



The Law Society
of England and Wales

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

*Response of the Law Society of England and Wales
and the City of London Law Society*

ETI Registration number: 24118193117-34

SUPPORTING solicitors

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

Response on behalf of the Law Society of England and Wales and the City of London Law Society

Introduction

1. This response has been prepared on behalf of the Company Law Committee of the Law Society of England and Wales and the City of London Law Society Company Law Committee.
2. The Law Society of England and Wales is the representative body of over 120,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of the Company Law Committee. The Committee is made up of senior and specialist corporate lawyers
3. The City of London Law Society (CLLS) represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees and in this case the response has been prepared by the CLLS Company Law Committee.
4. This response comprises the views of the Committees on key issues which should determine the approach of ESMA in responding to the Commission with technical advice in relation to possible delegated acts under the Amended Prospectus Directive. Our response is informed by our work in relation to equity issues and with a view to ensuring that the equity capital markets in Europe are fair, efficient and competitive.
5. We understand that there is a very short timescale to produce the delegated acts to allow implementation of the Amended Prospectus Directive. However we are concerned that the current process appears to result in a larger number of short consultations rather than allowing time for a full discussion of the key issues. It would be very helpful to have a clear timeline for the period to the July 2012 implementation date. As a large part of the work relating to summaries seems to be required to take account of the Commission's work on Packaged Retail Investment Products (PRIPs) we query whether that work should be completed before this work is undertaken.

Format of the final terms to the base prospectus (Article 5(5))

6. We are not commenting on this section of the consultation.

Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5))

Q8: Do you agree with our modular approach?

7. Yes.

Q9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?

8. We agree that it is helpful to specify those points which are considered likely to be 'key'. We do not agree that it is necessary for an issuer to include information on each of these points simply because the underlying prospectus includes such information. It should still be appropriate to conclude that the information in relation to that point is not key information, as this is defined for the purposes of the summary, and therefore should not or should not all be included in the summary. We refer to the test for inclusion of points in paragraph 81 of your Consultation Document:

"In preparing the requirements for disclosure in summaries, the test for inclusion of "Points" is whether that information is key information in the context of Art 5.2 of the Amended Prospectus Directive – "[a summary's] content should convey the key information of the securities concerned in order to aid investors when considering whether to invest in such securities.""

9. We would suggest that this formulation is included as an overriding test for the inclusion of information under each of the points (please see our suggested amendments in Appendix 1).

10. We agree that the five sections appear correct and that the points are such that information which is likely to be key to investors should be suitable for inclusion under one of the points. We cannot foresee what information might be included in future prospectuses and might be relevant for inclusion in the associated summary. We would therefore suggest that the approach taken in excluding 'other information' is wrong. It should certainly be the case that the 'other information' heading should be one that is used infrequently.

Q10: Do you agree that we have provided sufficient flexibility for issuers and their advisers in drafting summaries – whilst ensuring that summaries are brief and provide the reader with the necessary comparability between prospectuses?

11. We think more flexibility is required, as mentioned in Q9 above (a) to allow inclusion of other key information and (b) to allow information under any of the Points to be omitted if it is not "key".

12. We do not believe that the summary which would be produced in accordance with the requirements as drafted would be brief. We think, in particular, that it is important to include an overriding test of what is 'key' in relation to each of the points. See the response to Question 9 above.

Q11a: Do you agree that our approach adequately limits the length of summaries?

13. No we do not, because the points which are specified are mandatory. We expect summaries under this regime to be significantly longer, particularly given the absence of a word limit.

Q11b: What is “short” for a summary for: (i) an issuer; & (ii) an investor?

14. For an issuer who might face liability in relation to a prospectus, a summary will need to be long enough to include all the information that a judge might find should have been included. In the absence of a specific limit the summary is therefore likely to be long.

15. We believe that different investors will have different views on the level of detail they would wish to receive in the summary. We do not believe that even a revised form of summary will significantly increase protection of retail investors, particularly in relation to risky or complex securities, and that this is best achieved through regulation under MiFID rather than under the Prospectus Directive.

Q11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?

16. We do. We believe that Recital 21 to the Prospectus Directive should still be regarded as limiting summaries to 2500 words as it has not been specifically removed by the Amending Directive or its recitals.

17. We believe that any limit would need to be expressed as a limit on the number of words although there could be flexible application of that by the competent authorities in the case of very complex prospectuses.

18. It would be important to clarify the liability regime.

Q12a: Do you agree with our proposed content and format for summaries?

19. No.

20. Paragraph 99 of the Consultation Paper states that:

"A summary should be a fresh assessment by the issuer of the key information in the prospectus. It should not simply be a copy-out of text that appears in the main body of the prospectus."

21. We do not think it is appropriate to require information which is being presented as the key information from a longer document to be re-written, as this will make it very difficult to ensure that the summary is always consistent with the rest of the prospectus and is likely to encourage litigation on the basis that the summary is claimed to be misleading or inconsistent with the prospectus.

22. We do not think it is appropriate to prohibit the use of cross-references. It is always helpful when reading a summary to be able to cross-refer to more information on any point which the reader feels is of interest. As no 'boilerplate' is to be included in summaries it will be essential to be able to refer to such information.

23. We do not think that preventing the inclusion of risk factor headings is appropriate. We do not see any benefit in summarising risk factors. If risk factors can be written more succinctly they should be so written in the prospectus itself. We believe that the current practice of including the headings in the summary is more than adequate. We think there will be significant work involved in attempting to comply with a further summarising requirement.

Q12b: Are there other pieces of information which should appear in summaries? and are there disclosure requirements in our tables which are not needed for summaries?

24. See the response to Question 9.

Q13: Is there a need to augment Point B.9 with additional disclosure requirements, such as key assumptions, or to state that the forecast is reported on in the main body of the prospectus?

25. We believe that a better solution would be to cross-refer to the forecast in the main body of the prospectus.

Q14: Do you agree with our proposal for amending Article 3, 3rd paragraph, Prospectus Regulation?

26. Yes.

Q15: Could you estimate the change in costs that will arise from the proposals in this document for summaries?

27. We cannot as all prospectus drafting exercises are different. We believe that the key factors which will increase cost are: the need to re-write information for the summary (paragraph 99 of the Consultation Document), the removal of the word limit and the fact that the points/ modular system will not adequately limit length (paragraph 96 of the Consultation Document).

Proportionate disclosure regime (Article 7)

Proportionate disclosure regime regarding rights issues

Q16: Do you agree with the proposal to consider that “near identical rights” should have the same characteristics than pre-emption rights? Do you agree with the definition given in paragraph 117? Are there any other characteristics which should be taken into account?

28. We agree with the principles set out in paragraph 115. We attach some proposed wording in Appendix 2 which we believe more accurately reflects these principles. We believe the current drafting is too narrow in that it still in effect would only allow rights issues carried out in accordance with statutory pre-emption rights to qualify. In particular the Amending Directive does not require there to be any compensatory element to the secondary issue in question and therefore we believe that it is incorrect for the

implementing acts to include such a restriction on the application of the proportionate regime. In the context of the UK, the proportionate disclosure regime should not be confined to rights issues and, consequently, open offers should also be capable of falling within that regime.

Q17: Do you agree that there should be only one single proportionate regime and not two separate regimes, one for regulated markets and one for MTFs?

29. Yes.

Q18: Do you agree with the proposal to consider that appropriate disclosures requirements for MTFs would include, as a minimum, obligations to publish:

- annual financial statements and audit reports within 6 months after the end of each financial year,
- half-yearly financial statements within a limited deadline after the end of the first six months of each financial year, and
- inside information?

30. We believe that this should be decided on a market-by-market basis by looking at those MTFs and determining if their rules are approximately equivalent on these specified points.

Q19: What should be the maximum deadline for publishing half-yearly financial statements?

31. 4 months.

Q20: For issuers listed on MTFs where there is no disclosure requirements on board practices and remuneration, do you agree that this information should be included in the prospectus?

32. We do not think that it is necessary to include requirements in addition to those included in the 4th and 7th Company Law Directives. The rationale for the proportionate approach is that other shareholders will be buying in the market based on that information.

Q21: Are there any other disclosure requirements not listed above which should be required for MTFs?

33. No.

Q22: Regarding the appropriate rules on market abuse, do you agree that there should be provisions in order to prevent insider trading and market manipulation? Do you consider it necessary to require that the rules of the MTFs fully comply with the provisions of the Market Abuse Directive?

34. No. We do not think that the rules of the MTFs should be required to be fully comply with the provisions of the Market Abuse Directive. We would suggest that there should be an obligation to announce price sensitive information and that insider dealing and market manipulation rules should apply. We suggest that the relevant competent authority is asked to list those MTFs in respect of which the requirement to have equivalent rules is

satisfied. We think the test should be proportionate equivalence not that the rules are identical. We do not think that there should be a wider extension of MAD MTFs as a gateway to reduced disclosure. The increased regulatory burden (e.g. insider list requirement) would not meet the overall aims of the proposal to reduce the regulatory burden on issuers. We think that the extension of MAD to MTFs should be considered as part of the MAD review which we understand is likely to result in a legislative proposal in October 2011.

Q23: Are there any other EU Directive or Regulation not listed in paragraph 122 which should be taken into account?

35. No.

Q24: As regards MTFs with appropriate disclosure requirements and market abuse rules, do you agree that in order to benefit from the proportionate prospectus, issuers should be required to make available their periodic and ongoing disclosures in a way that facilitates access to information by posting them on their websites?

36. Yes, either on their websites or on any other publicly available equivalent.

Q25: Do you agree with the approach proposed in order to determine which items to delete from Annexes I and III of the Prospectus Regulation?

37. We agree with the rationale as set out in paragraph 121 of the Consultation Document:

"The rationale behind adapting prospectuses for rights issues is that because the issuer is listed, a certain amount of information will already be available to shareholders and the public in general. The wording of section 3.3 of the Mandate from the EC states: "... ESMA is invited to identify items which could possibly be considered redundant ... considering ... a certain amount of information is already available to the investors and the financial markets"."

38. The equity market in Europe would benefit from an approach that resulted in documentation closer to the pre-2005 regime and which justifies shorter disclosure for rights issues on the basis that the totality of information available in respect of an already listed company (IPO prospectus, periodic reporting, ad hoc reporting, analysts' coverage) and the fact that there is a market price for the securities that provides the background against which investors make their decision to participate and therefore requires only an abbreviated prospectus.

39. As a practical point, if items are deleted from the annexes for this purpose we would like the paragraph numbers to remain constant to avoid confusion.

Q26: Do you agree with the proposed items which could be deleted from Annex I (Minimum Disclosure Requirements for the Share Registration Document) and Annex III (Minimum Disclosure Requirements for the Share Securities Note) of the Prospectus Regulation?

- It should not be necessary to include financial information already made available to the market. Thus, in cases where the relevant financial information has already been made available by an issuer, disclosure of the information noted at paragraphs 15.1, 15.3,

15.4.1, 15.6 and 15.7.1 should be excluded. Paragraph 15.5 will generally be inapplicable.

In addition, given the effect on an issuer's balance sheet of a pre-emptive cash issue, it should not be necessary to include the pro forma information identified at paragraph 15.2. If pro forma information is included, an independent report should not be required in the case of a pre-emptive cash issue.

- Certain disclosures required under paragraph 5 (Business overview) should be removed as stated below.

“5.1. Principal Activities

A brief description of the issuer's operations and principal activities...”

“5.2. Principal Markets

A brief description of the principal markets in which the issuer competes...”

“5.4. If material to the issuer's business or profitability, summary information regarding the extent to which the issuer is dependent, on patents or licences, industrial, commercial or financial contracts or new manufacturing processes.”

The reason the removal is requested is that the business review in the audited financial statements of an issuer is required to contain a description of the above matters. This requirement is derived from Article 46(1) Directive 78/660/EEC (substituted by Article 1(14)(a) Directive 2003/51/EC) and Article 46(2) Directive 78/660/EEC.

Where section 5 requires disclosure of significant changes since the latest published audited financial statements, these requirements should remain.

- The disclosures required under paragraph 6 (Organisational Structure) should also be removed.

The reason the removal is requested is because the relevant information is required to be disclosed in an issuer's audited financial statements. This requirement is derived from Article 43(1)(2), Directive 78/660/EEC.

Q27: Do you consider that the language regime could be a concern in terms of investor protection in case of passporting? Do you consider that the proportionate disclosure regime should be conditional upon compliance with the language requirements of Article 19 of the Prospectus Directive?

40. No.

Q28: In case of issuers listed on regulated markets, do you consider that disclosures on remunerations required by item 15 of Annex I of the Prospectus Regulation are redundant with information already made available to shareholders and the public in general and could therefore be deleted from the proportionate prospectus for rights issues?

41. Yes.

Q29: Considering the objective to enhance investor protection, do you agree that information regarding the issuer's activities and markets and historical financial information can not be omitted?

42. Yes.

Q30: Do you consider that, in order to reduce administrative burden, incorporation by reference could be a solution? Do you have any suggestions to improve the incorporation mechanism?

43. We would prefer items to be removed from the proportionate prospectus by the exclusion from the annex, rather than incorporation by reference.

Q31: Do you agree with the proposals to require basic and updated information regarding the issuer's principal activities and markets?

44. We do not agree that there should be any requirement to include basic information on principal activities which should fall within that information which is already available to the public in general, see answers to Question 25 and 26.

Q32: Do you agree with the proposal to require only the issuer's historical financial information relating to the last financial year?

45. See our answer to Question 26. It should not be necessary to include financial information already made available to the market

Q33: Do you agree with the proposal to redraft certain items of Annex I and III of the Prospectus Regulation as proposed in paragraphs 132 to 134? Are there any other items which should be redrafted?

46. See our answer to Question 26.

47. Under paragraph 132, the word "statements" should be added after "audited financial" in the proposed wording for paragraph 5.2.1.

Q34: Do you agree with the proposal to include a statement in the proportionate prospectus drawing attention to the specific regime and level of disclosure applicable to rights issues?

48. Yes. The warning should be amended so it does not refer only to rights issues, but instead to all pre-emptive offers covered by the proportionate disclosure regime.

Q35: Do you agree with the schedule for rights issues presented in Annex 2 of this consultation paper?

49. See our answer to Question 26.

Q36: What are the costs for drawing up a full prospectus? What are the most burdensome disclosure requirements? Can you provide any data? Can you assess the costs that the proposed proportionate prospectus will allow issuers to save?

50. Following the approach set out in question 26 will, we believe, make prospectus preparation significantly cheaper. If a proportionate prospectus can be produced in a week and can be made to be only 20 pages long, then it will be much cheaper to produce.

Proportionate disclosure regime regarding SMEs and issuers with reduced market capitalisation

Q37: Do you agree that a full prospectus should always be required for an IPO and for initial admission to a regulated market (as described in paragraph 141 above)?

Q38: Do you agree with the proposal summarized in the table in paragraph 141?

Q39: Do you agree that there should be only one schedule for a proportionate prospectus for both unlisted and listed SMEs and Small Caps or do you believe that further consideration should be given to having a separate regime for unlisted companies, dealt with under the proposed revision to MiFID?

Q40: Can you provide data on the average costs for SMEs and Small Caps to draw up a prospectus? What are the most burdensome parts of a prospectus to produce?

Q41: Do you consider that the three items identified in paragraph 147 (the OFR and the requirements to include a statement of changes in equity and a cash flow statement when the audited financial statements are prepared according to national accounting standards and to produce interim financial statements when the registration document is dated more than nine months after the end of the last audited financial year) could be omitted without lowering investor protection?

Q42: Do you agree with the items ESMA proposes to delete and to redraft listed in Annex 4 and the proportionate schedule for the share registration document presented in Annex 5?

Q43: Are there any other items which could be deleted or redrafted? Please justify any suggestions, including, if possible, the costs that would be saved and the impact on investor protection.

Q44: Taking into account the items which ESMA proposes to delete or redraft as per Annex 4, do you consider the proportionate disclosure regime for SMEs/Small Caps could strike the right balance between investor protection, the amount of information already disclosed to the markets and the size of the issuers?

Q45: Given the number and nature of the items ESMA proposes to delete and to redraft listed in Annex 4, do you consider the proposal would suppose a significant reduction of the costs to access financial markets for SMEs and Small Caps? Can you estimate the costs that the proposed proportionate prospectus will allow SMEs and Small Caps to save?

Proportionate disclosure regime regarding credit institutions and other issuers

Q46: Do you agree with the proposal to require historical financial information covering only the last financial year for credit institutions issuing securities referred to in Article 1(2)(j) of the Prospectus Directive?

Q47: "In performing its work on the proportionate disclosure regime, ESMA has sought to identify all possible omissions with regards to content of prospectuses as part of this Consultation Paper, however do you believe that further omissions are possible particularly with respect to the areas indicated in the request for advice by the Commission?"

51. We endorse the approach taken by ESMA in relation to a proportionate disclosure regime relating to SMEs. We believe that there should be only one schedule for a proportionate

prospectus for both unlisted and listed SMEs and Small Caps but that that schedule will be significantly different to the proportionate regime for a rights issue.

APPENDIX 1

Relating to Question 9

Part 4.V

Format and Contents of Summaries

for

Annexes I to XVII of the Prospectus Regulation

NB

- *The columns "Source" do not form part of the advice on the requirements for summaries - they are included as an aide to drafting and appear in italics in the tables.*
- For ease of reading the Annexes are referred to below with Arabic numerals in addition to their Roman characters.

Guide to using the tables

1. Summaries are constructed on a modular basis according to the annexes from the Prospectus Regulation on which the prospectus has been based. For example, the summary for a share prospectus would disclose the information required for the points for annexes I and III.
2. Each summary will be made up of five tables as detailed below.
3. For each point the summary should disclose: the point's number; the disclosure requirement; and the disclosure. Points should appear in the summary in their numeric order.
4. Where a point is not applicable to a prospectus the point should not appear in the summary. This would ensure that summaries do not contain "*not applicable*" for any point.
5. Summaries may contain cross-references to specific parts of the prospectus.
6. Summaries for prospectuses using new annexes relating to proportionate disclosure should treat as non-applicable Points correlating to items not required for the proportionate prospectus annex.
7. In preparing the requirements for disclosure in summaries, the test for inclusion of information under each point specified in this [part] is whether that information is key information in the context of Art 5.2 of the Amended Prospectus Directive – “[a summary’s] content should convey the key information of the securities concerned in order to aid investors when considering whether to invest in such securities.”

Section A - Introduction and warnings

Annexes	Point	Disclosure requirement	Source
All	A.1	This summary is drawn up to facilitate comparability of the summaries of similar securities and sets out the key information about the [securities] in order to aid investors when considering whether to invest in such securities.	Mandate Art 5.2 PD
All	A.2	It provides the key information that retail investors need in order to be able to decide which offers and admissions of securities to consider further.	Recital 15 Amending Directive
All	A.3	Warning that: <ul style="list-style-type: none"> • <i>[this] summary should be read as introduction to the prospectus;</i> • <i>any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor;</i> • <i>where a claim relating to the information contained in [the] prospectus is brought before a court, the plaintiff investor might, under the national legislation of the Member States, have to bear the costs of translating the prospectus before the legal proceedings are initiated; and</i> • <i>civil liability attaches only to those persons who have tabled the summary including any translation thereof, and applied its notification, but only if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities.</i> 	Art 5.2 PD Art 6.2 PD

Section B- Issuer and any guarantor

Annexes	Point	Disclosure requirement	Source
1,4,7,9,11	B.1	The legal and commercial name of the issuer.	<i>Annex 1 item 5.1.1 Annex 4 item 5.1.1 Annex 7 item 4.2 Annex 9 item 4.1.1 Annex 11 item 4.1.1</i>
1,4,7,9,11	B.2	The domicile and legal form of the issuer, the legislation under which the issuer operates and its country of incorporation.	<i>Annex 1 item 5.1.4 Annex 4 item 5.1.4 Annex 7 item 4 5 Annex 9 item 4.1.4 Annex 11 item 4.1.4</i>
1	B.3	A description of, and key factors relating to, the nature of the issuer's current operations and its principal activities, stating the main categories of products sold and/or services performed and identification of the principal markets in which the issuer competes.	<i>Annex 1 item 6</i>
1,4,11	B.4	A brief description of the most significant recent trends affecting the issuer and the industries in which it operates.	<i>Annex 1 item 12 Annex 4 item 8.2 Annex 11</i>

Annexes	Point	Disclosure requirement	Source	
			<i>item 7.2</i>	
1,4,9,11	B.5	If the issuer is part of a group, a brief description of the group and the issuer's position within the group.	<i>Annex 1 item 7.1</i> <i>Annex 4 item 7.1</i> <i>Annex 9 item 6.1</i> <i>Annex 11 item 6.1</i>	
1	B.6	<p>In so far as is known to the issuer, the name of any person other than a member of the administrative, management or supervisory bodies who, directly or indirectly, has an interest in the issuer's capital or voting rights which is notifiable under the issuer's national law, together with the amount of each such person's interest.</p> <p>Whether the issuer's major shareholders have different voting rights.</p> <p>To the extent known to the issuer, state whether the issuer is directly or indirectly owned or controlled and by whom and describe the nature of such control.</p>	<i>Annex 1 items 18.1</i> <i>Annex 1 items 18.2</i> <i>Annex 1 items 18.3</i>	Amended to mirror the Annex 1 requirement.
1	B.7	<p>Selected historical key financial information regarding the issuer, presented for each financial year for the period covered by the historical financial information, and any subsequent interim financial period accompanied by comparative data from the same period in the prior financial year except that the requirement for comparative balance sheet information is satisfied by presenting the year end balance sheet information.</p> <p>This should be accompanied by a brief narrative description of significant change to the issuer's financial condition and operating</p>	<i>Annex 1 items 3.1 & 3.2</i> <i>Annex 1 item 9</i> <i>Annex 1 item 20.9</i>	It is not normal to summarise the OFR, which is generally complicated but informative. It would be difficult to provide a brief summary. We are not aware that this task is about changing the content of summaries, but is about standardising the content. On that basis we do not think KPIs or the period already covered by historical information should be included.

Annexes	Point	Disclosure requirement	Source	
		results subsequent to the period covered by the historical key financial information.		
1	B.8	Selected pro forma financial information, identified as such. All notes and assumptions should be [included/omitted] [and if omitted, cross references to them should be included]	<i>Annex 1 item 20.2</i>	'Selected' to conform to point B.7 on historical information. What is being provided is not a summary but selected highlights. It is important that the requirement clearly specifies the inclusion or omission of notes and assumptions rather than leaving the question to be answered on a case by case basis.
1,4,9,11	B.9	Where a profit forecast or estimate is made, state the figure.	<i>Annex 1 item 13</i> <i>Annex 4 item 9</i> <i>Annex 9 item 8</i> <i>Annex 11 item 8</i>	
1,4,9,11	B.10	A description of the nature of any qualifications in the historical financial information, including cross-references to the full descriptions of those qualifications.	<i>Annex 1 item 20.1 & 20.4.1</i> <i>Annex 4 item 13.3.1</i> <i>Annex 9 item 11.3.1</i> <i>Annex 11 item 11.3.1</i>	It will be helpful to investors to be directed to the detail of qualifications.
3	B.11	If the issuer's working capital is not sufficient for the issuer's present	<i>Annex 3 item 3.1</i>	The binary statement included in the consultation draft is CESR guidance only

Annexes	Point	Disclosure requirement	Source	
		requirements an explanation should be included.		<p>and should not be entrenched as a regulatory requirement.</p> <p>For the purpose of the summary investors should be entitled to assume that there is sufficient working capital, save if a contrary statement appears.</p>
4,9,11	B.12	<p><i>Use only the first paragraph of B. 7, plus:</i></p> <ul style="list-style-type: none"> • "A statement that there has been no material adverse change in the prospects of the issuer since the date of its last published audited financial statements or a brief description of any material adverse change." • "A brief description of significant change to the issuer's financial condition and operating results during or subsequent to the period covered by the historical key financial information." 	<p><i>Annex 4 item 3</i></p> <p><i>Annex 9 item 11</i></p> <p><i>Annex 4 item 8.1</i></p> <p><i>Annex 9 item 7.1</i></p> <p><i>Annex 11 item 7.1</i></p> <p><i>Annex 4 item 13.7</i></p> <p><i>Annex 9 item 11.6</i></p> <p><i>Annex 11 item 11.7</i></p>	
4,9,11	B.13	A brief description of any recent events particular to the issuer which are to a material extent relevant to the evaluation of the issuer's solvency.	<p><i>Annex 4 item 5.1.5</i></p> <p><i>Annex 9 item 4.1.5</i></p> <p><i>Annex 11</i></p>	

Annexes	Point	Disclosure requirement	Source
			<i>item4.1.5</i>
4,9,11	B.14	<i>B.5 plus:</i> "If the issuer is a dependent upon other entities within the group, this must be clearly stated."	<i>Annex 4 item 7.2</i> <i>Annex 9 item 6.2</i> <i>Annex 11 item 6.2</i>
4,9,11	B.15	A brief description of the issuer's principal activities stating the main categories of products sold and/or services preformed, including its competitive position.	<i>Annex 4 item 6</i> <i>Annex 9 item5</i> <i>Annex 11 item5</i>
4,7,9,11	B.16	<i>Use only the final paragraph of B.6</i>	<i>Annex 4 item12.1</i> <i>Annex 7 item 7.1</i> <i>Annex 9 item 10.1</i> <i>Annex 11 item 10.1</i>
5,13	B.17	A brief description of credit ratings assigned to an issuer or its debt securities at the request or with the cooperation of the issuer in the rating process.	<i>Annex 5 item 7.5</i> <i>Annex 13 item 7.5</i>
6	B.18	A brief description of the nature and scope of the guarantee including its terms and conditions.	<i>Annex 6 items 1 & 2</i>
6	B.19	Section B information about the guarantor as if it were the issuer of the same type of security that is the subject of the guarantee. Therefore	<i>Annex 6 item 3</i>

Annexes	Point	Disclosure requirement	Source	
		provide such information as required for a summary for the relevant annex.		
7	B.20	A statement whether the issuer has been established as a special purpose vehicle or entity for the purpose of issuing asset backed securities.	<i>Annex 7 item 4.1</i>	
7	B.21	A brief description of the issuer's principal activities including a global overview of the parties to the securitisation program including information on the direct or indirect ownership or control between those parties.	<i>Annex 7 items 5.1 & 5.2</i>	
7	B.23	Where, since the date of incorporation or establishment, an issuer has not commenced operations and no financial statements have been made up as at the date of the registration document, a statement to that effect.	<i>Annex 7 item 8.1</i>	
7	B.24	<i>Use only the first paragraph of B.7</i>	<i>Annex 7 item 8.2</i>	
7	B.25	Where an issuer has prepared financial statements give a statement that there has been no material adverse change in the prospectus of the issuer since the date of its last published audited financial statement or a brief description of any material adverse change.	<i>Annex 7 item 8.4</i>	
8	B.26	A brief description of the underlying assets including: <ul style="list-style-type: none"> • confirmation that the securitised assets backing the issue have characteristics that demonstrate capacity to produce funds to service any payments due and payable on the securities • a brief description of the general characteristics of the obligors and in the case of a small number of easily identifiable obligors, a general description of each obligor • a brief description of the legal nature of the assets • loan to value ratio or level of collateralisation 	<i>Annex 8 item 2</i>	
8	B.27	Where the assets comprise obligations that are not traded on a	<i>Annex 8 item</i>	

Annexes	Point	Disclosure requirement	Source	
		regulated market or equivalent market, a brief description of the principal terms and conditions of the obligations.	2.2.13	
8	B.28	Where more than 10 per cent of the assets comprise equity securities that are not traded on a regulated or equivalent market, a brief description of those equity securities.	<i>Annex 8 item 2.2.15</i>	
8	B.29	Where a valuation report relating to real property is included in the prospectus, a brief description of the valuation.	<i>Annex 8 item 2.2.16</i>	
8	B.30	Where the assets comprise equity securities that are admitted to trading on a regulated or equivalent market, a brief description of the securities.	<i>Annex 8 item 2.2.14</i>	
8	B.31	In respect of an actively managed pool of assets backing the issue a brief description of the parameters within which investments can be made, the name and description of the entity responsible for such management including a brief description of that entity's relationship with any other parties to the issue.	<i>Annex 8 item 2.3/2.3.2</i>	
8	B.32	Where an issuer proposes to issue further securities backed by the same assets a statement to that effect.	<i>Annex 8 item 2.4</i>	
8	B.33	A brief description of the structure of the transaction, including, if necessary, a structure diagram.	<i>Annex 8 item 3.1</i>	
8	B.34	A brief description of the flow of funds including information on credit enhancements.	<i>Annex 8 item 3.4</i>	
8	B.35	The name and a brief description of the originators of the securitised assets.	<i>Annex 8 item 3.5</i>	
8	B.36	The names and addresses and a brief description of any swap	<i>Annex 8 item</i>	

Annexes	Point	Disclosure requirement	Source	
		counterparties and any providers of other material forms of credit/liquidity enhancement.	3.8	
10	B.37	Information about the issuer of the underlying shares: <ul style="list-style-type: none"> • B.1 • B.2 • B.3 • B.4 • B.5 • B.6 • B.7 • B.9 • B.10 • D.4 	<i>Annex 10 items 1 to 25</i>	
10	B.38	Information about the issuer of the depository receipts: <ul style="list-style-type: none"> • "Name and registered office of the issuer of the depository receipts." • "Legislation under which the issuer of the depository receipts operates and legal form which it has adopted under the legislation." 	<i>Annex 10 items 26.1 & 26.3</i>	
15	B.39	The following information from Annex 1: <ul style="list-style-type: none"> • B.1 • B.2 • B.5 • B.6 • B.7 • B.8 • B.9 • B.10 	<i>Annex 15, preamble</i>	

Annexes	Point	Disclosure requirement	Source	
		<ul style="list-style-type: none"> • C.4 • C.8 • D.2 		
15	B.40	A brief description of the investment objective and policy which the collective investment undertaking will pursue with a description of the instruments used.	<i>Annex 15, item 1.1 and item 1</i>	
15	B.41	The borrowing and/or leverage limits of the collective investment undertaking. If there are no such limits, include a statement to that effect.	<i>Annex 15, item 1.2</i>	
15	B.42	A brief description of the regulatory status of the collective investment undertaking together with the name of any regulator in its country of incorporation.	<i>Annex 15, item 1.3</i>	
15	B.43	A brief profile of a typical investor for whom the collective investment undertaking is designed.	<i>Annex 15, item 1.4</i>	
15	B.44	A brief description of any investment restrictions which will apply to the collective investment undertaking.	<i>Annex 15, item 2</i>	
15	B.45	Where the main body of the prospectus discloses that more than 20% of the gross assets of the collective investment undertaking may be invested, directly or indirectly, in a single underlying asset, or in one or more collective investment undertakings which may in turn invest more than 20% of gross assets in other collective investment undertakings, or there is an exposure to the creditworthiness or solvency of anyone counterparty over that amount, the identity of the entity should be disclosed together with a brief description of the exposure (e.g. counter-party).	<i>Annex 15, item 2.2</i>	
15	B.46	Where a collective investment undertaking may invest in excess of 40% of its gross assets in another collective investment undertaking the summary	<i>Annex 15, item 2.5</i>	

Annexes	Point	Disclosure requirement	Source	
		<p>should briefly explain either:</p> <p>(a) the exposure, the identity of the underlying collective investment undertaking, and provide such information as would be required in a summary note by that collective investment undertaking; or</p> <p>(b) where the securities issued by an underlying collective investment undertaking have already been admitted to trading on a regulated or equivalent market, the identity of the underlying collective investment undertaking.</p>		
15	B.47	A brief description of the applicant's service providers including the maximum fees payable.	<i>Annex 15, item 3 and item 3.1</i>	
15	B.48	The identity and regulatory status of any investment manager, investment advisor, custodian, trustee or fiduciary (including and delegated custody arrangements).	<i>Annex 15 items 4 & 5</i>	
15	B.49	A description of how often the net asset value of the collective investment undertaking will be determined and how such net asset value will be communicated to investors.	<i>Annex 15, item 6</i>	
15	B.50	In the case of an umbrella collective investment undertaking, a brief description of any cross liability that may occur between classes or investment in other collective investment undertaking.	<i>Annex 15, item 7.1</i>	
15	B.51	<p>B.7 plus:</p> <ul style="list-style-type: none"> • "Where a collective investment undertaking has not commenced operations and no financial statements have been made up as at 	<i>Annex 15, item 8.1</i>	

Annexes	Point	Disclosure requirement	Source	
		the date of the registration document, a statement to that effect."		
15	B.52	A brief description of the collective investment undertaking's portfolio.	<i>Annex 15, item 8.2</i>	
15	B.53	An indication of the most recent net asset value per security (if applicable).	<i>Annex 15, item 8.3</i>	
16	B.54	<p>A brief description of the issuer, including:</p> <ul style="list-style-type: none"> • The legal name of the issuer and a brief description of the issuer's position within the national government framework. • The legal form of the issuer. • Any recent events relevant to the evaluation of the issuer's solvency. • A description of the issuer's economy including its structure with details of its main sectors. 	<i>Annex 16, item 3</i>	
16	B.55	A brief description/the key facts of public finance and trade information for the two fiscal years prior to the date of the prospectus. With a brief description of any significant changes to that information since the end of the last fiscal year.	<i>Annex 16, items 4 & 5</i>	
17	B.56	<p>A brief description of the issuer, including:</p> <ul style="list-style-type: none"> • The legal name of the issuer and a brief description of the issuer's legal status. • The legal form of the issuer. • A brief description of the issuer's purpose and functions. • The sources of funding, guarantees and other obligations owed to the issuer by its members. 	<i>Annex 17, item 3</i>	

Annexes	Point	Disclosure requirement	Source	
		<ul style="list-style-type: none">Any recent events relevant to the evaluation of the issuer's solvency.		
17	B.57	Selected key historical financial information covering the latest two financial years. This should be accompanied by a brief description of any significant changes to the issuer's financial position since the last audited financial information.	<i>Annex 17, item 4</i>	

Section C - Securities

Annexes	Point	Disclosure requirement	Source
3,5,12,13	C.1	A description of the type and the class of the securities being offered and/or admitted to trading, including the ISIN (international security identification number).	<i>Annex 3, item 4.1 Annex 5, item 4.1 Annex 12, item 4.1.1 Annex 13, item 4.2</i>
3,5,12,13	C.2	Currency of the securities issue.	<i>Annex 3, item 4.4 Annex 5, item 4.4 Annex 12, item 4.1.5 Annex 13, item 4.5</i>
3,5,12,13	C.3	An indication of whether the securities are in registered or bearer form.	<i>Annex 3, item 4.3 Annex 5, item 4.3 Annex 12, item 4.1.4 Annex 13, item 4.4</i>
1	C.4	The number of shares issued and fully paid and issued but not fully paid. The par value per share, or that the shares have not par value.	<i>Annex 1, items 21.1.1.(b) & (c)</i>

Annexes	Point	Disclosure requirement	Source	
3	C.5	A brief description of the rights attached to the securities, for shares other than ordinary shares.	<i>Annex 3, item 4.5</i>	For the purpose of the summary, this is not necessary for ordinary shares.
3,5,12,13	C.6	A brief description of any restrictions on the free transferability of the securities.	<i>Annex 3, item 4.8 Annex 5, item 4.13 Annex 12, item 4.1.10 Annex 13, item 4.14</i>	
3	C.7	An indication as to whether the securities offered are or will be the object of an application for admission to trading on a regulated market and the identity of all the regulated markets where the securities are or are to be traded.	<i>Annex 3, item 6</i>	
1	C.8	A brief description of dividend policy and the amount of the dividend per share for each financial year for the period covered by the historical financial information.	<i>Annex 1, item 20.7</i>	
5,12,13	C.9	<i>C.5 plus:</i> <ul style="list-style-type: none"> • "including ranking" • "including limitations to those rights" 	<i>Annex 5, item 4.5 Annex 5, item 4.6 Annex 12, item 4.1.6 Annex 12, item 4.1.7 Annex 13, items 4.6 &</i>	

Annexes	Point	Disclosure requirement	Source
			4.7
5,13	C.10	<p><i>C.9 plus:</i></p> <ul style="list-style-type: none"> • "the nominal interest rate" • "the date from which interest becomes payable and the due dates for interest" • "where the rate is not fixed, description of the underlying on which it is based" • "maturity date and arrangements for the amortisation of the loan, including the repayment procedures" • "an indication of yield" • "name of representative of debt security holders" 	<p><i>Annex 5, item 4.7</i></p> <p><i>Annex 5, item 4.8</i></p> <p><i>Annex 5, item 4.9</i></p> <p><i>Annex 5, item 4.10</i></p> <p><i>Annex 13, items 4.8, 4.9., 4.10 & 4.11</i></p>
5	C.11	<p><i>C.10 plus:</i></p> <ul style="list-style-type: none"> • "if the security has a derivative component in the interest payment, provide a clear and comprehensive explanation to help investors understand how the value of their investment is affected by the value of the underlying instrument(s), especially under the circumstances when the risks are most evident" 	<i>Annex 5, item 4.7</i>
5,12	C.12	An indication as to whether the securities offered are or will be the object of an application for admission to trading, with a view to their distribution in a regulated market or other equivalent markets with indication of the markets in question.	<p><i>Annex 5, item 6.1</i></p> <p><i>Annex 12, item 6</i></p>
8	C.13	The minimum denomination of an issue.	<i>Annex 8, item 1.1</i>
10	C.14	<p>Information about the underlying shares:</p> <ul style="list-style-type: none"> • C.1 • C.2 	<i>Annex 10, items 20.6 &</i>

Annexes	Point	Disclosure requirement	Source	
		<ul style="list-style-type: none"> • C.3 • C.4 • C.5 • C.6 • C.7 • C.8 	<p>21.1.1</p> <p>Annex 10, item 27</p> <p>Annex 10, item 30</p>	
10	C.15	<p>Information about the depository receipts:</p> <ul style="list-style-type: none"> • C.1 • C.2 • C.3 • C.5 • C.6 • "Describe the exercise of and benefit from the rights attaching to the underlying shares, in particular voting rights, the conditions on which the issuer of the depository receipts may exercise such rights, and measures envisaged to obtain the instructions of the depository receipt holders - and the right to share in profits and any liquidations surplus which are not passed on to the holder of the depository receipt." • "Brief description of the bank or other guarantee attached to the depository receipt and intended to underwrite the issuer's obligations." 	<p>Annex 10, item 28</p> <p>Annex 10, item 28.8</p> <p>Annex 10, item 28.12</p>	
12	C.16	<p>A brief description of how the value of the investment is affected by the value of the underlying instrument(s), unless the securities have a denomination of at least EUR 50 000.</p>	<p>Annex 12, item 4.1.2</p>	
12	C.17	<p>The expiration or maturity date of the derivative securities - the exercise date or final reference date.</p>	<p>Annex 12, item 4.1.11</p>	

Annexes	Point	Disclosure requirement	Source
12	C.18	A brief description of the settlement procedure of the derivative securities.	<i>Annex 12, item 4.1.12</i>
12	C.19	A brief description of how the return on derivative securities takes place.	<i>Annex 12, item 4.1.13</i>
12	C.20	The exercise price or the final reference price of the underlying.	<i>Annex 12, item 4.2.1</i>
12	C.21	A brief description of the type of the underlying and where the information on the underlying can be found.	<i>Annex 12, item 4.2.2</i>
12	C.22	. Indication of the market where the securities will be traded and for which prospectus has been published.	<i>Annex 13, item 5</i>
14	C.23	Information about the underlying share: <ul style="list-style-type: none"> • "A brief description of the underlying share." • C.2 • C.3 • C.5 plus the words " ... and procedure for the exercise of those rights." • "Where and when the shares will be or have been admitted to trading." • C.6 • "Where the issuer of the underlying is an entity belonging to the same group, the information to provide on this issuer is the information required by the share registration document. Therefore provide such information required for a summary for Annex 1. 	<i>Annex 14, item 1</i> <i>Annex 14, item 1.4</i> <i>Annex 14, item 1.3</i> <i>Annex 14, item 1.5</i> <i>Annex 14, item 1.7</i> <i>Annex 14, item 1.8</i> <i>Annex 14, item 2</i>

Section D - Risks

Annexes	Point	Disclosure requirement	Source	
1 & 3 together	D.1	Summary information on the risk factors.	<i>Annex 1, item 4 & Annex 3, item 2</i>	<p>We do not see any benefit in summarising risk factors. If risk factors can be written more succinctly they should be so written in the prospectus itself. We believe that the current practice of including the headings in the summary is more than adequate. We think there will be significant work involved in attempting to comply with a further summarising requirement.</p> <p>We do not see that risk factors relating to the issuer and securities are more worthy of inclusion in the summary than risk factors relating to the industry.</p>
1,4,7,9,11,16,17	D.2	Summary information on the risk factors.	<i>Annex 1, item 4 Annex 4, item 4 Annex 7, item 3 Annex 9, item 3 Annex 11, item 3 Annex 16, item 2 Annex 17, item 2</i>	As above

3,5,13	D.3	Summary information on the risk factors.	Annex 3, item 2 Annex 5, item 2 Annex 13, item 2	As above
10	D.4	Information about the issuer of the underlying shares: <ul style="list-style-type: none">D.2	Annex 10, item 4	
10	D.5	Information about the depository receipts: <ul style="list-style-type: none">D.3	Annex 10, 31.3.1	
12	D.6	<i>D.3 plus:</i> <ul style="list-style-type: none">"This must include a risk warning to the effect that investors may lose the value of their entire investment or part of it, as the case may be, and/or, if the investor's liability is not limited to the value of his investment, a statement of that fact, together with a description of the circumstances in which such additional liability arises and the likely financial effect."	Annex 12, item 2	

Section E - Offer

Annexes	Point	Disclosure requirement	Source
3,10	E.1	The total net proceeds and an estimate of the total expenses of the issue/offer, including estimated expenses charged to the investor by the issuer or the offeror.	<i>Annex 3, 8.1 Art 2.1(s)(iii) PD Annex 10, item 32.1</i>
3,5,10,12	E.2	Reasons for the offer, use of proceeds, estimated net amount of the proceeds.	<i>Annex 3, item 3.4 Annex 5, item 3.2 Annex 10, item 31.1.1 Annex 12, item 3.2</i>
3,5,10,12	E.3	A brief description of the terms and conditions of the offer.	<i>Annex 3, item 5 Annex 5, item 5 Annex 10, item 29 Annex 12, item 5</i>
3,5,10,12 ,13	E.4	A brief description of any interest that is material to the issue/offer including conflicting interests.	<i>Annex 3, item 3.3 Annex 5, item 3.1 Annex 10, item 31.2.1</i>

			<i>Annex 12, item 3.1</i> <i>Annex 13, item 3</i>	
3,10	E.5	Name of any significant person or entity offering to sell the security. Key lock-up agreements: the parties involved; and indication of the period of the lock up.	<i>Annex 3, item 7.1</i> <i>Annex 3, item 7.3</i> <i>Annex 10, item 27.14/15</i>	In the case of both selling shareholders and lock-ups, the information should be included in the summary only if it is significant. Either this can be accepted as a general point in the introduction or must be made here.
3,10	E.6	The amount and percentage of immediate dilution resulting from the offer. In the case of a subscription offer to existing equity holders, the amount and percentage of immediate dilution if they do not subscribe to the new offer.	<i>Annex 3, item 9</i> <i>Annex 10, item 27.16</i>	
All	E.7	Estimated expenses charged to the investor by the issuer or the offeror.	<i>Art 2.1(s)(iii)</i> <i>PD</i>	

APPENDIX 2

Relating to Question 16

8. ESMA considers therefore that Article 7(2)(g) should be implemented in a broad manner in order to allow the technical replacement of statutory pre-emption rights with similar pre-emptive provisions to be treated as though they were statutory pre-emption issues. ESMA also agreed that a precise definition of "near identical rights" should then be established in order to avoid abuses and prevent any such issue to be structured in a way that the obligation to file a prospectus would be circumvented. ESMA proposes therefore to consider that "near identical rights" should have the same characteristics as pre-emption rights, meaning:
- (a) shareholders are offered entitlements free of charge;
 - (b) shareholders are entitled to take-up new shares in proportion (as nearly as may be practicable) to their existing holdings or in the case of holders of other securities entitled to take up new shares, they are entitled to do so in accordance with the terms of those securities;
 - (c) the issuer is able, as regards entitlements under **Error! Reference source not found.**, to impose limits or restrictions and make arrangements it considers necessary or appropriate to deal with treasury shares, fractional entitlements, record dates and legal, regulatory or practical problems in, or under the laws of, or requirements of any territory or regulatory body;
 - (d) the minimum period during which shares may be taken up is similar to the period for the take-up of statutory pre-emption rights under the national legislation of the issuer;
 - (e) after expiration of the exercise period, the rights lapse.

Explanation

1. *The changes at (b) and (c) above reflect the basis on which shareholders disapply pre-emption rights in relation to pre-emptive offers. All types of pre-emptive offer should benefit from the proportionate disclosure regime as they would all be "offers of shares" falling within Article 7(2)(g) of the Prospectus Directive, which does not restrict the proportionate disclosure regime to offers which include a negotiable instrument and involve the sale or rights for the benefit of shareholders who do not take up their rights. For example, an open offer would be made to shareholders in proportion to their existing holdings. However, shareholders would not be entitled to sell their rights nor to be paid the proceeds of the sale of the rights. the Second Company Law Directive does not require a pre-emptive offer to include a renounceable right of allotment nor a requirement for a sale of rights.*

2. *The reference in (b) to "other securities" is intended to cover convertible securities where the holders are entitled to participate in a pre-emptive offer. In this case, the entitlement is not in proportion to the holding of the relevant security but generally on a "see through" basis. Thus, the reference to "in accordance with the terms of those securities".*
3. *The points referred to at paragraph 115 of the consultation should be expressly referred to in the description of "near identical rights". The above drafting seeks to achieve this.*

For further information, please contact:

Catherine Howdle
Internal Market EU Policy Advisor
The Joint Brussels Office of the Law Societies
85 Avenue des Nerviens, Box 10
B-1040 Brussels, Belgium
Tel (+32-2) 743 85 85
Fax (+32-2) 743 85 86
<http://www.lawsociety.org.uk>