Deutsches Aktieninstitut

Disclosure Guidelines

Position on disclosure requirements under the Prospectus Regulation

Deutsches Aktieninstitut's response to the ESMA consultation on Guidelines on disclosure requirements under the Prospectus Regulation,
4 October 2018.

Introduction[1]

Deutsches Aktieninstitut (transparency register number 38064081304-25) represents the interests of publicly traded companies, banks, stock exchanges and investors in Germany since 1953. Its members represent 85 percent of the market capitalization of stock corporations listed in Germany. Deutsches Aktieninstitut has offices in Frankfurt am Main, Brussels and Berlin (www.dai.de).

In its response to the ESMA consultation on Guidelines on Disclosure Requirements under the Prospectus Regulation, Deutsches Aktieninstitut welcomes that ESMA wants to provide more opportunities to refer to existing financial reporting (financial statements) from the prospectus rather than duplicating the figures in the prospectus (see recital 14). The prospectus regulation aims at enabling the investor to make an informed investment decision. No other medium is better suited for this purpose than the annual report including the annual financial statements and / or interim financial reports, so that a stronger referencing - especially for debt transactions of existing stock corporations - represents a more reasonable reduction of information asymmetries.

ESMA's proposed guidance addresses many issues already covered by the annual financial statements and management reports. Additional guidelines, e.g. the Operating and Financial Review, Capital Resources and Profit Forecast raise questions as to what should distinguish these required disclosures for the prospectuses from the disclosures according to IFRS in the Financial Statements and Management Report. It would be more useful if, instead, ESMA would clarify what information it expects in the prospectuses in addition to these reports, which become part of the prospectus when being incorporated. That would be legally more sound and easier for companies. Again, these additional disclosures should be very few, as all significant issues relating to the financial position, results of operations and development of the company must be reported in the annual financial statements and management report.

In addition, it would be very much appreciated if the Guidelines were sorted overall according to equity and non-equity relevant guidelines. This would greatly increase readability. The previous guidelines were clearer in this regard.

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[1]This position paper summarizes the response of Deutsches Aktieninstitut to the consultation of European Securities and Markets Authority (ESMA) on on Guidelines on disclosure requirements under the Prospectus Regulation (ESMA31-62-1239), https://www.esma.europa.eu/file/51885/download?token=gftEvPHF.

1 Operating and financial review

Question 1:

Do you agree with the choice to largely carry over the CESR recommendations on OFR? If not, could you please indicate what further guidance should be provided and the legal basis for such?

The possibilities to reference to financial reports should be made even clearer. Please refer to the explanations in the introduction. Next to the topic presented in the introduction, there also seem to be contradictions with the ESMA Guidelines on Alternative Performance Measures. For example, Guideline 3 (iii) appears to be in conflict with number 25 of the APM Guidelines. Finally, the wording of guideline 2 (margin no 21) regarding comparability should be amended to clearly refer to "similar information provided elsewhere in the prospectus".

Question 2:

Do you agree with the introduction of draft guideline 4 in order to provide further guidance on the use of the management report? Do you believe the inclusion of any separate non-financial report (when applicable) could materially increase the length of equity prospectuses? If so, please provide your reasoning and an alternative proposal.

Yes. Regarding the non-financial report, inclusion of a separate report would result in a significant increase of the length of the prospectuses. So far, the non-financial KPIs were not necessary in most prospectuses.

With regard to the aforementioned information in relation to environmental, social and governance (ESG) matters, we assume that a reference to the CSR report is sufficient. Otherwise, the meaningfulness of the CSR report as such would be put in question.

Question 3:

Do you believe the application of draft guidelines 1, 2, 3 and 4 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

Guideline 1 and 2 will probably not cause any major changes in costs, but Guideline 3 and 4 will. In particular, consulting and auditing costs are estimated to increase by 10%.

2 Capital resources

Question 4:

Do you agree with the choice to largely carry over the CESR recommendations on capital resources? If not, could you please indicate what further guidance should be provided and the legal basis for such?

No comment.

Question 5:

Do you consider that the clarifications in these draft guidelines on how text provided elsewhere should be cross-referred to are useful?

Yes, it should be clear that it makes sense to refer to the cash flow statement, as its presentation is subject to accounting standards and thus provides a common reporting basis for investors.

Question 6:

Do you believe the application of draft guidelines 5, 6, 7 and 8 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

3 Profit forecasts and estimates

Question 7:

Do you agree with the choice to largely carry over the CESR recommendation on profit forecasts and estimates? If not, could you please indicate what further guidance should be provided and the legal basis for such?

We consider that Guideline 11 is not useful and should be removed since the clean statement required by the delegated act is clear and straightforward. As regards other guidelines on pro forma and estimates and under the assumption that Guideline 11 should not be removed, the type of prospectus should be differentiated more clearly. For an IPO, the forecast is certainly more important than for smaller debt transactions, especially under long-term issuance programs of large public companies.

Question 8:

Do you believe the application of draft guidelines 9, 10, 11 and 12 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

Additional costs may incurby reference to Guideline 12 if the issuer is not familiar with the accounting systems and principles of the acquired entity. In addition, the inclusion of a profit forecast of an acquired company may be misleading. The investor may not always be aware of the significance of this profit forecast. This is all the more true since the forecast base often has changed as a result of the acquisition. The profit forecast of the target company should not have to be included as it irritates the investor more and does not meaningfully inform the investor on its own.

4 Historical financial information

Question 9:

In relation to draft guideline 14, do you consider that it is beneficial to clarify the application of the bridge approach for prospectuses that include less than three years of financial information? If not, please elaborate on your reasoning and suggest an alternative approach.

No comment.

Question 10:

Do you agree with the guidance set out in draft guidelines 13, 14, 15, 16 and 17? If not, please explain your reasons and provide alternative suggestions.

When changing the accounting standard, issuer are faced additional significant burdens due to the requirements of the guidelines. The preparation of adjusted financial statements based on the new accounting framework, which is comparable to the previous framework, can be very difficult. The bridge approach allows the investor to make a valuation during this period. Regarding the restated financial statement (Guideline 13), however, it should be sufficient to explain the reason for the restatement. In addition, its effects could be explained, as far as possible and not already done in the notes anyway. A line item per line item comparison appears not to be appropriate.

Question 11:

Do you consider that additional guidance is necessary as regards the restatement of historical financial information in the case of prospectuses that include less than three years of financial information? If so, please explain your view.

No.

Question 12:

Do you believe the application of any of the draft guidelines 13, 14, 15, 16 and 17 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a besteffort basis – quantify them.

Of course, the burden mentioned in Question 10 is also financial.

5 Pro forma information

Question 13:

Should draft guideline 18 include any other standard indicators of size? Have you ever used other indicators because the three indicators included in draft guideline 18 would produce anomalous results?

The CESR recommendations §92 and §93 clearly state that the list of indicators is non-exhaustive and that other indicators can be applied. We consider that this statement should be carried forward in ESMA guidelines. But it should not result in further indicators in general.

Question 14:

In draft guideline 18, do you agree that when an issuer is involved in several transactions which individually do not, but which collectively do, constitute a 25% variation to the issuer's size, pro forma information should be required unless it is disproportionately burdensome to produce it?

We are not in favour of systematically expanding the pro forma scope of application to situations where the issuer is involved in multiple transactions, which collectively constitute a 25% variation to the size of the issuer's business, and consider in accordance with CESR's previous position that the situation should be assessed on a case by case basis.

Question 15:

In draft guideline 18, do you agree that when an issuer is involved in several transactions of which only one constitutes a 25% variation to the issuer's size, pro forma information should be required for all the transactions unless it is disproportionately burdensome to produce it?

We are not in favour of systematically expanding the pro forma scope of application and - in accordance with CESR's previous position – we favour a case-by-case assessment of the situation. The principle of proportionality should be respected.

Question 16:

In draft guideline 25, do you agree that the accountant / auditor report should not be permitted to include an emphasis of matter?

Preventing "qualifications or emphases of matter" in the independent auditor's report is not the task of issuers. In practice, implementation of this guideline would hardly be possible. Therefore, this guideline has to be removed. In addition, it may be misleading for the investor to remove it even though the auditor obviously considers it essential (compare also ISA 706 item 5).

Question 17:

In relation to draft guidelines 19, 20, 21, 22, 23, 24 and 26 which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

No comment.

Question 18:

Do you believe the application of any of the draft guidelines 18, 19, 20, 21, 22, 23, 24, 25 and 26 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

Preparing pro forma financial information can be costly. The benefit of the information, however, depends on the individual case. The requirements applicable to all should therefore be reconsidered.

6 Interim financial information

Question 19:

Do you agree with the proposal to carry over only part of the CESR recommendations on interim financial information since some of the contents appear to be obsolete under the current legislative framework? If not, could you please indicate which CESR recommendations should have been retained and the legal basis for including them in these draft guidelines?

Yes, we agree with the updates to the CESR recommendations mandated inter alia by the revision of the Transparency directive.

Question 20:

Do you believe the application of draft guidelines 27 and 28 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

7 Working capital statements

Question 21:

Do you agree with the rules for calculation of working capital in draft guideline 31? If you do not agree, please explain why and propose an alternative approach.

No comment.

Question 22:

Do you agree with the rules for calculation of present requirements in draft guideline 32? If you do not agree, please explain why and propose an alternative approach.

No comment.

Question 23:

Do you agree that it is useful to require credit institutions to take their liquidity risk into account when they determine their working capital? Do you agree with the requirements of draft guideline 34?

Yes, the approach seems to be appropriate.

Question 24:

Do you agree that it is useful to require (re)insurance undertakings to take their liquidity metrics and their regulatory capital requirements into account when they determine their working capital? Do you agree with the requirements of draft guideline 35?

Yes.

Question 25:

In relation to draft guidelines 29, 30, 33, 36 and 37, which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

No comment.

Question 26:

Do you believe the application of any of the draft guidelines 29, 30, 31, 32, 33, 34, 35, 36, and 37 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No comment.

8 Capitalisation and indebtedness statements

Question 27:

Would you like more specific guidance on what to disclose concerning the type of guarantee according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

It is important to ensure that the statement of capitalization does not go beyond of what is required in the regular reporting under the Transparency Directive or IFRS. Furthermore see response to Q31.

Question 28:

Would you like more specific guidance on how credit institutions and (re)insurance undertakings should adapt the capitalisation statement according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

The requirements should, as far as possible, be consistent with the regular reporting under the Transparency Directive and IFRS.

Question 29:

Do you agree that trade receivables and trade payables should be included in the indebtedness statement, as proposed in draft guideline 39?

See response to Q31.

Question 30:

In the indebtedness statement, do you agree that financial liabilities from leases should be included under financial debt and described further in a paragraph after the statement of indebtedness?

No comment.

Question 31:

Do you consider that any line items in either the capitalisation or the indebtedness statement are not useful to investors? Please explain your answer.

All in all, the drafting of the Guideline was handled with a very high level of accounting expertise. But the requirements should, as far as possible, be consistent with the regular reporting under the Transparency Directive and IFRS, e.g. the benefits of dividing into Guaranteed and Secured appear to be of little help to the investor as he cannot match this information with the closing information. The structure of the cap table should be closer to the published balance sheet and the annexes to the financial liabilities.

Proposal for a combination of capitalization and indebtedness statement:

	As of September 30, 2018		
	Actual	**Adjustment**	**As adjusted**
	(in EUR million)		
	(unaudited)		
Cash, cash equivalents and time deposits			
Financial liabilities			
Noncurrent financial liabilities			
Bonds, commercial paper and notes			
Liabilities to banks			
Deposit business			
Other financial liabilities			
Current financial liabilities			
Bonds, commercial paper and notes			
Liabilities to banks			
Deposit business			
Other financial liabilities			
Total financial liabilities			
Total equity			
Total capitalization			

Question 32:

Do you have any other comments on draft guidelines 38 and 39?

Please refer to question 31.

Question 33:

Do you believe the application of draft guidelines 38 and 39 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No comment.

9 Remuneration

Question 34:

Do you agree with the approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

Yes.

Question 35:

Do you believe the application of draft guideline 40 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

10 Related party transactions

Question 36:

Do you agree with the content of this draft guideline? Do you think it provides further clarity to the market? If not, please explain.

No comment.

Question 37:

Do you believe that the application of draft guideline 41 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

11 Acquisition rights and undertakings to increase capital

Question 38:

Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

Yes.

Question 39:

Do you believe the application of draft guideline 42 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

12 Options agreements

Question 40:

Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

Yes.

Question 41:

Do you agree with the introduction of a specific disclosure point on the potential dilution effects connected to the exercise of option agreements?

No, we do not agree with this new point which is not required by the delegated act. Item 19.1.6 of Annex I, for instance, only requires information about the capital under option (or agreed to be put under option) and details of the options. There is no requirement to disclose information on the potential dilution.

Question 42:

Do you believe the application of draft guideline 43 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

Yes, since it requires additional information.

13 History of share capital

Question 43:

Do you agree with the guidance set out in draft guideline 44 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

Yes.

Question 44:

Do you believe the application of draft guideline 44 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

14 Description of the rights attaching to shares of the issuer

Question 45:

Do you agree with the guidance set out in draft guideline 45 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

Yes.

Question 46:

Do you believe the application of draft guideline 45 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

15 Statements by experts

Question 47:

Do you agree with the guidance set out in draft guideline 46 which has been subject only to minor revision? If not, please elaborate on your

reasoning and suggest an alternative approach.

No comment.

Question 48:

Do you believe the application of draft guideline 46 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No comment.

16 Information on holdings

Question 49:

Do you agree with the proposal to carry over only part of the CESR recommendations on information on holdings? If not, please indicate what further CESR recommendations should be retained and the legal basis for their inclusion in these draft guidelines.

Yes.

Question 50:

Do you consider the clarification on the general principle whereby this draft guideline does not apply when the required information is provided in the issuer's consolidated / separate financial statements prepared in accordance with IFRS to be useful?

Yes, we consider the clarification very useful and important. In addition, it should be made clear in the entire Guidelines if, in the opinion of ESMA, information is required that is not already included in the consolidated / separate financial statements of the issuer prepared in accordance with IFRS.

Question 51:

Do you believe the application of draft guideline 47 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

17 Interests of natural and legal persons involved in the issue / offer

Question 52:

Do you agree with the guidance set out in draft guideline 48 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

Yes.

Question 53:

Do you believe the application of draft guideline 48 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No.

18 Collective investment undertakings

Question 54:

Do you agree with the guidance set out in the draft guidelines which have been subject only to minor revision, i.e. draft guidelines 49, 50, 52, 53, 54, 55 and 57? If not, please elaborate on your reasoning and suggest an alternative approach.

No comment.

Question 55:

Do you agree with the inclusion of new draft guideline 51? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.

No comment.

Question 56:

Do you agree with the inclusion of new draft guideline 56? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.

No comment.

Question 57:

Do you believe the application of any of the draft guidelines 49, 50, 51, 52, 53, 54, 55, 56 and 57 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

No comment.

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