amending Directive, pursuant to which the consent should be given in a written agreement between the parties, enabling assessment by the relevant parties (i.e. not by the investors) of whether the resale or final placement of securities complies with the agreement.

In any case, a publication of the consent should not be included in the prospectus or base prospectus/final terms. Such inclusion would, in particular, jeopardize the flexibility of the issuer (or the person responsible for drawing up the prospectus) in practice often needed in the context of (large) capital market transactions. If necessary at all, publication of the consent should be made in a manner provided for in Article 14 paragraph 2 of the amended Directive, e.g. on the website of the issuer (or the person responsible for drawing up the prospectus) and then be filed for storage with the competent authority.

Q12: If the above elements are known at the time of approval of the prospectus or the time of filing the final terms, what are the disadvantages (if any) for including this information within the prospectus or final terms?

Response: Any inclusion of the consent as proposed by ESMA in the prospectus or final terms would – to the extent possible (please see the description of the distribution of debt and equity securities via a retail cascade in the section "General comments" above) – result in a distortion of competition amongst the distributors without creating any advantages for investors.

Q13: ESMA believes that the means of publication to be used in relation to the existence of a consent and any conditions attached to it should allow investors and competent authorities to clearly determine the responsibilities of the persons involved. Instead of including the above elements within the prospectus do you believe that there are any other methods of publication for this information that would also provide sufficient transparency and legal certainty? If yes, please specify.

Response: If necessary at all, publication of the consent should be made in a manner provided for in Article 14 paragraph 2 of the amended Directive, e.g. on the website of the issuer (or the person responsible for drawing up the prospectus) and then be filed for storage with the competent authority.

The publication on the website would provide for sufficient transparency, whilst the following filing for storage with the competent authority would ensure legal certainty.

Q14: Do you consider a supplement necessary in relation to information on retail cascades? Please explain and justify your position, also taking into account different typical situations of retail cascades and any effect such retail cascade related information may have on the assessment of the securities.

Response: In the DDV's view and since the consent should not be included in the prospectus or, if mandatory, by using an "open" consent only (please see the description of the distribution of debt and equity securities via a retail cascade in

the section "General comments" above), no supplement is necessary in relation to information on retail cascades.

In any case, the DDV does not consider the appointment of financial intermediaries after the approval of a prospectus but before the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs later, as a significant new factor within the meaning of Article 16 of the amended Directive.

This view is based on the DDV's understanding that the appointment of additional financial intermediaries is, in any case, not capable of affecting the assessment of the securities themselves by investors. In addition, a supplement would trigger a right of withdrawal for investors, which does not appear appropriate in a situation where only a new distribution agreement has been closed between the issuer and a financial intermediary.

Q15: In case of standalone prospectuses:

Q15a) If a supplement is not required, how should the consent to use the prospectus be published?

Q15b) If a supplement is not required, how can it be safeguarded that the investor and the competent authority in the home member state but also the competent authorities in any host member states learn of the new information? Please explain and justify your position, also taking into account issues as e.g. language requirements, filing of such information with the relevant competent authorities and responsibility issues that may arise in respect of such disclosures outside of a prospectus.

Q15c) Without prejudice to the requirement of a supplement, when information on a retail cascade is not known at the time of approval of a prospectus, do you consider it necessary to indicate in a prospectus how such information on retail cascades will be published? Should there be any specific regulation or guidance detailing by what means such information should be published (e.g. requiring publication in accordance with Article 14.2. Prospectus Directive)?

Response: In the DDV's view and since the consent should not be included in the prospectus or, if mandatory, by using an "open" consent only (please see the section "General comments" above), no supplement is necessary.

If necessary at all, publication of any appointment of additional financial intermediaries and, consequently, of the extension of the consent to additional financial intermediaries should be made in a manner provided for in Article 14 paragraph 2 of the amended Directive, e.g. on the website of the issuer (or the person responsible for drawing up the prospectus) and then be filed for storage with the competent authority. The publication on the website would provide for sufficient transparency, whilst the following filing for storage with the competent authority would ensure legal certainty.

For the purposes of safeguarding the investors, the DDV considers an indication in the prospectus how such information on retail cascades, i.e. on additional financial intermediaries, will be published, as useful.

B. INFORMATION ON TAXES WITHHELD AT SOURCE

Q1: Under the circumstances where taxes on the income of the securities have been withheld at source in a country where the issuer is not acting nor has appointed a paying agent, was such information on withholding tax indeed not disclosed in the prospectus? If necessary to correctly understand the context, please provide additional legal explanations on the withholding tax mechanism.

Q2: Are there cases where a tax on the income of the securities would be withheld at source, which however would not be required to be disclosed in the prospectus in accordance with the current wording of the Prospectus Regulation on tax information? If yes, please provide specific examples.

Q3: Are there cases where the Prospectus Regulation currently requires information on taxes on the income of the securities withheld at source, which will not be levied in practice in that specific case? If so, please provide specific examples and identify any difficulties.

Q4: What information on withholding tax should be required by the Prospectus Regulation in order to ensure that the prospectus provides investors with sufficient information to know the "net" amount that they will receive in accordance with the terms of the securities?

Q5: In cases where tax treaties mitigate or prevent applicable double taxation, do you consider it useful for investors to be informed of this fact?

Response: The Prospectus Regulation requires disclosure in the prospectus of information on taxes from the securities withheld at source in respect of the country of the registered office of the issuer and the country(ies) where the offer is being made or admission is being sought.

ESMA stated in its FAQ No 45 that this disclosure "refers to information on any amount withheld at source, that is, by the issuer or by any agent appointed by it for the purpose of making payment on the securities". As a result and where the ultimate investor holds securities through a custodian or a clearing system, the

issuer (or the person responsible for drawing up the prospectus) does not have to describe in the prospectus any withholding that may be made by that custodian or clearing system when passing on any payment on the securities.

Such understanding is in line with the general interpretation of the Prospectus Regulation in Germany. The expression "at source" clearly indicates that only a taxation within the sphere of the issuer is meant and not the taxation within the sphere of the investor. Only the issuer is "at source". As a result, the DDV is of the view that ESMA's rationale of FAQ No 45 should explicitly be reflected in the Prospectus Regulation.

Any broadening of ESMA's (previous) understanding of "taxes from the securities withheld at source" would lead to excessively burdensome tax disclosure to be given by the issuer (or the person responsible for drawing up the prospectus), thereby jeopardising ESMA's mandate to reduce the (administrative) burdens.

The relevant provisions of the Prospectus Regulation do not intend to require extensive disclosure of the individual tax treatment in relation to each investor and any changes.

C. INDEX COMPOSED BY THE ISSUER

Q6: Do you agree with ESMA's observation that it is not a common market practice to issue, under prospectuses prepared for the purpose of the Prospectus Directive, derivative securities linked to an index composed by another issuer? If not, please provide specific examples.

Response: The DDV does not agree with ESMA's observation. In the DDV's view it is a common market practice to issue, under prospectuses prepared for the purpose of the Prospectus Directive, derivative securities linked to an index composed by another issuer.

Q7: Do you agree to keep the current requirement of the Prospectus Regulation to disclose the description of an index composed by the issuer in the prospectus? If yes, please feel free to provide additional arguments. If not, please provide the reasoning behind your position.

Response: As already stated in the DDV's formal response of to your Consultation on ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU published on 15 June 2011 (ID Ref: 45030011303-07), the DDV considers that there is no reason why indices composed by the issuer should be treated differently from indices composed by external service providers. This proposal would lead to a manifestly unfair position where all market participants are free to use an index unrestricted except for its owner.

For instance, this proposal would have placed Goldman Sachs entities into an unfavourable position when using its well established GSCI index family as the underlying for its securities (prior to selling this business) which other market participants would have been free to use with no additional restrictions.

Although the DDV shares ESMA's general approach that specific disclosure may be made in relation to proprietary indices, the DDV proposes to include the relevant description of the proprietary index in the relevant final terms. At the time of drawing up the base prospectus, the issuer (or the person responsible for drawing up the base prospectus) does – similar to the use of indices composed by external service providers – neither know which proprietary index will actually be used as underlying for the securities under the base prospectus nor where information

about the index actually used can be obtained. Consequently, any specific disclosure in relation to proprietary indices may in practice only be made in the relevant final terms.

Q8: Do you agree that Item 4.2.2. of Annex XII needs to be revised to the extent that an index description should also be required for an index composed by any entity belonging to the same group as the issuer, or by an entity acting in association with, or on behalf of, the issuer? If not, please provide your reasons.

Response: The DDV does not agree with ESMA that Item 4.2.2. of Annex XII needs to be revised to the extent that an index description should also be required for an index composed by any entity belonging to the same group as the issuer, or by an entity acting in association with, or on behalf of, the issuer.

Any such revision would result in not only a manifestly unfair position of the issuer owning the index, but also of any issuer in the same group as the index owner.

* * *