Deutsches Aktieninstitut

ESMA's proposals will severely burden the real economy that is reliant of using the capital market right now

Position Paper of Deutsches Aktieninstitut e.V. as of 28 June 2013 in regard of ESMA's Consulation Paper "Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus"

Summary

Deutsches Aktieninstitut has established this position taking the view of its members, especially of the "real economy" and especially those issuers regularly issuing bonds.
Deutsches Aktieninstitut is **very** concerned about the interpretations of ESMA and believes that sometimes such interpretation does not lie within the spirit or even wording of the Prospectus Directive and Regulation. This may be very harmful for the economy and especially for the issuance of debt securities that has developed to an indispensable instrument of corporate financing after the financial crisis.
Please find the reasons for these concerns in our comments to the different parts of the Consultation Paper.

1 Introduction

Supplements trigger the right to withdraw for investors. Issuers or persons responsible for drawing up the prospectus (in the following: persons responsible) take a responsible position and try to avoid the situation to face withdrawals in the first place. But issuers take responsibility and make sure investors can make an informed assessment on the basis of the supplemented prospectus. So, issuers of debt instruments issued under a base prospectus try to avoid the situation of having to supplement the prospectus during a public offer under the base prospectus, e.g. by using issuance windows in which no regular financial (interim) reports are published. This is not possible in all cases: There has been a major change in the last reform of the Prospectus Directive by the Omnibus Directive. The period in which a prospectus has to be supplemented ends either if trading of the securities begins or the offer ends, **whichever occurs later**. The latter insertion by the Omnibus Directive **reveals that the application of this primary market directive and the secondary market directives overlap to the detriment of issuers**. Deutsches Aktieninstitut has always criticised this because the primary market and secondary market obligations and respective legislation have not been harmonised. With trading on a regulated market, the securities are subject to the secondary market directives and their disclosure regime. An example for the lack of harmonization to the detriment of issuers is the right of the issuer "to delay under his own responsibility the public disclosure of inside information such as not to prejudice his legitimate interests provided that such omission would not be likely to mislead the public and provided that the issuer is able to ensure the confidentiality of that information", Article 6 (2) of the Market Abuse Directive 2003/6/EC. An equivalent right to delay a supplement to a prospectus does not exist, even if the same information is concerned.
Where the issuer decides to disclose such information immediately, a supplement to the prospectus (if neccesary), must be approved by the competent authority which may take up to seven working days. Investors so get the possibility to speculate against the issuer in the meantime and simply withdraw if the stock price does not develop in the way they expected. Article 16 of the Prospectus Directive (PD) does not exclude investors from the right to withdraw that have known the new information before they agreed to purchase or subscribe for the securities and so abuse the right that was surely intended to help investors in situations the information was new to them.

Although of course ESMA cannot change the law, it can help to soften the consequences in areas in which it is empowered. Unfortunately ESMA does the opposite. The lack of harmonisation so fully goes to the detriment of issuers or persons responsible.

We would also like to draw the attention to the fact that the new approach of the retail cascade could have a significant effect on the functioning of the market. Intermediaries can only make public offers if they have the consent to use the prospectus by the issuer. As we have stated above, issuers try to avoid public offers if new information is expected and make sure that a base prospectus is supplemented before a public offer takes place in case new information has occurred. However, this is not possible down the chain of the retail cascade as issuers regularly do not know which intermediary will make a public offer making use of the general consent to do so. It is practically not possible to make sure that all intermediaries will stop their offers if new information triggering a supplement comes up. For liability reasons issuers take a restrictive approach concerning the time period for which consents are granted. In the first place, this probably has no effect on the primary market of the securities, meaning in this context, the first time securities are publicly offered to investors by intermediaries. ESMA should be aware that there may be an effect on the secondary market of securities that finally spills back on the primary market and so to the access to capital of issuers. Secondary market here means subsequent sales of the securities from investors to others, back to intermediaries, back to investors and so on. Such subsequent sales bring liquidity to the market which is very important especially for retail investors as this offers them an exit possibility. Intermediaries are rather careful if there is no consent to use a prospectus because there is no legal certainty what qualifies as public offer and what qualifies as an offer where a prospectus is not necessary. By the time being there may be no available updated prospectus at all. The more the requirement to make offers only on a basis of a prospectus is extended the more influence this may have on the functioning of the secondary market as intermediaries and large investors fear for liquidity. Finally, large investors may not buy securities in the primary market or reduce their amount. This may, due to the prospectus regime even be the case for listed securities as the duty to make public offers on the basis of a prospectus does not end anymore with the admittance to trading. So, due to the change primary and secondary market it is unclear when the primary market ends and the secondary market begins of the same securities. We would like to stress that Recital 11 of the new PD obliges the EU Commission to take action: “In order to allow for the efficient application of Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) (2), Directive 2003/71/EC and Directive 2004/109/EC and to clarify underlying problems of differentiation and overlaps, the Commission should put forward a definition for each of the terms ‘primary market’, ‘secondary market’ and ‘public offer’.” **So, in a RTS we would expect that the EU Commission comes forward with such definitions now as this is linked to the topic of supplements to prospectuses**.

Finally, we would like to express that in ESMA’s cost-benefit analysis of Annex III the costs related to the withdrawal of investors is not even mentioned. The cost-

benefit analysis gives the impression that there are costs around 19,000 EUR which is misleading because the considerably higher costs have to be considered that arise from such withdrawals and costs for the economy that can occur if finally issuers can't take the risk of issuing securities anymore. Such costs have to be estimated according to the frequency of supplements and taking into account if issuers are able to avoid such supplements during the period of a public offer. So the requirement of a supplement may effectually cost the issuer the difference of the market price and the issue price for all securities for which a withdrawal right is execised. It also needs to be considered that systematic requirements of a supplement effectively create blackout periods – e.g. in connection with the periodical announcement of financial information - in which an issuer is unable to use the capital markets for its financing activities. The financial impact of such a loss of refinancing opportunities in the capital market can hardly be estimated.

2 Scope of the RTS (III.)

Deutsches Aktieninstitut welcomes that the new RTS tries to bring more legal certainty to determine whether a particular new factor, mistake or inaccuracy requires the publication of a supplement to the prospectus. Such uncertainty is also linked to the question of when an offer is public, though. There should finally be legal certainty, too.

2.1 Para. 12

Deutsches Aktieninstitut does not agree that the new wording of Article 16 (1) has solved any uncertainty with regard to the time when the obligation to supplement a prospectus ends. It is still unclear which elements define a public offer. If circumstances that may easily be interpreted as a public offer change, it is especially difficult to say at which stage the public offer ended. For example, if the initial offeror, like an intermediary, still lists the respective securities on his website, but instead of linking that directly to the possibility to buy them online, finally only offers them on request in direct contact. Is that still a public offer? So, there is also uncertainty when such offer ends and a supplemented prospectus respectively the consent to use such prospectus is needed. Please also see our hint on Recital 11 of the new PD in the introduction.

2.2 Para. 17-18

ESMA does in accordance with the Directive not make a distinction between positive, negative or neutral change when assessing the materiality or significance. As the Directive does not explain, ESMA should explain why positive effects may trigger a supplement and thus the right to withdraw for investors. Even if the Directive also wanted to protect investors that speculate against the relevant security and so also wanted such information to be given to the public, one has to wonder why for such cases there is a link to the right to withdraw for investors. **Investors that speculate against the securities would not hold the securities directly but other instruments. The right to withdraw would not help them, but the information alone**. Maybe ESMA can interpret this, explain and give examples, so the market and addressees of the Directive, can understand better.
Even if ESMA considers that positive changes may be relevant, a clear distinction should be made between the security classes, especially shares and bonds. Bonds are less volatile than shares and positive changes are less likely to have an impact on the price especially for bonds with an investment grade rating. As for bonds,

only changes affecting the ability of the issuer to fulfil its obligations will be relevant for investors (please see our comments in to para. 6.11). Positive news that do not trigger a rating improvement can hardly move the price of such bonds and are therefore not material for investors. Bonds usually have a limited potential for an increase in the price as they will be redeemed at their nominal amount at maturity. Therefore, only under exceptional circumstances positive or neutral changes will represent a material new development for investors. Especially for positive and neutral changes, it should be up to the issuer to decide whether a supplement is necessary or not.

We do not agree that “it is difficult to assess what investors perceive as a negative, positive or neutral change as it would depend on their expectations”, as most of the times this will be very clear. Also, we believe that the PD does not hint at subjective perceptions but for the prerequisites of the content and supplements to the prospectus sets up an objective standard or objectified perceptions. **Given that, there should be a very restrictive and differentiating approach concerning possible neutral or positive effects**. We consider it necessary for ESMA to take a differentiated view and consider different requirements for different securities and different issuer classes. Even within a security class such as bonds the level of the information required for the protection of investors is different depending on the credit quality of the issuer. Investment grade bond issuances have to be treated different than high yield issues. Instead, ESMA proposes a “list of specific situations which systematically require the publication of a supplement” that do “not distinguish between positive and negative changes.”

3 The test to be performed in Article 16 (1) of the Prospectus Directive (IV.)

Deutsches Aktieninstitut does not agree that the test whether a new factor, mistake or inaccuracy qualifies as a triggering event for producing a supplement is the same test as whether information should be included in the prospectus. With the terms "significant" and "material" Article 16 has clearly raised the bar. Together with ESMA's view putting "any mistake" on a level with "material mistake" we believe that the limit of just interpreting the wording of the Directive is reached and crossed.

In the absence of definitions for the terms "material" and "significant" in Article 16(1) of the Prospectus Directive, ESMA decided that the test whether a new factor, mistake or inaccuracy qualifies as a triggering event for producing a supplement is the same test as whether information should be included in the prospectus. As a consequence, ESMA considers that significance or materiality should be assessed according to the same qualitative and/or quantitative criteria used when drafting the prospectus.

Deutsches Aktieninstitut believes that there is a relevant difference between the "informed assessment" that Article 5(1) of the Prospectus Directive aims at and materiality and significance triggering a supplement. **As the legislator has seen that such wording ("informed assessment") is indefinite and general and so leaves room for interpretation and leads to a level of legal uncertainty with the risk of liability that is inadequate, the Directive as well as the Regulation (PR) regulate in detail the requirements for the content of the prospectus**.

We believe that ESMA cannot use a provision in the Directive that has been well elaborated via additional legislation trying to give it more contour and legal certainty to stakeholders, to interpret a provision that is indefinite and general as well. What does Article 5(1) say? The prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities".

We believe that the terms "material" and "significant", but also their relation to "which is capable of affecting the assessment" outline very clearly that the level of interpretation of what triggers a supplement is high above the notion of "necessary for an informed assessment". If this were not the case, the Directive would have used in Article 16(1) PD the same wording and referred to Article 5(1) PD. It would have said **"Every ~~significant~~ new factor, ~~material~~ mistake or inaccuracy relating to**

the information included in the prospectus which is capable of affecting the *informed* assessment of the securities *according to Article 5(1)*" needs a supplement. But instead, the Directive uses the terms "material" and "significant" and has clearly tried to raise the bar!

Additionally, **we are astounded** that ESMA puts "any mistake or inaccuracy" on a level with "material mistakes" if the omission of information prevents investors from making an informed assessment. Given what we have tried to explain above such link to Article 5(1) which needs clarification and is clarified by law is not helpful. As everything that is required according to Article 5(1) should be necessary for an informed assessment, every mistake affects the informed assessment, of course. Again, the Directive uses the term "material" mistake and inaccuracy which means that there can be mistakes that affect the informed assessment, but as they are not material, no supplement is necessary.

4 Specific situations which require a supplement to the prospectus (V.)

> There should be absolute legal clarity which information a supplement has to contain, no interpretations of persons responsible should be required by ESMA. Clarity will not only help issuers but also competent authorities as this is also to protect competent authorities against lawsuits by persons responsible with the argument that the new information could have been disclosed earlier if the approval of the supplement had not been rejected. The reasons of the competent authority for the rejection may be not upheld by the court.

Q1: Do you agree that a supplement should include the disclosure requirements of the Prospectus Regulation relating to the triggering event and also any other objective consequences deriving from such an event which are capable of affecting the assessment of the relevant securities? If not, please provide the reasoning behind your position.

It depends on how ESMA can be interpreted, here. We believe that there should be no simple alignment with the PR and the notion of significant and material in Article 16(1).
ESMA clarifies that a supplement should contain any information necessary for investors to understand the new factor, material mistake or inaccuracy and thereby make an informed assessment. **Deutsches Aktieninstitut wonders what "understand" means in this context. Does that mean the supplement has to give explanations or interpretations to investors?** While we see that information should be formally given in a way that it is clear e.g. if it comes to language and format, we are not sure if ESMA establishes an additional material requirement.
If the supplement has to contain information concerning any objective significant consequences to the information in the prospectus, ESMA can be interpreted in a way that it requires interpretations of the information disclosed. We are not sure that this in intended by the Directive. If ESMA's wording can be interpreted in that way, we would like to hint on the following: As supplements should be approved quickly so that between the time the person responsible is aware of the new information and the supplement the number of investors agreeing to buy the securities does not rise, there should be **absolute legal clarity** which information a supplement has to contain. **This is also to protect competent authorities against lawsuits by persons responsible with the argument that the new information could have been disclosed earlier if the approval of the supplement had not been re-**

jected. The reasons of the competent authority for the rejection may be not upheld by the respective court.
Instead, in our view, the PD requires the supplement to include the relevant information when read together with the prospectus and the supplement needs not contain all relevant information on its own.

5 Timing Issues (V.I.)

Timing issues would be appeased if ESMA did not raise legal uncertainty about the minimum content of supplements (see V.) and respected the wording “significant” and “material” in Article 16(1).

ESMA is of the opinion “that the significance of any of the situations included in the below list is such that investors cannot make an informed investment decision where the disclosure requirement for the particular event is not included in a supplement to the prospectus. Therefore, the mentioned timing constraints cannot be used as a reason to exclude any situation from the below list, where a supplement is always required, nor as a reason to reduce the associated disclosure requirements.”
But timing issues would be appeased if ESMA did not raise legal uncertainty about the minimum content of supplements (see V.) and respected the wording “significant” and “material” in Article 16(1).

6 List of triggering events (V.II.)

6.1 Publication of new annual audited financial statements (V.II.i.)

Q2: Do you agree that the publication of audited annual financial statements systematically triggers the obligation to prepare a supplement? If not, please state your reasons.

No.

Even though there is a widespread practice among issuers to provide a supplement after the publication of annual financial statements, there should not be a systematic requirement but a differentiating approach taking into account the significance and materiality of the financial information and respective guidance of ESMA.

ESMA has tried to do this for depositary receipts and asset backed secutities but hasn't taken into account bond issues. There should be no systematic requirement for a supplement for base prospectuses of bonds issued by investment grade rated issuers. We believe that a systematic requirement would not be in line with the PD:Although base prospectuses are valid for twelve month and allow regular issuances, the PD has not set up a requirement for a regular update of financial figures, although the legilator knew that due to other regulation in such a period of time there will be new financial information available. Still, as there is a lack of special regulation, like for any kind of prospectus only the prerequisites of Article 16(1) PD are to be complied with.

But ESMA does not consider the materiality and significance of the triggering event and so reduces the prerequisite to a formal alignment to the Prospectus Regulation. Para. 66. shows very clearly ESMA's approach: "ESMA is of the opinion that even though the depositary receipts are not considered as equity securities from the Prospectus Directive perspective, the disclosure requirements in the Prospectus Regulation are the same and therefore the need for a supplement should be the same."

The prerequisite of Article 16(1) gives room for differentiation, though.

If it comes to plain vanilla bond issuers, e.g., above all, it is of importance to investors if the issuer can fulfill its payment obligations in the future. **For this, most changes in financial statements are of no relevance for bond securities.** This is no price sensitive information (see ESMA's argument "price sensitivity"in paragraph 59). Only because financial statements have to be inserted in the prospectus in the first place, ESMA considers supplements always as necessary, not testing if the information is material and significant and is capable of affecting the assessment of the securities. As stated above, the alignment of the requirements of Article 5(1) with Article 16(1) PD

doesn’t reflect the wording of the directive. ESMA makes its proposals on a case by case basis anyway and should reflect basically the differences of different securities.

So, finally it should remain to be the responsibility of bond issuers to decide whether annual financial statements represent “a significant new factor… capable of affecting the assessment of the securities”.

Q3: Do you agree that issuers of asset-backed securities where claims of the investors against the issuer are limited to the underlying assets and the issuer is a special purpose vehicle only have to prepare a supplement on a case by case basis for audited financial statements? If not, please state your reasons.
No answer.

Q4: Please list other situations where a supplement would not always be required for the publication of annual audited financial statements, if any.
As stated above, this could be the case for bond issues and any financial statement where financial statements have no effect on the issuer`s ability to fulfil the payment obligations to the investors.
One example are financial statements of a financing subsidiary, whose bonds are guaranteed by the parent or holding company. The rating of these bonds will be provided on the basis of the credit rating of the guarantor. Financial statements of a financing subsidiary are therefore unlikely to be relevant for investors and a supplement should not be required.
We appreciate that ESMA does not “systematically” require a supplement for the approval of the issuer’s or guarantor’s shareholder’s meeting. We wonder though, why ESMA considers this in the first place. Only in exceptional circumstances shareholder meetings can be relevant for bond issuances. We do not see the additional information value in such approval.

Q5: Do you believe that there should be a systematic requirement to prepare a supplement for interim financial information? If yes, please provide reasons.
No. There should not be a systematic requirement but a differentiating approach taking into account the significance and materiality of the financial information (please see our answer above to Q2).

Q6: What do you assess the cost estimate to be to comply with this requirement?
The plain cost of supplementing a prospectus is not the point of a true and fair cost-benefit analysis. Supplementing a prospectus triggers the right for investors to withdraw from their acceptances. Article 16(1) is meant to provide a balance of the need of investors for updated information against the very strict consequences of the right to withdraw. In extreme cases of initial material mistakes the whole issue could have to be unwound. So the costs depend on the point in time of the summary and the number of investors that withdraw.
Issuers try to avoid the situation by not issuing around the time when new financial

statements are set up. But this may be not possible down the chain of the retail cascade. So the requirement of a supplement may effectually cost the issuer the difference of the market price and the issue price for all securities for which a withdrawal right is execised. It also needs to be considered that systematic requirements of a supplement effectively create blackout periods – e.g. in connection with the periodical announcement of financial information - in which an issuer is unable to use the capital markets for its financing activities. The financial impact of such a loss of refinancing opportunities in the capital market can hardly be estimated. So, as we stated in the introduction the cost-benefit analysis of annex III of the consultation paper does not give a fair view of the real costs.

6.2 Profit forecast for equity securities and depositary receipts (V.II.ii.)

Q7: Do you agree that there should be a systematic requirement to produce a supplement in case of publication of a profit forecast? If not, please state your reasons.

No.

As we have stated above there should be a differentiating approach and respective guidance. Profit forecasts may only be of significance for the assessment of the securities if they deviate from the last respective information of the Prospectus. They may also not be relevant at all for bond issues especially for investment grade bonds.

Q8: Do you agree that the systematic requirement to prepare a supplement for a profit forecast should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.

See answer above.

Q9: What do you assess the cost estimate to be to comply with this requirement?

See our other general answers concerning costs.

6.3 Profit estimate for an annual financial period (V.II.iii.)

Q10: Do you agree that there should be a systematic requirement to prepare a supplement for a profit estimate in relation to the annual financial period? If not, please state your reasons.
No. Given the approach that ESMA takes concerning systematically having to update prospectuses if new financial statements are published this would lead to a systematical doubling of supplements. Also, profit estimates are not required by the Prospectus Regulation to be included in the prospectus, e.g. of debt securities. They can be included on a voluntary basis. ESMA now systematically requires supplements for profit estimates. We believe that this is not in line with Article 16(1) and the Prospectus Regulation as this means that issuers are by law allowed not to insert profit estimates but as soon as the prospectus is published they would have to immediately supplement a profit estimate. This is contradictory. Any request of ESMA to insert a profit estimate in the prospectus in the first place would violate the Prospectus Regulation at least regarding bonds.

Q11: Do you agree that the systematic requirement to prepare a supplement for annual profit estimates covered by e.g. Annex I, item 13.2 subparagraph 1 (referring to profit estimates for which a report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.
See our answer above in which we disagree with the systematic requirement already.

Q12: Do you agree that the systematic requirement to prepare a supplement for financial information relating to the previous financial year covered by e.g. Annex I, item 13.2 subparagraph 2 (referring to profit estimates for which no report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.
No. See our answer to Q10.

Q13: Do you believe that there should be a systematic requirement to prepare a supplement for interim profit estimates? If yes, please provide reasons.
No. See our answer to Q10.

Q14: What do you assess the cost estimate to be to comply with this requirement?
See our other general answers concerning costs.

6.4 Change in control of the issuer for equity securities and depositary receipts (V.II.iv.)

Q15: Do you agree that there should be a systematic requirement to produce a supplement in case of a change in control of the issuer? If not, please state your reasons.
Also here, a supplement should only be required if the change of control is significant. This may not be the case when the change of control of an SPV issuing ABS or whose issues are secured by a guarantor in the case of debt securities as the major information for investors may well be the value of underlying assets or the solvency and credit worthiness of the guarantor.

Q16: Do you agree that the systematic requirement to prepare a supplement in case of change in control of the issuer should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.
There should be no systematic requirement to prepare a supplement in case of debt securities.

Q17: What do you assess the cost estimate to be to comply with this requirement?
See our other general answers concerning costs.

6.5 Public takeover bids for equity securities and depositary receipts (V.II.v.)

Q18: Do you agree that there should be a systematic requirement to produce a supplement in case of a public takeover bid? If not, please state your reasons.
No answer.

Q19: Do you agree that the systematic requirement to prepare a supplement in case of a public takeover bid should only apply to equity securities covered by Article 4(2)(1) and Article 17(2) of the PR and depositary receipts? If not, please state your reasons.
No answer.

Q20: What do you assess the cost estimate to be to comply with this requirement?

No answer.

6.6 Working Capital Statements for certain equity securities (V.II.vi.)

Q21: Do you agree that there should be a systematic requirement to draw up a supplement in case of a positive and a negative change to the issuer's working capital statement? If not, please indicate your reasons.
ESMA is of the opinion that the change of a qualified working capital statement into a clean working capital statement shows an improvement which is especially affecting the investment decision of potential new investors and should be supplemented.
Deutsches Aktieninstut wonders why this event should trigger the right to withdraw for investors who have already agreed to invest and so protects such investors. New potential investors do not have to be protected from positive information. Maybe ESMA can explain.

Q22: Do you agree that the systematic requirement to prepare a supplement in case of a positive and a negative change to the issuer's working capital statement should apply to equity securities covered by 4(2)(1) and convertible/exchangeable debt securities in accordance with Article 17(2) of the Prospectus Regulation? If not, please state your reasons.
See our answer above especially concerning positive changes.

Q23: What do you assess the cost estimate to be to comply with this requirement?
See our general remarks concerning costs.

6.7 Admission to trading or offer to the public in an additional EU member state (V.II.vii.)

Q24: Do you agree that a supplement should always be required where an issuer is seeking admission to trading on (an) additional EU regulated market(s) or intending to make an offer to the public in (an) additional EU Member State(s) than the one(s) foreseen in the prospectus? If not, please state your reasons.
We regret that such information is categorized as B in Regulation 486/2012 in the first place. We do not see why such information is of significance for assessing the

securities and should trigger the right to withdraw for investors that have already agreed to purchase securities.

Q25: What do you assess the cost estimate to be to comply with this requirement?
As stated before, also such systematic requirement in connection with the right to withdraw may prevent issuers from expanding an offer and so preventing them from using the capital markets for its financing activities. The financial impact of such a loss of refinancing opportunities in the capital market can hardly be estimated.

6.8 New significant financial commitment for equity securities (V.II.viii.)

Q26: Do you agree that there should be a systematic requirement to draw up a supplement in case of a new significant financial commitment which is likely to give rise to a significant gross change? If not, please indicate your reasons.
No, there should not be a systematic requirement but only if the assesment of the securities is affected.

Q27: Do you agree that the systematic requirement to produce a supplement for a significant financial commitment should apply to issuers covered by Article 4(2)(1) and Article 17(2) of the Prospectus Regulation? If not, please indicate your reasons.
No answer.

Q28: What do you assess the cost estimate to be to comply with this requirement?
See our answers above concerning costs.

6.9 Any judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the prospectus (V.II.ix.)

Q29: Do you agree that issuers should always prepare a supplement for any judgment or concluding event, even if subject to appeal, in governmental, legal or arbitration proceedings already disclosed in the prospectus? If not, please indicate your reasons.

No, it is of imprtance that investors are aware of such cases. But only if estimations are expressed in the prospectus, e.g. concerning a fine that may be paid, and are not met because the fine finally is so high that it can severly affect the issuer, a correction should be supplemented.
ESMA is of the opinion that even were an issuer wins a legal proceeding it "is difficult to assess what investors perceive as a negative, positive or neutral change as it would depend on their expectations" (hinting at their comment in para 17). We do not agree that this is the case. Especially for bond issuances a positive or neutral judgement can hardly be considered to be material for the assessment of the securities. It should remain for issuer to decide whether a judgement, even a negative one, does affect the assessment of the relevant securities.

Q30: Do you agree with the triggering elements as set out in Paragraph 87? If not, please indicate your reasons.
No. The different stages of the proceedings etc. may "provide insights", but they may still have noeffect on the assessment of the securities. If you compare ESMA's approach with the accepted market practice of ad hoc disclosure of securities under the Market Abuse Directive which is very strict, ESMA's approach is even stricter. We do not see any reason for that. We cannot believe that ESMA even considers e.g. the decision to accept further material into evidence during a court proceeding (see para 88) to be of any relevance here. ESMA considers "any" judgment or concluding e.g. legal proceeding as such subjet to a supplement without any further test if this is of significance or materiality for the assessment of the securities, but just because the proceeding had been mentioned in the prospectus. ESMA should consider that annual financial reporting at least in Germany has to contain certain proceedings. If such information is automatically implemented in prospectuses just because the financial statements are inserted into the prospectus as a whole that does not mean that issuers or persons repsonsible consider them at all to be of relevance for an informed assessment of the securities. Also updating information on such basis would not be of relevance for the assessment of securities either. This shows that a systematic requirement only based on formal considerations is not the right way to deal with Article 16(1) PD.
Again, Deutsches Aktieninstitut thinks that this is not in line with the wording of Article 16(1), as even an initial estimation of the significance of the effect, that has been the reason for mentioning such information within the prospectus can have changed. ESMA needs to consider that such a formal requirement may trigger a constant flow of supplements for issuers who have to disclose multiple legal proceedings in their prospectuses, even though the issuers may have loss provisions in place which cover the whole financial impact of those procedures. We can hardly understand why this kind of risk should be treated so formally.

Q31: ESMA does not make a distinction between equity and debt securities. Do you believe such a distinction should be made? If yes, please state your reasons.
Yes, there should be a distiction because only if the credit-worthiness and

solvency of the issuer or the guarantor (as the case may be) are affected such developments of the proceedings may justify the requirement for a supplement. Again, ESMA obvisously ignores the prerequisites of Article 16(1).

Q32: What do you assess the cost estimate to be to comply with this requirement?
See our answers above concerning costs.

6.10 Increase in aggregate nominal amount of the programme (V.II.x.)

Q33: Do you agree that a supplement should always be required in case of an increase of the aggregate nominal amount of the programme? If not, please state your reasons.
No. ESMA considers different aspects, like why the nominal amount is mentioned in a base prospectus on a voluntary basis sometimes. Given that, Deutsches Aktieninstitut wonders why ESMA suddenly comes to the conclusion that such information is always of importance for investors. ESMA even does not take into account negligible increases.
But there is a widespread practice of supplements in such cases. If the dealership agreement changes and with it all contracts that are linked to this, there may be a reason to supplement a prospectus. So, it should be left to the issuer to decide on the relevance for Article 16(1) in due responsibility.

Q34: What do you assess the cost estimate to be to comply with this requirement?
See our answers above concerning costs.

6.11 Other situations (V.II.xi.)

Q35: Which additional elements should be included in the list above that systematically trigger the need to produce a supplement? Please indicate any arguments which support the inclusion of such elements.

In case of bond issues such circumstances could be in general changes to the terms & conditions of the notes and a rating downgrade either of the issuer or, if the issuer is a financing subsidiary, whose bonds are guaranteed by the parent or holding company, the downgrade of the guarantor.

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