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European Securities and
Markets Authority (ESMA)
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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 15 June 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,

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RESPONSE

TO

ESMA'S CONSULTATION PAPER DATED 15 JUNE 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 15 June 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 18 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, WestLB, WGZ BANK. 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.

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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 view of the high degree of importance of the base prospectus regime to DDV's members, they consider that certainty, clarity and efficiency of the regulatory framework which underpins it must always constitute the key considerations underlying any changes or developments. In this regard, DDV is of the view that certain aspects of the proposed technical advice set out in the Consultation Paper raise concerns for the retail structured products and debt capital markets in general. In particular, while DDV notes ESMA's finding that a more restrictive approach in relation to the content of the final terms is required, it considers that the proposed measures are excessively formalistic and are likely to result in a considerable loss of the very flexibility which the base prospectus regime was intended to provide. DDV accepts that there is scope for greater clarity as to the distinction between the types of information which may be contained in the final terms and the information which may only be contained in a prospectus supplement. However, our view is that such greater clarity could, and should, be achieved without prejudicing the flexibility of the base prospectus regime which enables our members and other participants in the European retail structured products market to adapt to the changing nature of this dynamic market.

ESMA's proposals mean that the information currently contained in the final terms (for instance information on proprietary indices) would in many cases require a supplement or a whole new standalone or base prospectus in future. In general, our view is that the proposals would lead to a significantly increased number of both (base) prospectuses and supplements, thereby forcing issuers to incur substantial costs.

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

- **categorisation of information:** DDV is of the view that the proposed introduction of exhaustive categories of information (CAT.A, CAT.B and CAT.C) is a formalistic distinction which would adversely impact the flexibility of the base prospectus regime without providing any additional advantages to the investors. DDV considers that the proposed distinction contradicts the substantive decision criterion under the Prospectus Directive and the Prospectus Regulation. Further, the proposed requirement to set out certain issue-specific information (such as the formula for payments) in the base prospectus or in a supplement thereto would adversely impact the readability of prospectuses, thus undermining one of the key purposes of the Prospectus Directive, namely that information should be provided in an easily analysable and comprehensible form. We also consider the distinctions between the proposed information categories to be arbitrary. In particular, we were unable to think of any situation where a deviation from the elections set out in the base prospectus in respect of information which is proposed to be classified as CAT.A could not be reasonably necessitated by the circumstances of a specific issuance. In addition, the distinction between the proposed CAT.B and CAT.C is, in our view, very artificial and disregards the only key consideration, namely whether the relevant information could only be determined at the time of the individual issuance. In this regard, we have produced a table, annexed hereto, which sets out our proposals regarding the categorisation of certain types of information required by Annexes V and XII to the Prospectus Regulation so as to mitigate the conflict between the proposals put forward in the Consultation Paper and the requirements of the Prospectus Directive for prospectuses to be easily analysable and comprehensible.

- **prohibition on integrated conditions:** DDV is very concerned that ESMA seems to propose the prohibition of the long-established practice of setting out the relevant terms and conditions of the securities in the final terms, producing what is commonly known as the “integrated conditions” form of terms and conditions, i.e. terms and conditions that are comprehensively laid out in the respective final terms without that need to make reference to general terms or other terms laid out in the base prospectus. From a German law perspective, integrated conditions make the terms and conditions considerably more analysable and comprehensible for retail investors and, thus, are regarded as essential in order to comply with consumer protection provisions such as § 3 of the German Bond Act (*Schuldverschreibungsgesetz*) and §§ 305 et seqq. of the German Civil Code (*Bürgerliches Gesetzbuch*). To this extent, we consider the schedule-based format of final terms and of terms and conditions (also called “long form

conditions"), such as the pro forma final terms contained in the IPMA Handbook (ICMA's Primary Markets Handbook) to be often difficult to understand for retail investors, thereby raising transparency concerns. In this context, we should point out that in developed securities markets, such as Germany, schedule-based formats of final terms are used only for wholesale offers and offers to institutional investors, while retail issuances are documented using the form of integrated conditions. This is because it is extremely important to provide retail investors with a clear and comprehensible set of final terms and terms and conditions which allow such investors fully to understand the features of the security, rather than leaving them to obtain the necessary information from a number of different sources.

- **requirements for prospectus summaries:** We consider that ESMA's approach to prospectus summaries would result in excessively long summaries which would not only fail to enhance comparability and comprehensibility but would actually make summaries more difficult to understand. Further, the proposed format for summaries would make conformity with the forthcoming Key Investor Information Documents pursuant to the PRIPs initiative more difficult. Overall, our view is that the proposed format of the prospectus summaries puts form over substance and focuses on standardisation at the expense of genuine comparability and informative value.

- **combination of summary and final terms:** If ESMA requires that summaries annexed to final terms are to be translated then this is contrary to the principles of the base prospectus regime and, in the words of the Prospectus Directive, discourage cross-border offers and multiple trading. Further, any requirement to translate summaries annexed to final terms would give rise to delays and would further undermine the flexibility intended by the base prospectus regime.

A. FINAL TERMS

I. General Comments

In general terms, DDV is extremely concerned about the impact of ESMA's restrictive approach to the form and content of final terms on the structured products market. Our view is that the proposed changes are disproportionate to the aim of eliminating the inconsistencies in the use of final terms identified by ESMA in the Consultation Paper. Furthermore, we consider that, taken together, the proposals would have a significant negative effect on both the comprehensibility of the final terms from an investor's viewpoint (as generally required by Recital 20 and Article 5(1) of the Prospectus Directive) and on the flexibility of the base prospectus system for the issuers, which was intended to be the key benefit of the base prospectus system. The highly rigid nature of ESMA's proposed changes severely limits the range of information which may be included in the final terms, thereby undermining the ability of issuers to react to the highly dynamic markets conditions and ever-changing investor demand.

Further, we are concerned that while achieving no obvious benefit for investors, the proposed changes would require large-scale amendments to the existing documentation for debt and derivatives securities. ESMA’s proposals mean that the information currently contained in the final terms (for instance information on proprietary indices) would in many cases require a supplement or a whole new standalone or base prospectus in future. In general, our view is that the proposals would lead to a significantly increased number of both (base) prospectuses and supplements, thereby forcing issuers to incur substantial costs.

We propose that the inconsistencies in the use of final terms identified in the Consultation Paper should, in the first instance, be dealt with by developing the interpretative guidance for the main regulatory provisions and, where necessary, by stricter selective supervision.

More particularly, we wish to make the following specific comments.

Proposed exhaustive categorisation of information which may be included solely in the final terms (para. 25 of the Consultation Paper)

We consider the proposed exhaustive list of information which is permitted to be included solely in the final terms to be excessively formalistic and unhelpful. The approach adopted in both the Prospectus Directive and the Prospectus Regulation is based on whether or not the relevant information can only be determined at the time of the individual issue. In view of the considerable diversity of structured securities, we consider that it would be highly impractical to

rely on a rigid and exhaustive list for an assessment as to whether specific information is suitable for inclusion only in the final terms. Such an assessment should, in our view, always take into account the relevant features of the specific issue. We also note that the Consultation Paper does not provide sufficient explanation for the distinction between the proposed categories of information, which in many instances appears to be arbitrary.

In particular, we were unable to conceive of any situation where a deviation from the elections set out in the base prospectus in respect of information which is proposed to be classified as Cat.A could not be reasonably necessitated by the circumstances of a specific issuance.

Further, the distinction between the proposed Cat.B and Cat.C is, in our view, artificial and disregards the only key consideration, namely whether the relevant information could only be determined at the time of the individual issue, as stipulated in Recital 17 of the Amending Directive and Article 22(2) of the Prospectus Regulation. On the face of it, both Cat.B and Cat.C items seem suitable for inclusion only in the final terms. For instance, it is not clear why the description of market or settlement disruption events (referred to in item 4.7 (x) in Annex V of the Prospectus Regulation) was designated as a Cat.B, rather than a Cat.C item. The requirement for additional market disruption events may arise as a result of a sudden change in market conditions which would, by definition, mean that the information regarding such new disruption event is known only "at the time of the individual issue" in the sense of Recital 17 of the Amending Directive.

DDV's view is that the formalistic approach of the Consultation Paper does not reflect the substance-based approach of the Prospectus Directive and the Prospectus Regulation. We are particularly concerned that the effect of ESMA's proposals would be to replace careful substantive assessment of individual issuances with what seems to be a mechanical "box-ticking" check of transaction documents against the proposed list by national regulators. If this approach is followed, it is likely to lead to considerably less flexibility for market participants as there will be no scope for substantive arguments or discussion.

Proposed prohibition on integrated conditions (para. 30 of the Consultation Paper)

The inclusion of integrated terms and conditions of the securities in the final terms is a long-established market practice in a number of European markets, including Germany. The proposed prohibition of this long-standing market practice that can be derived from paragraph 30 of the Consultation Paper undermines the key objectives of analysability and comprehensibility contained in both the Prospectus Directive and the Prospectus Regulation. We were therefore surprised that ESMA based this proposed prohibition on Article 26(5) of the Prospectus

Regulation which expressly permits the replication of certain information in the final terms by suggesting that this Article, in fact, restricts the scope of information which may be replicated. We consider this interpretation of Article 26(5) of the Prospectus Regulation to be manifestly incorrect.

Specifically, the Consultation Paper refers, in the same paragraph 30, to Recital 17 of the Amending Directive which states that final terms should only contain information specific to the issuance. However, Recital 17 is evidently concerned only with the distinction between information which may be set out in the final terms and that which requires the publication of a prospectus supplement and must be read together with the third paragraph of Article 5(4) for its proper meaning. We, therefore, disagree that the use of the word "only" in Recital 17 of the Amending Directive can be interpreted to mean that the replication of certain parts of the base prospectus in the final terms is prohibited.

Further, the Consultation Paper also refers to the use of the word "some" in the second paragraph of Article 26(5) of the Prospectus Regulation to suggest that not all information set out in the base prospectus may be replicated in the final terms. However, even if this highly restrictive interpretation is correct, the word "some" is used only in the second paragraph of Article 26(5) of the Prospectus Regulation which deals specifically with the form of final terms which is presented as a separate document containing only the final terms. Since the integrated conditions type of final terms does not take such a form, ESMA's conclusion that "the replication of information must remain limited" does not apply to them.

In addition to the above errors of law, we also disagree with ESMA's argument that the summary required pursuant to the Prospectus Directive would provide a "full picture to investors", thereby making integrated conditions form of final terms unnecessary. According to Recital 15 of the Amending Directive and Article 5(2) of the Prospectus Directive, a summary contains only the key information, which by definition prevents it from providing a full picture to the investors. If summaries were intended to provide a full picture of the issuance, it would be unnecessary expressly to exclude liability for summaries as provided in Recital 16 of the Amending Directive. As follows from the Consultation Paper, a retail investor will be expected, as a matter of law, to read an entire base prospectus consisting of several hundred pages as well as identify and read the relevant prospectus supplements, together with the short form of final terms in order to gain a complete understanding of the derivative security which he is considering to purchase. As this process is currently simplified for the investor by the issuer producing an integrated form of final terms, we consider that the proposals would be a step back as far as comprehensibility is concerned.

It appears that this proposal constitutes another step to enable regulators to mechanically review base prospectuses and final terms in order to prevent the misuse of final terms. We, therefore, reiterate our disagreement in principle with such an approach to producing new Level 2 measures. On the basis of the above, we disagree with the proposed prohibition on integrated form of final terms.

Proposed prohibition on changes to payout formulae, inclusion of risk factors or descriptions of proprietary indices in the final terms (para. 51 to 53 of the Consultation Paper)

The above proposals would, in our view, have a considerable impact on the issuer's ability to respond to the investors' demand. Accordingly, we consider that these proposals go against the very purpose of the base prospectus regime and the Prospectus Directive. We set out our specific concerns below, dealing with each proposal in turn.

- **payout formulae (paragraph 51):** the Amending Directive stipulates, at Recital 17, that the question of whether or not any specific information may be included in the final terms depends on whether such information can only be determined at the time of the issuance. In this regard, we disagree with ESMA's statement at paragraphs 49 and 51 that competent authorities must review algebraic formulae and related definitions for completeness and comprehensibility. In our view, there is no legal basis for this assertion since it implies that even though payout formulae can only be determined at the time of issue, they nevertheless cannot be included only in the final terms. Such a review by competent authorities would amount to an economic review of individual issuances, which, as the Consultation Paper itself acknowledges at paragraph 51, is without any legal basis. Further, in the same paragraph of the Consultation Paper, ESMA points out that a new payout formula may give rise to a new product and, accordingly, would need to be disclosed in the base prospectus. However, while we acknowledge that information regarding a wholly new product should be disclosed in the base prospectus (or a prospectus supplement), ESMA's proposal would in effect prohibit minor variations to products which are already described in the base prospectus, for instance the addition of minimum payout amounts at the request of the potential investors. Such requests are dictated by market conditions and in many cases cannot be foreseen at the time of drafting the base prospectus. The ability of the issuer to quickly adapt to market conditions and accommodate this type of investor request is a fundamental purpose of the base prospectus system. Our view is, therefore, that this proposal should not apply to modifications of payout formulae which do not give rise to a wholly new product.

- **risk factors (paragraph 52):** the need to include additional risk factors in the final terms is very often justified by the particular characteristics and risks of a specific type of underlying. For instance, while the relevant base prospectus may contain extensive risk factor disclosure in relation to market indices as a type of underlying, it would clearly be impossible to include specific risk factors relating to all international markets for which such market indices exist. Such information should, in our view, be included in the final terms and it should at least be possible to specify risk factors laid out in the base prospectus if this is indicated in the base prospectus. Such an interpretation is also justified by the materials of the law making procedure (for details see the DDV comment on No. 2 Annex V/XII of the Prospectus regulation; see in the annex to this paper). The proposed blanket prohibition on the inclusion of risk factors in the final terms would severely restrict the ability of the investors to select particular types of underlying. In our view, this cannot be the intended effect of the Prospectus Directive.

- **proprietary indices (paragraph 53):** it is not clear why it is proposed that the descriptions of issuer-composed indices cannot be included in the final terms, while the descriptions of indices composed by third parties are permitted, especially since such indices can often be replaced by baskets.

In the regrettable event of ESMA deciding to proceed with the above proposals, we consider that as the absolute minimum, it would be essential to make it clear that any additional risk factors and additional types of underlying (including issuer-composed indices) may be described in a supplement to the base prospectus. Currently, certain authorities insist on this type of information being contained in a new prospectus – base or standalone, as the case may be, which requires a lengthy prospectus approval process.

II. Responses to questions

Question 1: Do you consider the list of "Additional Information" in Annex B complete? If not, please indicate what type of information could be classified as "Additional Information" and to what item they would belong to (CAT.A, CAT.B or CAT.C, as defined in Part 3.III). Please add your justifications.

Question 2: As for the "additional provisions, not required by the relevant securities note, relating to the underlying" (included in Annex B), please provide the information which could fall under this item.

For ease of reference, we respond to questions 1 and 2 together. As laid out above we think that the current distinction in Article 26(5) of the Prospectus Regulation that allows to present the final terms either in a separate document or integrated into the base prospectus should be upheld. Related to this and based on the assumption to final terms can also be integrated into the base prospectus, it is our view that the information that can be given in final terms should not be exhaustive. At least the following types of information should be added to the list of "Additional Information" in Annex B:

- **country-specific information:** in a number of issuances, it is necessary to include information in the final terms which is specific to the country in which the offer of the securities is made. For instance, it is often necessary to include information regarding the tax position of the investor which is more specific than the information on taxation required pursuant to the relevant annex to the Prospectus Regulation (CESR FAQ No. 45). The extremely wide range of such additional country-specific information makes it and impracticable to include it in the base prospectus. Accordingly, we consider that such information should be classified as Cat.A information.

- **inducements paid to distributors:** in certain jurisdictions, issuers disclose information relating to the inducements which they pay to distributors in the interests of greater transparency for the investors. We consider that such information should be classified as Cat.C information.

- **product-specific risk factors:** changes in the market may, from time to time, have an effect on certain types of underlying (for instance, shares). This may take a wide range of different forms. Accordingly, in view of the extremely wide range of risk-related information which potentially may need to be disclosed, we consider that this type of information should be classified as Cat.C information. This is because it would be inappropriate to disclose issuance-specific information in a supplement to the base prospectus. As an alternative, we would propose adding a new Cat.C item entitled "Product-specific risk factors".

- **other information:** any other product-specific information which may influence an investor's assessment of the securities.

Question 3: Under "CAT.B" items, is the list of details which can be filled out in the final terms complete? If not, please indicate with your justifications what elements should be added.

In our view, instead of the exhaustive list of information which may be included in the final terms proposed under paragraph 44, it would be appropriate simply to permit the inclusion of any specific information which is not an abstract provision or a formula. For instance, one example of such information which is not provided for in the Consultation Paper is information relating to alternative assets (for instance, certain types of shares) which are sometimes used in order to determine the redemption or physical delivery amount in the event of a market disruption.

While we disagree with the overall exhaustive approach to the categorisation of information proposed by ESMA, should this approach go ahead, we would propose a number of changes to the categorisations currently set out in the Consultation Paper. Our proposal in this respect are set out in more detail in the table annexed hereto

Question 4: Based on the instructions given in this document, could you please estimate the increase of the number of supplements to be approved in per cent?

Information currently included in final terms, such as that relating to proprietary indices or payout formula modifications, would in many instances require a supplement or indeed a whole new standalone or base prospectus, depending on the whether certain authorities continue their current administrative practices. The effect would be that an unmanageable number of additional prospectuses or supplements (running into tens of thousands) would be required as between 5 and 15 per cent. of the information currently contained in final terms would necessitate a supplement.

Question 5: Based on the instructions given in this document, could you estimate the increase of the relevant costs?

Increased costs would be incurred in the form of legal and administrative fees in connection with the preparation of additional supplements (question 4), translation costs in respect of issue-specific summaries and possibly final terms (questions 6 and 7) and the increased legal and internal costs associated with a greatly increased number of templates.

B. SUMMARY OF THE PROSPECTUS

I. General comments

In general terms, DDV is concerned that the approach to prospectus summaries proposed in the Consultation Paper puts form over substance.

First, the proposals would, in our view, make summaries unacceptably lengthy, thereby failing to achieve any meaningful improvements to their comparability. Further, the approach of basing the requirements for summaries on the Annexes to the Prospectus Regulation takes away the important flexibility of the issuer to tailor the summary to the specific features of the securities. In this regard, we consider that the approach to the form and content of summaries must be based on principles, rather than on an exhaustive list of information. In addition, if ESMA states that the summary should be written as though it formed the "body of a letter from the chair, or managing board of the issuer" (see paragraph 101 of the Consultation Paper) then this is not really helpful since that might create discrepancies between the summary and the remaining prospectus and room for misinterpretations.

Secondly, we are concerned about the effect of the proposed measures on the timing and cost of issuances. In particular, if ESMA's view is applied that issue-specific summaries annexed to the Final Terms (see paragraph 69 of the Consultation Paper) will be subject to the same translation requirements as summaries of base prospectuses, the proposals will result in a significant increase in the cost of issuances.

Thirdly, we do not agree with ESMA's proposal for amending the third paragraph of Article 3 of the Prospectus Regulation. According to our understanding, this proposal would mean that final terms will need to be approved by the competent authorities since summaries would form an integral part of such final terms.

Finally, in our view, the process of developing the templates for prospectus summaries should be aligned as far as possible with the process of developing the templates for Key Investor Information Documents (KIID) pursuant to Directive 2009/65/EC (the UCITS IV Directive).

Our position in respect of each of the above points is further set out below in our responses to ESMA's questions in the Consultation Paper.

II. Responses to questions

Question 6: Do you agree with the proposed mechanism of combining the summary with the final terms? If not, please provide your reasons and an alternative suggestion.

Question 7: Please estimate any possible costs that this mechanism would imply for issuers.

For ease of reference, we respond to questions 6 and 7 together. DDV's primary concern relates to the implications of the proposals for the existing language and translation arrangements. In particular, it is unclear to us whether the proposals would result in a requirement to translate final terms. We believe that such a requirement would be contrary to the existing base prospectus regime pursuant to the Prospectus Directive which currently does not require final terms to be translated. Such a requirement would also result in significant delays (thereby further undermining the crucial flexibility for the issuers) and a substantial increase in costs.

Question 8: Do you agree with our modular approach?

Question 9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?

Question 10: 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?

DDV strongly disagrees with the proposals referred to in all three questions above and considers them unhelpful. Further, the insistence on a fresh assessment of the information in the prospectus and the express prohibition on the replication of information contained in the body of the prospectus poses a risk of inaccuracies in summaries and of causing confusion for investors.

We consider ESMA's proposed approach of basing the required content of prospectus summaries on the items set out in the Annexes to the Prospectus Regulation to be unsuitable. This highly prescriptive approach would, in our view, not only result in excessively lengthy summaries because it requires the inclusion of a number of individual information items from the Annexes but would also seriously impair the comprehensibility of summaries for investors by making them conform to a rigid and inflexible format. In our view, the proposed inflexible requirements for the content and order of summaries would prevent issuers from adapting them in such a way as to properly reflect the specific features of the securities – either by omitting irrelevant and unhelpful information or including other information which is important for a full understanding of the securities.

For these reasons, we consider that the requirements for the content of summaries should be less prescriptive and more principles-based. For instance, the content requirements should be based on broader guidelines, rather than on the proposed modular approach which simply references the disclosure requirements in the Annexes to the Prospectus Regulation. Further, the content requirements should usefully take account of the key information defined in the Amended Directive, rather than simply incorporate them.

In our view, the development of the proposed templates for prospectus summaries could usefully be aligned with the development of the Key Investor Information Documents (KIID) pursuant to the UCITS IV Directive which would help achieve compatibility between the two documents as requested in paragraph 3.2 of the Commission's mandate. In general terms, we consider that at the very least, information contained in summaries should not be required to be set out in a specific rigid order. While we acknowledge the need for comparability of summaries, the prescription of a rigid order in which information must appear in them would have the opposite effect by preventing issuers from setting out information in an order which is most logical for the security in question, thereby making the summary less readable and comprehensible. In this regard, we should point out that the objective of ensuring comparability for the purposes of KIIDs under the UCITS IV Directive has not affected the flexibility to draft such documents at the level of the (relatively broadly defined) individual information items.

Question 11a: Do you agree that our approach adequately limits the length of summaries?

On the one hand, DDV accepts the abolition of the word count requirement for summaries which is especially unsuitable for cross-border issuances where the summary must be prepared in several languages. On the other hand, we do not agree that the approach proposed in the Consultation Paper will adequately limit the length of summaries. On the contrary, we perceive a significant risk of summaries becoming excessively long due to the proposed rigid and formalistic approach which would prevent issuers from focussing on providing a helpful overall view of the securities in the summary for the investors. This may, in turn, lead to the imposition of word limits by individual national authorities. For this reason, we would prefer ESMA to provide clear guidelines in relation to the length of summaries.

Question 11b: What is "short" for a summary for: (i) an issuer; & (ii) an investor?

We consider that the question of whether a summary is short depends solely on the specific characteristics of the prospectus which it relates to. Therefore, our view is that there cannot be a rigid word limit in relation to summaries.

Question 11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?

Our view is that there should be no numeric limit on the length of summaries. Such a limit would in many cases force issuers to omit information which they consider to be material, thereby undermining the purpose of the summary and giving rise to increased legal risk.

Question 12a: Do you agree with our proposed content and format for summaries?

Further to our position set out above, we also disagree with the proposed prohibition on the inclusion of any information other than as specified in sections A to E in Part 4.V of the Consultation Paper. Our views above regarding the unacceptability of the proposed prohibition on the inclusion in the final terms of any information not specifically required by the Annexes to the Prospectus Regulation also applies to ESMA's proposals in respect of summaries (subject, of course, to the applicability of a materiality test for summaries). For instance, certain additional information concerning the underlying may well be suitable for inclusion in the summary. Our overall view is, therefore, that the summary must be sufficiently specific to the issue in order to be helpful to investors, rather than a mere formality.

Question 12b: 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?

In the event that the overall approach to the content of summaries set out in the Consultation Paper is adopted, DDV has the following specific comments on the proposed content requirements (references are to the specific sections in Part 4.V of the Consultation Paper):

- **issuer's competitive position (B.15):** we disagree with the requirement to describe the issuer's competitive position in the summary. Such a requirement would go far beyond the relevant requirements for the prospectus itself pursuant to which it is only necessary to include the "basis for any statement in the registration document made by the issuer regarding its competitive position".

- **order of the core information about the securities:** information referred to in points C.5, C.6, C.9, C.10, C.11, C.12 and C.16 to C.21 forms the description of the core features of the securities, such as the redemption entitlement of the investors. In our view, it would be especially inappropriate to require this information to be set out in a particular rigid order as this would severely impair the readability of the summary. For instance, for many securities, it would be helpful to combine information on the potential effect of the value of the underlying on the value of the investment" (C.16) with the description of the

rights attached to the securities (C.5). For this reason, we consider that at least for the information items referred to in this paragraph there should be no rigid order in which they must appear in the summary, enabling the issuer to decide on the most logical layout.

Question 14: Do you agree with our proposal for amending Article 3, 3rd paragraph, Prospectus Regulation?

We do not agree with this approach in relation to issue-specific summaries, as it would mean that final terms would require the approval of competent authorities, since such summaries would form an integral part of the final terms.

Question 15: Could you estimate the change in costs that will arise from the proposals in this document for summaries?

We estimate the additional costs arising in the event of the proposals being adopted to be considerable. If adopted, the proposal will significantly increase the workload involved in documenting each issuance, resulting in increased costs for the issuers. Further, we are concerned that the proposed issue-specific summaries will be subject to the same translation requirements as summaries of base prospectuses. The translation of issue-specific summaries will result in a considerable increase in the cost of individual issuances.

Annex to the DDV Response

The following table encompasses DDV's comments on the categorisation proposed by ESMA in relation to information items contained in Annex V and Annex XII of the Prospectus Regulation. The list includes only those information items in respect of which DDV has a differing view on categorisation and is not intended to be exhaustive.

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
	Annex V/XII			
2	Risk factors	CAT.A	CAT.C	Certain types of underlying involve highly specific risks which it would be impracticable to set out in the base prospectus. Further, changes in the market which were not known at the time of drafting the prospectus may have an effect on the underlying (for instance, shares) of the relevant product. In our view, it is appropriate to set out risk factors which are specific to a particular product in the final terms and it should at least be possible to specify risk factors laid out in the base prospectus if this is indicated in the base prospectus. This view is also reflected by the current administrative practice of a number of national authorities and in accordance with CESR FAQ No. 57 when CESR makes reference to the fact that there is usually no need that information specific to a certain underlying or redemption structure is to be vetted by the competent authority (as cited in paragraph 14 of the ESMA Consultation Paper). We consider that it would be inappropriate to include such risk factors in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market. This is also in accordance with Recital 17 of the Amending Directive that does not mention risk factors as information that is excluded from the scope of final terms (in this respect the Amending Directive deviates from legislative drafts in the law making procedure in which

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
				"new risk factors" have been mentioned as an example of information items that should in general be included in a supplement to the prospectus; see for example Council draft dated 4 November 2010).
	Annex V			
4.6.	A description of the rights attached to the securities, including any limitations of those rights, and procedure for the exercise of those rights.	CAT.B	CAT.C	This section relates to information concerning specific redemption provisions and price determination information. It is possible that, owing to the changes in the market which were not known at the time of drafting the prospectus, it may be necessary to make certain modifications which are not provided for in the base prospectus. For instance, it may be necessary to provide that price is to be determined on the basis of an average intra-day rate, instead of the closing rate. It would be impracticable and impossible to allow for all the possible variations of this kind in the base prospectus, as it would become completely unreadable. We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market. Furthermore, we consider the distinction between CAT.B and CAT.C information in the context of this information item to be particularly arbitrary.
4.7.	(ii) Provisions relating to interest payable	CAT.B	CAT.C	It is possible that, owing to the changes in the market which were not known at the time of drafting the prospectus it may be necessary to add certain information which is not provided for in the base prospectus, for example concerning interest adjustment clauses. It would be impracticable and impossible to allow for all the possible variations of this kind in the base prospectus. Further, it would render the base prospectus completely unreadable. In our view, such product-specific information should be contained in the final terms

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
				(provided that this has been indicated in the base prospectus). We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market. The differentiation between CAT.B and CAT.C seems particularly arbitrary in the context of this item.
	(v) The time limit on the validity of claims to interest and repayment of principal	CAT.A	CAT.C	It is possible that, owing to the changes in the market which were not known at the time of drafting the prospectus it may be necessary to add certain information which is not provided for in the base prospectus. It would be impracticable and impossible to allow for all the possible variations in the base prospectus. Further, it would render the base prospectus completely unreadable. In our view, such product-specific information should be contained in the final terms. We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market.
	Where the rate is not fixed,			
	(vi) statement setting out the type of underlying	CAT.A	CAT.C	Whether this type of information should be classified as CAT. A will depend on how the competent authorities interpret the word "type". If "type" is interpreted as an umbrella term which refers to broad categories of underlying, such as "Share" or "Index", then CAT. A may be acceptable for this type of information. However, if "type" is a narrow term which refers to the specific characteristics of the underlying (or overlaps with the description of the underlying at item 4.7 (vii)), then this type of information should be categorised as CAT. C, in line with the proposed classification of item 4.7 (vii). Otherwise, the distinction between the information relating to the type of the

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
				underlying and the description of the underlying would appear to be arbitrary. It is possible that, owing to the changes in the market which were not known at the time of drafting the prospectus it may be necessary to add certain information which is not provided for in the base prospectus. It would be impracticable and impossible to allow for all the possible variations of this kind in the base prospectus. Further, it would render the base prospectus completely unreadable. In our view, such product-specific information should be contained in the final terms. We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market.
	(viii) and of the method used to relate the two	CAT.B	CAT.C	Information referred to in this category overlaps to a large extent with item 4.7(vii) (description of the underlying) and should, in our view, be merged with that item. It is possible that, owing to the changes in the market which were not known at the time of drafting the prospectus it may be necessary to add certain information which is not provided for in the base prospectus. It would be impracticable and impossible to allow for all the possible variations in the base prospectus. Further, this would render the base prospectus completely unreadable. In our view, such product-specific information should be contained in the final terms. We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market. The differentiation between Cat.B and Cat.C seems particularly arbitrary in the context of this item.

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
				We disagree with ESMA's view expressed at para. 49 and reiterated at para. 51 that it is necessary for competent authorities to "review algebraic formulas along with its related definitions and descriptions as regards to completeness, comprehensibility and consistency". In our view, there is no legal basis for this assertion since it implies that even though certain information can only be determined at the time of issuance, it is nevertheless not suitable for inclusion in the final terms.
	(x) Description of any market disruption or settlement disruption events that affect the underlying	CAT.B	CAT.C	In our view it is self-evident that certain unforeseen changes in the markets which are not known at the time of drafting the prospectus (for the purposes of Recital 17 of the Amended Directive) can necessitate additional market or settlement disruption events. For instance, one example of such sudden market developments were the air traffic restrictions caused by the Icelandic ash cloud in 2010. The differentiation between CAT.B and CAT.C seems particularly arbitrary in the context of this item.
	(xi) Adjustment rules with relation to events concerning the underlying	CAT.B	CAT.C	In our view it is self-evident that certain unforeseen changes in the markets which are not known at the time of drafting the prospectus (for the purposes of Recital 17 of the Amended Directive) can necessitate additional market or settlement disruption events. The differentiation between CAT.B and CAT.C seems particularly arbitrary in the context of this item.
	(xiii) If the security has a derivative component in the interest payment, provide a clear and comprehensive explanation to help	CAT.B	CAT.C	Information referred to in this category overlaps to a large extent with item 4.7(vii) (description of the underlying) and should, in our view, be merged with that item. It is possible that, owing to the changes in the market which were not known at the time of

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
	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.			drafting the prospectus it may be necessary to add certain information which is not provided for in the base prospectus. It would be impracticable and impossible to allow for all the possible variations in the base prospectus. Further, it would render the base prospectus completely unreadable. In our view, such product-specific information should be contained in the final terms. We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market. The differentiation between CAT.B and CAT.C seems particularly arbitrary in the context of this item.
4.10	Representation of debt security holders including an identification of the organisation representing the investors and provisions applying to such representation. Indication of where the public may have access to the contracts relating to these forms of representation	CAT.A	CAT.C	We consider that the identification of the trustee on the basis of the base prospectus should not be required in all circumstances. First, this could contravene domestic rules of a number of member states (for instance, under German law the common representative (*gemeinsamer Vertreter*) who represents noteholders with respect to noteholder resolutions can be (i) appointed subsequent to the issuance of bonds without the need to nominate a representative in the terms and conditions at the beginning of the term of the respective bonds or (ii) selected for each bond issue under a base prospectus individually). Secondly, it is also inconsistent with item 4.7 (xii) which classifies the name of the calculation agent as CAT. C. Prospectus authorities are not required or authorised to approve the appointment of a trustee.
4.14	In respect of the […] country(ies) where admission to trading is being sought […]	CAT.A	CAT.C	The jurisdictions in which particular securities issued under a base prospectus are offered or admitted to trading is one of the factors determined by the market

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
				condition immediately before the issuance. This information is not known at the time of drafting the prospectus and, therefore, cannot be included in it. Further, we consider that it would be disproportionate to stipulate that information on withholding taxes in all potential offering or listing jurisdiction should be included in the base prospectus. Likewise, it would not be proportionate to require the inclusion of information on all the eligible alternatives.
5.2.1	(i) The various categories of potential investors to which the securities are offered	CAT.A	CAT.C	In our view, there is not reason why this information could not be included in the final terms. The proposed approach of listing all the possible alternatives is unnecessarily formalistic.
5.3.1	(ii) the method of determining the price and the process for its disclosure	CAT.B	CAT.C	In fast changing market environments, it may be necessary to determine the pricing method for certain securities immediately prior to the issuance, in particular when products have a long subscription period. In such circumstances, the pricing method would clearly not be known at the time of drafting the prospectus. Likewise, price determination methods may rely on market parameters not known at the time of drawing up the prospectus. It would be impracticable and impossible to allow for all the possible variations in the base prospectus. Further, it would render the base prospectus completely unreadable. In our view, such product-specific information should be contained in the final terms. We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market. The differentiation between CAT.B and CAT.C seems particularly arbitrary in the context of this item.

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
	Annex XII			
4.1.2	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 unless the securities have a denomination per unit of at least EUR 50 000 or can only be acquired for at least EUR 50 000 per security.	CAT.B	CAT.C	This is based on the same analysis as our proposal to reclassify item 4.1.7 as CAT.C.
4.1.7 / 4.1.13 (i), (iii)	A description of the rights attached to the securities, including any limitations of those rights, and procedure for the exercise of said rights.	CAT.B	CAT.C	This item deals with information relating to specific redemption provisions and provision for the determination of price. It is possible that, owing to the changes in the market which were not known at the time of drafting the prospectus it may be necessary to add certain information which is not provided for in the base prospectus. It would be impracticable and impossible to allow for all the possible variations in the base prospectus. Further, it would render the base prospectus completely unreadable. In our view, such product-specific information should be contained in the final terms. We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market. The differentiation between CAT.B and CAT.C seems particularly arbitrary in the context of this item. We disagree with ESMA's view expressed at para. 49 and reiterated at para. 51 that it

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
				is necessary for competent authorities to "review algebraic formulas along with its related definitions and descriptions as regards to completeness, comprehensibility and consistency". . In our view, there is no legal basis for this assertion since it implies that even though certain information can only be determined at the time of issuance, it is nevertheless not suitable for inclusion in the final terms.
4.1.14	In respect of the […] country(ies) where admission to trading is being sought	CAT.A	CAT.C	The jurisdictions in which particular securities issued under a base prospectus are offered or admitted to trading is one of the factors determined by the market condition immediately before the issuance. This information is not known at the time of drafting the prospectus and, therefore, cannot be included in it. Further, we consider that it would be disproportionate to stipulate that information on withholding taxes in all potential offering or listing jurisdiction should be included in the base prospectus. Likewise, it would not be proportionate to require the inclusion of information on all the eligible alternatives.
4.2.2	A statement setting out the type of the underlying	CAT.A	CAT.C	Whether this type of information should be classified as CAT. A will depend on how the competent authorities interpret the word "type". If "type" is interpreted as an umbrella term which refers to broad categories of underlying, such as "Share" or "Index", then CAT. A may be acceptable for this type of information. However, if "type" is a narrow term which refers to the specific characteristics of the underlying (or overlaps with the description of the underlying at item 4.2.2(ii) and (iii)) then this type of information should be categorised as CAT. C, in line with the proposed classification of item 4.2.2(ii) and (iii)). Otherwise, the distinction between the information relating to the type of the underlying and the

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
				description of the underlying would appear to be arbitrary. It is possible that, owing to the changes in the market which were not known at the time of drafting the prospectus it may be necessary to add certain information which is not provided for in the base prospectus. It would be impracticable and impossible to allow for all the possible variations of this kind in the base prospectus. Further, it would render the base prospectus completely unreadable. In our view, such product-specific information should be contained in the final terms. We consider that it would be inappropriate to include such information in a supplement to the base prospectus and that it would prevent issuers from promptly reacting to changes in the market.
	(ii) a description of the index if it is composed by the issuer	CAT.A	CAT.C	We consider 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.
4.2.3	Description of any market disruption or settlement disruption events that affect the underlying	CAT.B	CAT.C	In our view it is self-evident that certain unforeseen changes in the markets which are not known at the time of drafting the prospectus (for the purposes of Recital 17 of the Amended Directive) can necessitate additional market or settlement disruption events. For instance, one example of such sudden market developments were the air traffic restrictions caused by the Icelandic ash cloud in 2010. The differentiation between CAT.B and CAT.C seems

No.	Type of information	ESMA's proposed category	DDV proposed category	DDV's comments
				particularly arbitrary in the context of this item.
4.2.4	Adjustment rules with relation to events concerning the underlying	CAT.B	CAT.C	In our view it is self-evident that certain unforeseen changes in the markets which are not known at the time of drafting the prospectus (for the purposes of Recital 17 of the Amended Directive) can necessitate additional provisions. The differentiation between CAT.B and CAT.C seems particularly arbitrary in the context of this item.
5.2.1	(i) The various categories of potential investors to which the securities are offered	CAT.A	CAT.C	In our view, there is not reason why this information could not be included in the final terms. The proposed approach of listing all the possible alternatives is unnecessarily formalistic.
	Additional Information			
	Country(ies) where the offer(s) to the public takes place / Country(ies) where admission to trading on the regulated market(s) is being sought	CAT.A	CAT.C	The jurisdictions in which particular securities issued under a base prospectus are offered or admitted to trading is one of the factors determined by the market condition immediately before the issuance. This information is not known at the time of drafting the prospectus and, therefore, cannot be included in it. For this reason, we consider it to be unnecessary to list all such potential jurisdictions in the base prospectus (with the result that all base prospectuses would on a standard basis refer to all EEA countries).