Deutsches Aktieninstitut

Useful Simplifications versus New Difficulties

ESMA has made good suggestions, but unfortunately might also create new difficulties. The result of Level 1 and 2 should improve the current prospectus regime.

Deutsches Aktieninstitut's response to the consultation of ESMA on format and content of the prospectus, 28 September 2017

Introduction[1]

Deutsches Aktieninstitut (register number 38064081304-25) represents the interests of publicly traded companies, banks, stock exchanges and investors in Germany since 1953. Its members represent 80 percent of the market capitalization of stock corporations listed in Germany. Deutsches Aktieninstitut keeps offices in Frankfurt am Main, Brussels and Berlin (www.dai.de).

Deutsches Aktieninstitut very much welcomes the intention to facilitate capital market access while ensuring adequate investor protection. Strengthening capital markets in Europe has become even more important in a phase of new challenges such as the decision of the United Kingdom to leave the European Union. Unfortunately, we see the achievements of the objectives of the revision of the prospectus law jeopardized.

The objective was to reduce administrative burdens and costs that seem unnecessary and to make the regime more appropriate for small and medium-sized enterprises and companies with reduced market capitalisation. Furthermore, the prospectus should be shortened for the sake of appropriate investor protection and should not be diluted by unnecessary explanations. In order to achieve these goals, it is necessary not to anticipate supposed investor interests, but to question the need for current requirements.

In addition, a sufficient framework has already been established at level 1 in order to ensure the comparability of the different prospectuses. Now it is therefore important for issuers to have sufficient flexibility to include only the information that is appropriate for their securities.

Furthermore it should not be overlooked that there have also been introduced new burdens at level 1 such as the limitation of the number of risk factors and the risk categorization. In order to achieve the above mentioned objectives, the new burdens at level 1 must be compensated on the one hand and, on the other hand, further alleviations have to be achieved.

[1]This position paper summarizes the response of Deutsches Aktieninstitut to the consultation of European Securities and Markets Authority (ESMA) on format and content of the prospectus (ESMA31-62-532), https://www.esma.europa.eu/press-news/esma-news/esma-proposes-simplifications-prospectuses.

In the light of the above, we highlight in particular the following points:

Requirements not foreseen in the level 1 text:

Issuers are best placed to determine how to tell their "equity story" and deliver meaningful information. Whilst the nature and extent of the information to be disclosed in a prospectus are legitimately set by the EU legislation, issuers should not be subject to excessive constraints regarding how such information is to be presented.

An important point where ESMA implements new requirements that are burdensome to investors is the new disclosure requirement to describe changes in the borrowing and funding structure and provide a description of the expected financing of (future) activities. Especially the forward looking description puts a new burden on issuers to provide a new set of information.

Another case in point is ESMA's proposal to mandate the disclosure of a cover note, a requirement which is not foreseen by the Level 1 text and runs counter to the stated aim of simplification. Rather, issuers should be free to include a cover note or not and to choose the order of presentation of the different sections, including where to place the risk factors.

Another example is ESMA's proposal to require issuers to confirm that they have complied with the Transparency Directive and the Market Abuse Regulation in order to benefit from the alleviated secondary issuance regime (see below answer to question 74).

Riskfaktors:

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

Level 1 (articles 16.4 and 16.5 of the Regulation) mandates ESMA to develop guidelines to assist authorities in the review of the specificity and materiality of risk factors and of their presentation across categories and empowers the Commission to adopt delegated acts to specify the criteria for the assessment of the specificity and materiality and for the presentation of risk factors.

As regards the Commission's empowerment to develop delegated acts, the Commission made a statement during a workshop on Prospectus level 2 measures that it will not envisage adopting any legislation on risk factors

in the short term. Issuers already have measures in place to assess and mitigate the risks they face and have developed internal control environment either compliant with national or international frameworks (eg.: COSO) as well as reporting processes.

It is key for issuers that the description of the risk factors in the prospectus can be aligned with the risk disclosure required under the Accounting Directive. Consequently, requirements of the prospectus regime should allow issuers to use the risk factors published in the management report mandated by the Accounting Directive also in the prospectus as risk factors regarding the issue, possibly completed by additional risk factors necessary for the specific issuance.

Furthermore, on the prioritisation of risk factors, we have concerns regarding the requirement for a supplement when the order of risk factors within one category changes.

The preferred approach regarding the categories of risk factors should be a flexible approach with a non-exhaustive and non-binding list that could be adapted where necessary to allow an alignment with the risk disclosure requirements under the Accounting Directive. Consequently, risk factors published in the management report mandated by the Accounting Directive could be incorporated in the prospectus, possibly completed by additional risk factors.

Additional scope for prospectus alleviation:

In addition to the proposed simplification, there is still a relatively big margin of manoeuvre on Level 2 to concretely alleviate the share registration document both for primary (full alignment of the Operating and Financial Review requirement with the management report required under the Accounting Directive; removal of the Strategy and Objectives disclosure requirement) and secondary offers (e.g. removal of the report of an independent accountant or auditor in case of profit forecast or estimate, as well as the disclosure requirement concerning property, plants and equipment, material contracts, operating and financial review except in case of rescue situations, corporate governance information unless a major material change occurred, i.e. a merger or an acquisition).

Question 1:

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

We do not support ESMA's proposal to make mandatory a cover note of 3 pages maximum. The introduction of a mandatory cover note is not required by Level 1. There is furthermore no rationale for turning a level 3 guidance into a more stringent obligation. This would be an extension of the standardized content of the prospectus without any benefit for the investor. An individual introduction, however, can give the investor an impression of the specific issuer and the securities.

Question 2:

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

We do not support the new section "how to use the prospectus". In many cases, this section is unnecessary or redundant with the summary of the prospectus and with the table of content. In the other cases it should be possible that the issuers adapt the design to individual needs, so the section should not be too formalistic in these cases.

Question 3:

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

Issuers should be able to choose the order of the sections including where to place the risk factors. In case the activities of the issuer are simple (eg.: retailer, manufacturer) reading the risk factors before the description of the business does not raise any particular issue. But in case the issuer undertake more complex activities (eg.: Biotech, Medtech or Fintech companies) that require a full understanding of the issuer's business, we consider that it is essential for (retail) investors to first understand the company's business before dealing with risk

factors. Since it would not make sense to have different regimes depending on the nature of the activities, we advocate for maximum flexibility. Flexibility is key in avoiding redundancies and will not impair the comprehensibility of prospectuses as long as a detailed table of content is included.

Question 4:

Should the URD benefit from a more flexible order of information than a prospectus?

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

Question 5:

Would a standalone and prominent use of proceeds section be welcome for investors?

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

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

Question 6:

Is the list of "additional information" in Article XXI of the Commission Regulation fit for purpose? What other types of additional information should be included in a replacement annex?

No comment.

Question 7:

Are the definitions proposed to be carried over to the new regime, and new definitions proposed adequate? Should any additional definitions be added?

No comment.

Question 8:

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

Generally speaking, Deutsches Aktieninstitut supports the intention of ESMA to simplify prospectuses (e.g.: removing the auditors' report on profit forecasts). However, the success of the prospectus reform is measured by whether producing prospectuses has been simplified and access to capital markets improved. In order to achieve this objective, the new burdens at level 1, such as the limitation of the number of risk factors and the risk categorization, must be compensated and further alleviations have to be achieved.

In any case, new requirements included in the technical advice with no benefits to investors but additional costs to issuers must be avoided. For example, the new requirement "use of proceeds" for wholesale debts can be mentioned here.

Question 9:

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

We don´t support to introduce the cover note. The introduction of a cover note is not required by the Regulation and opposes the objective to simplify the prospectus (see above under question 1). We consider that the scope of the scrutiny by the Competent Authority is clearly defined be Level 1. In addition there are new items e.g. item 1.5 of annex 1 and 7.4 of annexes 5 and 6 which include that information. There is no need for a new statement.

Question 10:

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

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

Question 11:

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

Most public companies have a website (such an obligation is required by other pieces of EU legislation). Therefore, including a link to the website and making documents on display electronically available should not raise any issue. However, ESMA should not require each and every issuer to have a website. The wording should be amended to allow the issuer to provide the website's address of a third party (especially in case of a group website set up by another group company (subsidiary or holding company). With regard to the website address in the prospectus, it should be made clear that the website of the parent company or the

guarantor can also be used. This is necessary because financing companies often do not have their own website and it seems unduly burdensome to require issuers to create a website instead of using the website of the parent company or the guarantee provider which in any case provides information relevant for the investors.

Question 12:

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

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

Question13:

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

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

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

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

9 OPERATING AND FINANCIAL REVIEW

~~***9.1 Financial condition***~~

To the extent not covered elsewhere in the registration document ~~*provide a description of the issuer's financial condition, changes in financial condition and results of operations for each year and interim period, for which historical financial information is required, including the causes of material changes from year to year in the financial information to the extent necessary for an understanding of the issuer's business as a whole.*~~

and to the extent necessary for an understanding of the issuer's business as a whole, a fair review of the development and performance of the issuer's business and of its position for each year and interim period for which historical financial information is required, including the causes of material changes.

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

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

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

a) the issuer's likely future development;
b) activities in the field of research and development.

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

~~***9.2 Operating results***~~

~~*9.2.1 Information regarding significant factors, including unusual or infrequent events or new developments, materially affecting the issuer's income from operations, indicating the extent to which income was so affected.*~~

~~*9.2.2 Where the historical financial information disclose material changes in net sales or revenues, provide a narrative discussion of the reasons for such changes.*~~

9.2.3 Moved to [11.11]

Question 14:

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

We very much welcome ESMA's proposal to remove the auditors' report on profit estimates and forecasts for equity and non-equity prospectuses. In case a profit forecast is included in a prospectus this requirement is an unnecessary and huge burden on issuers. Especially the necessary supplements increase this burden considerably. On the other hand, the audit reports do not provide any added benefit for investors. The audit statement has no effect on the quality of the profit forecasts and estimates. The issuers themselves have a very high interest in the accuracy of the information due to the potential prospectus liability. The auditors´ report on profit forecasts and estimates is thus a pure formality, which however creates massive costs.

We don´t agree in more detailed disclosure requirements regarding the assumptions. In this regard we would like to point out that there is a discrepancy between the explanations given by ESMA in the consultation paper (page 36) and the wording of annex 1 (page 47): ESMA explains that the trade-off is removing the auditors' report against the disclosure by the issuer of the full assumptions ; annex 1 however maintains the current wording and refers to the disclosure of the principal assumptions.

In addition, we would like to point out that the current regime that published profit forecasts/estimates have to be included in equity prospectuses while it is up the issuer whether or not to include them in debt prospectuses (based on question of materiality) should remain to apply.

However in the secondary issuance regime, we consider that the section on profit forecasts/estimates should be removed from the simplified prospectus

Question 15:

Do you agree with the proposal to explain any 'emphasis of matter' identified in the audit report?

No comment.

Question 16

Should there be mandatory disclosure of the size of shareholdings pre and post issuance where a major shareholder is selling down? Would this requirement imply any material additional costs to issuers?

No comment.

Question17:

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

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

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

Question 18:

Do you agree with the proposal to clarify the requirement for restated financial information?

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

Question 19:

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

Yes, we agree with ESMA's proposal.

Question 20:

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

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

- **Disclosure on strategy and objectives** is a new requirement ESMA proposes to introduce in the share registration document on the ground that information on the issuer's strategy and objectives are important – particularly in the case of IPO – and key for investors and analysts.

- We disagree with this new requirement as the Business overview section already provides for comparable information.

- **Disclosure regarding trend information and significant changes in the issuer's financial position** could be merged in one section and streamlined instead of having 2 separate sections.

- **Disclosure regarding the Board and Senior management** could be reduced to [3] years.

- **Disclosure regarding material contracts** (contracts not entered in the ordinary course of business) should be redrafted because the current wording is very confusing and may lead to diverging interpretations and implementations. Any contract material to the issuer's operations would be mentioned in other parts of the registration document (business overview, risk factors…).

- **Disclosure regarding the list of significant subsidiaries and information on holdings** could be removed because information will be included in the notes of the financial statements.

Question 21:

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

No comment.

Question 22:

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

We consider that this would make sense, as the differences between issuers would be taken into account.

Question 23:

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

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

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

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

Question 24:

Do you consider the changes to dilution requirements would be helpful to investors at the same time as being feasible to provide for issuers?

No comment.

Question 25:

Do you agree that the information solicited by item 9.2 is important for investors?

No comment.

Question 26:

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

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

- Regarding the information on taxation (new item 4.11 of annex 2): we welcome ESMA's proposal to remove the current requirement and include a warning that tax legislation can have an impact on the income received from the securities. However, we do not support ESMA's proposal to require information when there is a specific tax regime applicable to the investment: the abovementioned warning should suffice.

- Regarding the disclosure of price in case of admission , we do not support ESMA's proposal. As a matter of fact in case of admission, the only relevant and therefore material information for potential investors on the secondary market would be the first quoted price.

Question 27:

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

No comment.

Question 28:

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

We agree with ESMA that a specific disclosure on principal investments would not be useful for investors to allow them to take an informed investment decision. Therefore we support ESMA's proposal to remove this disclosure requirement but we do strongly not agree that it should be replaced by this new disclosure requirement on the issuer's funding structure and borrowing requirements. The wording of the proposal is absolutely unclear und could trigger big difficulties. The information on the issuer`s borrowing and funding structure is already included in the financial statements. Furthermore a requirement to describe expected financing of (future) activities introduces a wholly new disclosure element that is especially problematic under the prospectus liability regime as it is a plan/forecast of the financing. This automatically comes with uncertainties, is subject to changes. The discussion on profit forecasts show how complex and burdensome it is to describe the future in a prospectus. In case ESMA insists on this new disclosure, clear line items should be provided.

Question 29:

Do you agree that an issuer of retail non-equity should be required to include a credit rating previously assigned to it in the prospectus?

Yes, we agree.

Question 30:

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

Yes, we very much welcome ESMA's proposal to remove the auditors' report on profit estimates and forecasts for equity and debt. In case a profit forecast is included in a prospectus this requirement is an unnecessary and huge burden on issuers. Especially the necessary supplements increase this burden considerably. On the other hand, the audit reports do not provide any real added benefit for investors. The audit statement has no effect on the quality of the profit forecasts

and estimates. The issuers themselves have a very high interest in the accuracy of the information. In addition, there will always be the threat that the issuer will be held liable for the information provided. The auditors´ report on profit forecasts and estimates is thus a pure formality, which however creates massive costs.

Question 31:

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

The outstanding profit forecasts and estimates should not automatically be required to be included in the prospectus for non-equity securities. In general, we refer to the detailed answer under question 14. In addition, this requirement should not be required for the following reasons: outstanding profit forecast and estimates are not directly relevant to every non-equity investor. While non-equity securities are affected if the issuer finds himself in financial difficulties, not every forecast or change thereto is relevant for debt securities. This depends upon the term of the securities, short term or long term and the overall profitability of the issuer reflected in the rating of the issuer. The general requirement to include forecasts does not adequately reflect the broad range of debt securities and debt issuers.

Question 32:

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

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

Question 33:

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

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

- **Disclosure regarding trend information and significant changes in the issuer's financial position** could be merged in one section and streamlined instead of having 2 separate sections

- **Disclosure regarding material contract** should be redrafted because wording is very confusing (contracts not entered in the ordinary course of business; material contracts vs contracts including obligation or entitlement material to the group) ?

- Most public companies have a website (such an obligation is required by other pieces of EU legislation). Therefore, including **a link to the website** and making documents on display electronically available should not raise any issue. However, ESMA should allow issuers to use a third parties website, e.g. the website of its holding company or another group company. The wording of item 5.1.4 of section 5 of Annex 1 should be amended to allow the issuer, in such a case, to provide the website's address of a third party (a subsidiary of the holding company for instance).

Question 34:

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

Costs would be materially increased by the introduction of 5.1.7 (material) new requirements for the descriptions of the use of proceeds. Introduction of the new sections "cover note" and "how to use the prospectus" also do not decrease the costs. Actual changes in the costs are difficult to estimate.

Question 35:

Do you agree with the removal of the requirement for wholesale non-equity issuers to restate their financial statements? Would this significantly affect the informative value of the prospectus for investors?

Yes, we agree with ESMA's proposal.

Question 36:

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

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

- **Disclosure regarding trend information and significant changes in the issuer's financial position** could be merged in one section and streamlined instead of having 2 separate sections

- **Disclosure regarding material contract** should be redrafted because wording is very confusing (contracts not entered in the ordinary course of business ; material contracts vs contracts including obligation or entitlement material to the group) ?

- Most public companies have a website (such an obligation is required by other pieces of EU legislation). Therefore, including a **link to the website** and making documents on display electronically available should not raise any issue. However, ESMA should consider the case where the prospectus is filed by a holding company or a SPV which does not have any securities listed and therefore does not necessarily have a website. The wording of item 5.1.4 of section 5 of Annex 1 should be amended to allow the issuer, in such a case, to provide the website's address of a third party (a subsidiary of the holding company for instance).

- Moreover, a **better distinction between the retail and wholesale debt prospectuses** should be drawn. The wholesale debt prospectus should be much simpler and more straightforward than the retail debt prospectus. As regards to the disclosure of non-financial information (e.g. ESG items) there should be no requirement to publish such ESG items in the wholesale prospectuses. At the moment, it is politically desirable that ESG information is gaining in importance. At present, however, those factors are only taken into account by a few institutional investors in their investment decision. But the sustainability report of the issuers will always provide more information so they don't need this information in the prospectus. One exception is to be made for securities that specifically promote ESG aspects (e.g. green bonds), so issuers should be able to include them in the prospectus on a voluntary basis. For other securities it still would be a burden for the issuers and make the prospectus unnecessarily complex for the other investors.

Question 37:

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

No comment.

Question 38:

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

We support ESMA's proposal to reduce the disclosure requirement on taxation and to require a warning that the tax legislation may have an impact on the income received.

Question 39:

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

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

Question 40:

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

We strongly oppose to include this requirement for debts. The investor according to the current legal situation already gets all relevant information – the expected price, method of pricing and all costs and taxes that are specifically charged to him.

Hence there is no reason for new burdens imposed on issuers. If ESMA is of the opinion that the requirement is e.g. necessary for derivatives, this requirement must be restricted to these.

Question 41:

Do you agree with the proposal that the issue price of the securities to be included in the prospectus in the case of an admission to trading?

Yes, we agree with ESMA's proposal.

Question 42:

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

No comment.

Question 43:

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

The removing of tax description is likely to result in savings for issuers. This only applies, however, if the amendment to item 5.3.1 does not lead to new burdens for issuers (please refer to our answer to question 40).

Question 44:

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

ESMA proposes to add a new disclosure requirement on the use of proceeds. There is no such requirement in Annex XIII of Regulation 809/2004 (Minimum Disclosure Requirements for the Securities Note for debt securities with a denomination per unit of at least EUR 100 000) and ESMA does not provide a clear rationale for this new requirement. Wholesale debt and derivatives securities are placed with institutional investors and the prospectus is only drafted for the admission to trading on a regulated market. We strongly oppose to introduce the requirement "use of proceeds" for wholesale debts. Most of wholesale debt securities with a denomination per unit of at least EUR 100 000 are issued without special purpose but rather for general corporate business purposes and it is then usually impossible to track this money. Hence, it is impossible to list every line item of purposed use. It would be possible to state general purposes but there would be no use in it for the investors of wholesale debts. However, in the event that the financing is to be used for a specific purpose, it could be interesting for investors so it should be possible to include this in the prospectus on a voluntary base.

Question 45:

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

No comment.

Question 46:

Do you agree with the proposal to make derivate disclosures a building block?

No comment.

Question 47:

Do you agree with the proposal to reclassify the how the return on derivatives take place from B to A? If not, please explain why.

No comment.

Question 48:

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

No, we disagree with ESMA's proposal to enhance the disclosure in relation to situations where investors may lose all or part of their investment. Article 7(5) of the Regulation introduces a new warning in the summary that "*the investor could lose all or part of the invested capital*" and, where the investor's liability is not limited to the amount of the investment, another warning that "*the investor could lose more than the invested capital and the extent of such potential loss*". A summary would always be required except for wholesale non-equity prospectuses. Therefore we consider that retail investors awareness would be sufficiently enhanced in such circumstances and we don't consider that it is necessary to require an additional warning as proposed by ESMA in the risk factors section.

Question 49:

Do you consider that the requirements should be different where the return of the investment is linked to the credit of other assets (i.e. credit linked securities) than where the return is linked to the value of a security?

No comment.

Question 50:

Do you consider that any further changes be made to the derivatives securities building block? Please advise of any costs and benefits that would be incurred by the further changes you propose.

No comment.

Question 51:

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

No comment.

Question 52:

Do you agree with the proposed amendments to the annex relating to the underlying share?

No comment.

Question 53:

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

No comment.

Question 54:

Do you agree that the annex for third countries and their regional and local authorities should remain unchanged (with the exception of the reference to Member States)?

No comment.

Question 55:

Do you agree with the proposal relating to the asset backed securities registration document?

No comment.

Question 56:

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

No comment.

Question 57:

Do you agree with the proposal relating to the asset backed securities building block?

No comment.

Question 58:

Do you agree with the proposal to allow reduced disclosure where the securities comprising the assets are listed on an SME Growth Market?

No comment.

Question 59:

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

No comment.

Question 60:

Do you agree with the amendments to the pro forma building block? Should any further amendments be made to this annex? Please advise of any costs and benefits implied by the further changes you propose.

No comment.

Question 61:

Do you agree that the additional building block for guarantees does not need to change other than the minor amendments proposed by ESMA?

Yes, we agree with ESMA's proposal.

Question 62:

Do you think that depository receipts are similar enough to equity economically to require the inclusion of a working capital statement and / or a capitalisation and indebtedness statement? Please advise of any costs and benefits that would be incurred as a result of this additional disclosures.

No comment.

Question 63:

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

No comment.

Question 64:

Do you agree with the changes proposed by ESMA for collective investment undertakings?

No comment.

Question 65:

Is greater alignment with the requirements of AIFMD necessary? If so, where?

No comment.

Question 66:

Do you agree with the proposal to allow reduced disclosure where the securities issued by the underlying issuer/collective investment undertaking/counterparty are listed on an SME Growth Market?

No comment.

Question 67:

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

No comment.

Question 68:

Do you consider that any changes are required to the existing regime for convertible and exchangeable securities? If so, please specify.

No comment.

Question 69:

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

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

Question 70:

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

No comment.

Question 71:

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

No comment.

Question 72:

Should the URD schedule contain any further disclosure requirements?

Please refer to our answers to questions 20 regarding additional alleviations that ESMA could take into consideration when defining the URD schedule. In particular we consider that disclosures required in the OFR are also included in the management report defined by article 19 [and 29] of the Accounting Directive.

Therefore we consider that section 9 could be entirely removed from the share registration document and the URD and the OFR fully aligned with the management report.

Question 73:

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

No comment.

Question 74:

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

ESMA is proposing to require from issuers a compliance statement with the publication obligations of the Transparency Directive and Market Abuse Regulation in order to benefit from the secondary issuance regime. We oppose the introduction of such a statement. The conditions to benefit from the secondary issuance regime are set in article 14 of the Regulation and do not include any statement of compliance:

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

We consider therefore that there is no legal basis for ESMA to require such a compliance statement. Moreover, this statement is not necessary, as other rules

ensuring compliance with the Transparency Directive and Market Abuse Regulation, especially there is a sufficient sanction regime.

Share secondary issuance

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

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

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

MAR Summary

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

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

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

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

> "*The summary of the relevant information disclosed under Regulation (EU) No596/2014 featured in a simplified prospectus (the "MAR disclosure summary") shall be presented in an easily analysable, concise and comprehensible form. It shall not replicate all information already published under Regulation (EU) No 596/2014 and shall be an intelligible summary of the last relevant information.* ~~*The MAR disclosure summary shall be presented in a limited number of categories depending on their topics*~~
>
> ~~*The MAR disclosure summary shall provide a clear view of the evolutions and circumstances of facts and figures mentioned by the issuer. The summary shall not consist of simply a list of disclosures or links thereto and only MAR disclosures that are relevant to a particular offer shall be summarised*~~."

Non-equity securities secondary issuance

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

Question 75:

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

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

Question 76:

Do you consider that item 9.3 (information on corporate governance) is necessary?

Please refer to our answer to question 17.

Question 77:

Do you consider that information on material contracts is necessary for secondary issuance?

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

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

Question 78:

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

While it is hard to estimate in numbers, the new annex will reduce costs for issuers if our explanations are considered among the other questions. Investors however still have sufficient access to information, even though not all information will remain to be included in the prospectus.

Question 79:

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

No comment.

Question 80:

Is a single securities note, separated by security type, clear or would it be preferable to have multiple securities note schedules?

No comment.

Question 81:

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

No comment.

Contact

Sven Erwin Hemeling
Policy Advisor Capital Markets Law
Deutsches Aktieninstitut e.V.
Senckenberganlage 28
60325 Frankfurt am Main
Phone + 49 69 92915 - 27
Fax + 49 69 92915 - 12
hemeling@dai.de
www.dai.de

Maximilian Lück, LL.M.
Head of EU Regulatory Affairs
Deutsches Aktieninstitut e.V.
EU Liaison Office 58, Rue Marie de Bourgogne
B-1000 Bruxelles
Phone +32 2 7894102
lueck@dai.de
www.dai.de