Deutsches Aktieninstitut

Evidence and recommendations on how to improve the legislative process

Position Paper of Deutsches Aktieninstitut [Transparency-Register No. 38064081304-25] regarding the „Call for evidence: EU regulatory framework for financial services", 29th January 2016

1 General Remarks

We appreciate the initiative of the EU Commission to conduct an impact assessment of the regulatory framework for financial services. We are supporting this approach not only by giving evidence on regulatory deficits (please see Section 2 below) but also with recommendations on how to avoid these deficits in the future and to facilitate the application of EU law:

1.1 To improve the legislative process in general

First of all, financial and non-financial companies have had changed their internal accounting, compliance and reporting systems a lot in the past and have reached a sufficient level of transparency and efficiency. Rules are enough which is why we recommend the EU Commission to **contemplate new texts only when absolutly necessary ("Better regulation") after conducting meaningful and convincing impact assessment studies.** In this context, we would also like to urge all institutions involved in the regulatory process to comply with the recently agreed interinstitutional agreement, which is deemed as being an important step in avoiding inconsistent, burdensome and incoherent legislation in the future.[1]

Secondly, the participation of stakeholders in expert groups should be increased. Currently, issuers are often underrepresented, so that they can raise their voice de facto only in formal consultation processes but are rather little consulted as neutral experts in early drafting of legislative act. For example, the ESMA Securities and Markets Stakeholder Group (SMSG) has only one (real) issuer representative.

1.2 To improve the legislative process between the level 1-legislation and Delegated Acts as well as supervisory guidelines

Under "Issue 12" we give much evidence on inconsistencies between level 1- and texts of other levels which are primarily caused by the delegation of crucial political

[1] Agreement reached between EP Conference of Presidents, Council and Commission on 16 December 2015, http://www.europarl.europa.eu/news/en/news-room/20151216IPR07997/EP-Conference-of-Presidents-reaches-agreement-on-Better-law-making.

issues or where one of the European Supervisory Authorities (ESAs) has extended its mandate above the set conditions by level 1.

To prevent this, we firstly recommend to ensure that all crucial political issues of the respective dossier are tackled within the legislative procedure and avoid the temptation of overcoming possible deadlocks in negotiations by deferring discussions on some key contentious matters to the ESAs. EU Parliament and Council have to acknowledge their responsibility so that delegated acts, guidelines and anything else are not adding new political issues in sometimes already transposed directives or regulations.

In addition, to ensure that ESAs not trespass their mandates, the Rapporteur of the EU Parliament and a member of the current responsible Council Presidency should be informed about the drafts developments within the ESAs. This approach increases confidence in sublevel-rules and is therefore a good alternative to the proposed mandatory involvement of the whole EU Parliament.

Within the ESA framework, it is e.g. also seen as critical that in the case of the so called “bundling”, where the Commission regroups several empowerments for draft RTS into one single act**, no right to oppose only a part of the bundled delegated act is granted to the Parliament and the Council.** The institutions can only approve or object the whole “package”. In our view, it should however be possible for the Parliament and Council to object to each of the delegated acts separately. Examples like the one just stated impede democratic legitimacy of the regulatory process on sublevels and should be tackled accordingly in future proposals to reform the ESAs.

1.3 To improve the application of EU law

Facing several different new EU laws, usually accompanied by additional several regulations, especially in the form of delegated acts, guidelines etc. we also raise the point that EU law is almost not comprehensible to the market participants. Having a look at the draft of a new prospectus regulation there are foreseen 32 delegations of powers to ESMA or the EU Commission. This will result in a vast amount of regulations and guidelines. Due this amount of laws market participants are likely to not put all them really into account.

We therefore urgently recommend to develop a system where new regulations, especially when they are only supplementing a level 1-rule, can be included in an existing framework in a kind of consolidated version. At the very least links to the level 2-measure should be included in the level 1-rule.

2 Giving evidence of regulatory deficits

Although the call for evidence is primarily dedicated to financial services, we would like to take the opportunity to give evidence also on any regulatory framework which concerns capital market issues. Since the call is seeking for evidence on how to increase capital market finance of companies, especially SMEs, and among others how market liquidity could be improved, the EU Commission has to take any regulatory framework into account which constraints the companies' opportunities of capital market finance (e.g. initiatives like the Market Abuse Regulation, the Accounting Directive, the Transparency Directive, the proposed Prospectus Regulation) to get a comprehensive view, what causes the lack of liquidity, where investors are over or too poorly protected and where efforts and added value are disproportional to each other.

Please note that in our view this consultation is not only dedicated to level 1-rules such as directives and regulations, but also to level 2-rules like delegated acts, level 3-rules like guidelines, recommendations, Q&As, national rules transposing EU law (e.g. gold-plating) and any further official rule, decision or opinion (e.g. enforcement) which influences issuers, intermediaries and/or stakeholders within the EU regulatory framework.[2] Furthermore, we have not restricted the examples to existing legislation but also included comments on planned proposals or proposals being already introduced into the legislator process if we are of the opinion that respective proposal will most likely to contradict the objectives of this consultation.

Summarizing our position we offer a lot of evidence, describing inconsistent rules and rules which are running counter to the general idea of the Capital Markets Union. If the EU Commission really seeks to facilitate the entry to capital markets, regulation like the extended scope of MiFID II- and MAR-rules are contradictory. Especially many level 2-textes, e.g. under MiFID II and MAR, are to increase the level of bureaucracy to an inacceptable level for SMEs. This might result in a decline of stock listed companies and not – what is the actual intention of the CMU – in an increase.

[2] Like the EU Commission intends, s. p. 5 of the consultation document.

2.1 Rules affecting the ability of the economy to finance itself and grow

Issue 1: Unnecessary regulatory constraints on financing

- Delegated acts to the MiFID II/MiFIR framework, in case of following ESMA's technical advice, threaten the financing of small and medium sized companies

The delegated acts to the MiFID II/MiFIR framework may decrease the availability of finance for small and medium sized companies if ESMA's technical advice on this issue will be followed.[3] This is because ESMA proposes that free of charge financial research provided by banks to persons providing portfolio management and investment advice and to the mutual funds industry will be regarded as non-monetary benefits and will thus be limited. As a consequence, the level of information on shares of SMEs will likely decrease and the investment in the respective shares will be rendered less attractive for the mutual funds industry.

The EU-Commission should not follow the technical advice provided by ESMA regarding the treatment of research under MIFID II to prevent SMEs from unnecessary regulatory constrains on financing.

Issue 2: Market Liquidity

- CRD IV / CRR requirements constrain market making activities of financial institutions and causes the lack of liquidity which is why the proposed opposition of the prospectus exemption for bonds denominated in 100,000 Euro per unit will be useless

The interplay of higher capital requirements pursuant to Directive 2013/36/EU (CRD IV) and Regulation (EU) No 575/2013 (CRR) across the board with new requirements is leading to the situation that broker/dealer banks are massively reducing inventories on their trading books, which in turn is resulting in lower liquidity, especially in bond markets across all sectors.[4] In contrast to this evidence, the EU Commissions proposes to abolish the prospectus exemption for bonds with a denomination of 100,000 Euro per unit in Art. 1 of the proposed regulation and

3 https://www.dai.de/files/dai_usercontent/dokumente/positionspapiere/2015-02-20%20DAI%20ESMA%20MiFID%20MiFIR%20summary.pdf

4 The current state and future evolution of the European investment grade corporate bond secondary market, p. 3, ICMA, November 2014, http://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Secondary-Markets/survey-report-liquidity-in-the-european-secondary-bond-market-perspectives-from-the-market/

justifies this with a lack of liquidity in corporate bond markets.[5] This will clearly make the use of debt capital markets more expensive for the majority of issuers which will clearly contradict the general objective of the CMU. Furthermore, we do not see any argument why the dropping of the prospectus exemption could improve liquidity of the markets.

If the EU Commission`s intention is to increase liquidity, it has to review the capital requirements and other requirements in order to identity where market-making activities are negatively affected. E.g.:

- **the post and pre-trade transparency requirements under MiFID/MiFIR**
- **respectively the special RTS for market making,**
- **the LCR on a regularly basis**
- **and the potential separation of market making activities in the EU bank structure reform**

Issue 3: Investor and consumer protection

In general, we acknowledge an overwhelming amount of bureaucratic rules without a proportionate effect for the degree of investor protection. These rules need to be reduced in order to give companies, intermediaries and stakeholders a comprehensible regulatory framework they are able to act within without undue obstacles, costs and efforts.

- One example are the overwhelming documentation duties of investment firms, which have already negative side effects.

Deutsches Aktieninstitut has for example provided evidence that many German banks have already withdrawn from investment advice – especially with respect to share investment. In addition, a significant number of banks generally reduces advisory services due to increased compliance costs and the large variety of new regulatory standards to comply with. This trend should be reverted – regulation of investment advice e.g. under MiFID II/MiFIR should better balance out the benefits of investor protection and the costs of banks to implement the respective legal requirements.[6]

[5] Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, EU Commission, 30 November 2015, http://eur-lex.europa.eu/resource.html?uri=cellar:036c16c7-9763-11e5-983e-01aa75ed71a1.0006.03/DOC_1&format=HTML&lang=EN&parentUrn=CELEX:52015PC0583

[6] An example for a too far-reaching regulation of investment advice, the suitability report under MiFID II, and its likely negative impact on the level of investment advice offering is described in our comment…

The EU-Commission should take into consideration negative side effects of investor protection rules and should address these. This should happen in context with every new regulation process and not only in separate cumulative Impact assessments like this.

- Operators of MTF and OTF should not be in the scope of Directive 97/9/EC

Directive 97/9/EC introduced rules for investor-compensation schemes to cover losses investors may face when using investment firms under Directive 93/22/EEC (meanwhile replaced by Directive 2014/65/EU). Operators of regulated markets are not regarded as investment firms and this in our view holds true in case they operate a MTF or an OTF. As such, they have prior to MiFID II not been in scope of the investor-protection scheme.

We feel that the inclusion of operators of MTFs or OTFs be them investment firms or market operators with the only investment services performed being the operation of MTFs or OTFs or both does not fulfil the aim of directive 97/9/EC and as such is going beyond the needs for investor protection.

Issue 4: Proportionality/preserving diversity in the EU financial sector

No Comment.

2.2 Unnecessary regulatory burdens

Issue 5: Excessive compliance costs and complexity

- Documentation of market soundings (MAR/level 2-text)

Art. 11 of the Market Abuse Regulation (EU) No. 596/2014 (MAR) provides detailed requirements on how to record a market sounding. Pursuant to paragraph 3 the “disclosing market participant” (DMP) has even to record its conclusion about the disclosure of information which is not assessed as inside information. Furthermore, paragraph 5 requires detailed documentation of the communication with any possible investor. Among others the DMP has to inform the person receiving the market sounding that he is prohibited from using that information. Usually this

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on ESMA’s technical advice (https://www.dai.de/files/dai_usercontent/dokumente/positionspapiere/2015-02-20%20DAI%20ESMA%20MiFID%20MiFIR%20summary.pdf).

person receiving the information is an institutional investor and knows how to deal with inside information. The documentation is therefore only repeating existing rules and is to assess as burdensome.

Hence, the insider rules in the Market Abuse Regulation are sufficient which is why the detailed descriptions of ESMA in the Final Report of draft technical standards on the Market Abuse Regulation ESMA/2015/1455 are not necessary.

- The audit reform runs counter its objectives and will cause unjustified high compliance costs (Article 17 of Regulation no. 537/2014)

Article 17 of Regulation no. 537/2014 requires Europe-wide to rotate audit firms after a 10 year period. However, the Regulation also allows Member States to either extend or reduce the mentioned rotation period within certain limits. This leads to a situation where a patchwork of different rotation cycles in EU Member States is to be expected. One of the first Member States having implemented the Regulation has taken a ten-year approach. Other Member States might opt for an extension. Some Member States even plan to differentiate between different industries, eg Sweden is granting extension periods only for non-financial services industries.

For EU wide operating groups of companies, the patchwork of different rotation periods throughout Europe results in a situation, where the audit of the group`s consolidated financial statements, exclusively conducted and steered by the parent group auditor will nearly be impossible. Groups of companies usually engage one network of auditors to ensure timely and reliable provision of audit services. However, under the new EU audit legislation, audit committees at group level will need to take into account all different rotation periods in the various member states. This may create situations where it will simply not be possible to have a single audit firm network auditing all relevant entities of a group.

The above mentioned scenario will not only unnecessarily increase the complexity on group level, leading to recurring higher costs for groups of companies in Europe, but also runs counter the objectives of the EU-Audit reform: In de facto not being able to only engage one audit firm for the whole group, the necessary overview for providing high quality audit will be missing. A decrease of audit quality and consistency is to be feared. Furthermore, the efficiency of having only one network of auditors both from a timing and reliability perspective would be gone.

While the supreme parent company and all but one of its PIE subsidiaries reside in Member States A with a rotation period of 10 years, one subsidiary is located in Member State B which exercised its option to reduce the maximum rotation period to up to 7 years. There are two possibilities how to handle this situation:

1) Each group company has its own rotation period, resulting in different audit firms being engaged with different companies. This would significantly complicate the audit for the group auditor and increase the risk for uniform group accounting policies not being applied consistently. The communication between several different auditors in various Member States, who have been providing audit services for a company for a different amount of time and have different level of knowledge about the company, would inevitably be less efficient and end up in complex coordination processes. This, in turn, would lead to higher costs, inefficiencies and a higher risk of audit errors. Besides, if a PIE subsidiary has to appoint a new auditor after 7 years, this may effectively predetermine the parent's auditor selection 3 years later (and thus limiting its freedom of choice), bearing in mind the objective of a cohesive group-wide audit process.

2) Both the parent and all other group companies also reduce the period to seven years in order to ensure a consistent audit process, meaning that one audit firm will be responsible for the whole group. This means that the parent and all group companies will need to follow the PIE with the most restrictive exercise of the Member State options or, to put it bluntly, the tail is wagging the dog. This would effectively undermine a parent company's right to rotate auditors based on the 10-year period legislation in its home country which, in addition, coincides with the period envisioned by the EU Audit Regulation. Moreover, a more frequent rotation would prevent auditors from gaining deep insight into a company, which, as a result, would cause a loss of knowledge and a higher risk of audit errors.

Deutsches Aktieninstitut recommends an amendment of Article 17 of Regulation no. 537/2014 in the sense that it should be the supreme parent company's regime which determines the rotation period for all entities of the group being affected by the Regulation. By doing so, the above mentioned inefficiencies would be remedied. Such an approach is eg also taken regarding the requirement of having an audit committee only at group level (See Article 39 of the revised EU Audit Directive). Another example of a pan-European group perspective is the requirement to prepare group accounts. Only the supreme parent company is required to prepare consolidated financial statements.

- The audit of the group`s consolidated financial statements will lead in specific situations to unacceptable compliance costs (Art. 5(1) Regulation (EU) No. 537/2014)

Art. 5 (1) of Regulation no. 537/2014 establishes a blacklist of prohibited non-audit services which cannot be provided by the statutory auditor and its network. Member States are allowed to add services to the blacklist or to remove certain services from the list. At the end, it might be possible that every Member State will have adopted a different blacklist. The blacklist is not only applicable to the parent company and its public interest entities but also to controlled subsidiaries. As a consequence, also group entities that are not public interest entities subject or not even subject to statutory audit, will fall under the scope of the Regulation. According to an interpretation of the European Commission in September 2014 (Q&A document), these group entities have to follow the black list as implemented in their country of residence.

For EU groups of companies, this heavily complicates current practices where the compliance with auditor independence requirements is usually centrally monitored at the level of the supreme parent company. In the future, it will become extremely difficult for the parent company to ensure compliance with 28 variations of the blacklist. Thereby, the audit of the group`s consolidated financial statements, exclusively conducted and steered by the parent group auditor will become nearly impossible. The situation will lead to unnecessary inefficiencies and excessive, recurring compliance costs while at the same time not meeting the objectives set out in the Regulation efficiently and effectively.

As with the example of rotation periods mentioned above, the complexity of the additional requirements unnecessarily hampers EU groups‘ ability to focus on their prime activities to generate growth and to remain competitive.

The parent company’s Member State A permits auditors to provide tax services whereas a PIE subsidiary’s Member State B has put tax services on its “black list”. As a result, in order to ensure a comprehensive and efficient tax consultancy service by one firm for the whole group, the parent company will be practically forced to assign all these (group-wide) services to a third party. Apart from the huge administrative effort of replacing the statutory auditor, cost savings will be lost as well as in-depth knowledge arising from the combination of auditing and tax consultancy activities.

Again, we believe that it is detrimental that this situation will effectively encroach upon a parent company’s right, in accordance with its home country’s law, to obtain the best and widest possible consultancy services for its group.

We suggests the change of Art. 5 (1) in the way that in a group structure the applicable blacklist version should be the one adopted by the Member State where the supreme parent company of the EU group is residing.

- The approval of all non-audit services by each audit committee of an insurance group will result into massive duplication of approval requirements (Art. 5 (4) of Regulation (EU) No. 537/2014)

Art. 5 (4) of Regulation no. 537/2014 requires audit committees of public interest entities to approve non-audit services provided by the statutory auditor and its network for the public interest entity, controlled subsidiaries and the parent company. Accordingly, there is a need for each public interest entity in a group structure to have such an approval process by their individual audit committees installed.

For EU groups of companies, the approval requirement does not reflect the reality of how such services are actually monitored in a group structure. It is usually the supreme parent company which monitors such services by the statutory auditor and its network. The Regulation adds complexity, whereas its objective could be also equally reached by efficient monitoring processes installed on supreme parent company level.

For example: EU insurance group with subsidiaries in fifteen member states has its ultimate parent company in Member State E. As each subsidiary qualifies as a public interest entity there is a need to approve non-audit services for each entity. As the audit firm network provides non-audit services to all entities of the group, each audit committee of the insurance group has to approve all non-audit services. This results into massive duplication of approval requirements.

We suggests the modification of Art. 5 (4) of Regulation no. 537/2014. It should be the audit committee of the supreme parent company that approves all non-audit services for the statutory auditor and its network for the whole group.

- Adequate thresholds under the ancillary activity exemption (Art. 2(1)j MiFID II)

Under MiFID II the scope of the license requirement for investment firms will be broader so that there is principally the risk that non-financial companies will be regarded as an investment firm. This would trigger a huge bulk of additional requirements (e.g. clearing obligation under EMIR, being required to calculate regulatory capital under CRD IV/CRR etc.). To avoid this unintended consequence the company in question will have to give evidence that the use of commodity derivatives, emission allowances and derivatives thereof is an ancillary activity. The definition “ancillary activity” should therefore be appropriately defined. In addition, the proof that the respective instruments constitute only an ancillary activity should be lean and not overburden companies. In addition, emission allowances hold for regulatory purposes should be regarded as privileged transaction and not counted towards the ancillary activity thresholds (see below).

Thresholds defining the ancillary activity under MiFID should be set on an appropriate level.

- Effective monitoring of the proposed cap at various levels of a group is ineffective and will entail excessive compliance costs (Art. 4 (2) of Regulation no. 537/2014)

Art. 4 (2) of Regulation no. 537/2014 introduces a cap on the volume of non-audit services to be provided by the statutory auditor of the public interest entity. The cap amounts to 70 percent of the average audit fees of the last three years. It is common practice, that in a group structure, each public interest entity needs to ensure compliance with the cap calculated for the respective entity. Each member state may adopt varying detailed calculation requirements concerning the cap.

From an EU group perspective, the administration of such a requirement is usually performed at the level of the parent company. Effective monitoring of such a cap at various levels of a group is ineffective and inefficient and results into unnecessary bureaucratic burdens. It will entail excessive compliance costs, which will not meet the objectives set out by the Regulation efficiently and effectively.

An EU engineering group with the listed supreme parent company in Member State F has hundreds of subsidiaries across the EU. Part of the group are twenty subsidiaries in other member states which are themselves listed companies or finance vehicles which qualify as public interest entities. At each public interest entity of the group the cap needs to be calculated taking into account the relationship of the particular entity to other entities within the engineering group and following the variations of the local calculation methods. The processes for the calculation of caps with the engineering group are very complicated and compared to the goal of a restriction on the volume of services very complex and costly.

In our view, Art. 4 (2) should be modified in a way that the cap is only calculated at group level, more specifically at the supreme parent company of the group.

Issue 6: Reporting and disclosure obligations

- Unnecessary bureaucracy through obligations regarding insider lists and directors’ dealings (Art. 19 MAR/level 2-text)

ESMA`s interpretation of the Level 1-text of the Market Abuse Regulation is extremely wide. The high degree of additional bureaucracy will thwart the political will of the level 1-text, whose intention was to avoid exactly this effect and which results in high compliance costs. Examples are the extremely detailed requirements for insider lists (even the private cell phone number of persons on the insider list will have to be collected) and manager transactions reports.

In addition, also the level 1-regulation contains obligations that create additional bureaucracy without any clear benefit for investor protection.

E.g., according to Art. 18 para. 3 (c) of the MAR the issuer has also to record the concrete time of every insertion in the inside list. Another example of a superfluous obligation of the MAR is the duty of issuers to file a list of related persons that may also fall under the duty to notify managers' transactions (Art. 19 para. 5 MAR) This list only creates bureaucracy without any obvious benefit in terms of investor protection.

Due to the high degree of additional bureaucracy listings on an EU regulated market have already become less attractive. At least some of the secondary market obligations of an issuer work as an entry barrier for companies interested in capital market finance. This is exactly the opposite of the political objective of the Capital Markets Union.

A less strict interpretation of the level 1-text would reduce bureaucracy. Also, we recommend to redraft the MAR in some points.

- The obligation to disclose "passive" transactions as directors' dealings is misleading to the market and therefore misses its objective (MAR/level 2-text)

The wide interpretation of securities transactions to be notifiable under the managers' transactions regime in ESMA's final Technical Advise on possible delegated acts concerning the Market Abuse Regulation ESMA/2015/224 also contradicts the purpose of the level 1-text. The purpose of the level 1-text is to make public transactions of directors, which have a signalling effect for the market, because they may uncover whether the expectations of the relevant director in the future development of the company have changed. In order to have such a signalling effect, it is a minimum condition that the relevant director takes an active decision to invest or to reduce in existing investment in the securities. Transactions however, where directors are completely passive, as in the case of inheritances or gifts, cannot have any signalling value to the market. Another example of the counterintuitive interpretation of the level-1-text is ESMA's conclusion that the donation of shares or financial instruments relating to shares under a pre-determined remuneration package has to be notified as a manager's transaction. If these "transactions" were to be notified as ESMA proposes, market would be confused instead of being properly informed.

We recommend to exclude passive transactions from the obligation to be notified under the managers' transaction regime. This could be done by clarifying the Delegated Acts under development accordingly.

While the transparency of derivatives markets needed improvement in order to detect potential systemic risks the reporting obligations of EMIR as well as their specification with level-2 measures reach beyond this objective. An example is the obligation to report internal transactions. These transactions do not add to systemic risk but rather help to improve the risk management of non-financial companies. Also, the level of detail of a derivative transaction which has to be reported needs to be reviewed in order not to overload companies' compliance systems as well as the supervisory authorities' analytical capacities.

We recommend to abolish the reporting requirement for intra-group transactions, at least for non-financial companies not exceeding the clearing thresholds. Furthermore, we a one-sided reporting regime should be introduced, meaning that only one transaction partner should report the details of the transaction and should be responsible for the correctness of the data delivered.[7]

- Obligation to publish a prospectuses in the case of pure listing cases are useless because no one builds its decsion on this document

In the event of a private placement of securities, sometimes the issuer applies for the admission to trade the securities on a regulated market afterwards. Currently, a prospectus is necessary. However, the investors already subscribed for the securities and the securities are already traded on the secondary market. Therefore, the prospectus cannot facilitate the investor's decision about the investment. The investors have already decided about it.

However, if the issuer of shares or a bond is not also already admitted to trading on a regulated market, the requirement of a prospectus is comprehensible because periodically published information about the issuer is missing. But, in the case of secondary issuances, such information are periodically published due to obligations of the Transparency Directive, the Accounting Directive and the Market Abuse Regulation etc. In these cases a prospectuses for a mere application for admission to trading should not be necessary. In the case of bonds the publication of the terms and conditions are sufficient.

Therefore, the EU Parliament and Council should abolish the obligation of having a prospectus in the case of secondary issuances without a public offer in advance in new prospectus regulation replacing the current Prospectus Directive.

[7] See Deutsches Aktieninstitut's position paper regarding the EMIR review https://www.dai.de/files/dai_usercontent/dokumente/positionspapiere/2015-08-13%20EMIR%20review%20position%20paper%20DAI.pdf.

- Envisaged obligation to file annual financial statements in the structured electronic format XBRL/iXBRL under the Transparency Directive 2004/109/EU (TD)

According to Art. 4 para. 7 of the TD issuers have to file their annual reports in an electronic format by 2020. ESMA is currently developing a RTS which will specify this electronic format. In the respective consultation paper ESMA comes to the conclusion that issuers will have to file their consolidated financial IFRS statements in the so-called XBRL format. This proposal is made despite massive criticism by issuers across Europe and even though there is no indication for a clear market demand for XBR-reporting. If ESMA's proposal was accepted in the upcoming discussions issuers would face massive additional compliance costs as well as legal uncertainty. On the other hand potential benefits for investors are negligible, if there are any. We therefore do not understand why ESMA does not advocate the easiest and most efficient solution by proposing the electronic publication of PDF-report.

We therefore recommend the final RTS to be redrafted accordingly. Otherwise the XBRL-reporting duty should be excluded in the TD text on level 1.

- Replacing the Double Waiver Cap Regime (Art. 4 and 5 MiFIR)

We support the idea of curbing dark trading in equities. However, due to the operational complexities involved, we suggest replacing the current "Double Waiver Cap Regime" (MiFIR (Art 4 and 5) for the Reference Price Waiver and the Negotiated Trade Waiver with a far simpler model.

The model we propose envisages that only orders of a minimum size, but smaller than Large-in-Scale (e.g., 80% of Large-in-Scale) can be subject to these two waivers.

Issue 7: Contractual documentation

- Waiver of investment advice record for experienced retail investors (Art. 25 (6) MiFID II)

Rules governing investment advice of investment firms should be adjusted. For the benefit of effective investor protection an environment providing for widespread financial and economic literacy should be promoted instead of pursuing an ecosystem with even more regulatory requirements for issuers.

Therefore, among others experienced retail investors should have the option to waive the obligation that the suitability of the investment advice has to be recorded ("suitability report" Article 25 (6) MiFID II).

Issue 8: Rules outdated due to technological change

No comment.

Issue 9: Barriers to entry

As pointed out above the number and details of regulation that listed companies in Europe have to comply with when they wish to attract (equity) capital market finance works as barrier of entry for the demand side of the market.

- E.g.: The extended scope of MAR runs counter to the idea of MTFs as a first step into the capital market and are therefore contra CMU

Even worse, the legislator has decided to widen the scope of issuers duties under the MAR regime to companies listed on a MTF. In Germany, this will most likely have the consequence that companies of the so-called "Freiverkehr" (which is the privately regulated segment at the German stock exchanges) will have to notify managers' transactions, provide insider lists and publish inside information as soon as possible. As a consequence, differences in regulatory intensity between the regulated market and growth segments like the Alternext, the Entry Standard and the AIM will be reduced. This in turn reduces the attractiveness for SMEs to make the first step into the organised capital market.

The CMU project should therefore be used to reduce the general level of bureaucracy for listed companies. Also, the MAR should be quick fixed in order to preserve the existing regulatory differences between the regulated market and other market segments.

2.3 Interactions of individual rules, inconsistencies and gaps

Issue 10: Links between individual rules and overall cumulative impact

- The extension of market abuse- and MiFID II-obligations and the extension to MTFs are contrary to the intention of the Capital Markets Union to facilitate capital market finance

While the EU is on the one the side increasing reporting obligations, compliance costs etc. which results in a reduced attractiveness of capital market finance, the EU is on the other side searching for ideas to facilitate capital market finance.

The contradictory approaches are obvious which is why we recommend to decline the reporting, disclosure and compliance requirements. Examples underissues like the disclosure of passive directors' dealings, the documentation requirements of market soundings, the requirement of listing prospectuses in the case of secondary issuances etc., give evidence on the too far reaching requirements.

Furthermore, especially MTFs offer a possibility to get first experiences being listed on a market and should therefore require less disclosures and different compliance efforts than the rules for companies listed on regulated markets. Otherwise, MTFs cannot function as a first step into regulated markets.

Issue 11: Definitions

- There should be a single rule book for defined terms

Definitions of all Financial Market directives or regulations including level 2 texts: The various legislative texts use inhomogeneous terminology, the definitions of terminology is spread all over various legislative texts and includes reference chains as well as contradicting terminology. This is true for very basic definitions. We recommend combining all necessary definitions in a single rule book on definitions as an EU regulation which is then referred to by the various dossiers. This keeps maintenance of definitions across dossiers more simple and avoids usage of undefined terms, terms with varying content, etc. In case a deviation is intended on purpose, this needs to be clearly stated in the legislative text targeting to do so.

Only as an example there should be consistent definitions of terms like "SME" (MiFID II/Prospectus Directive/Accounting Directive), "APM" (ESMA Guidelines on APMs/Regulation RTS for approval and publication of the prospectus and dissemination of advertisements) etc.

Especially regarding the term market maker in Art. 4(1) No. 7 Directive 2014/65 (MiFiD II) 'market maker' is defined as a "a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against that person's proprietary capital at prices defined by that person".

By contrast, the Short selling regulation has a different definition of "market making activities" that refers to the activity of:

- posting firm, simultaneous two-way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market;
- as part of its usual business, fulfilling orders initiated by clients or in response to clients' requests to trade; and
- hedging positions arising from the fulfilment of tasks under points (i) and (ii).

While MiFiD's objective is to subject certain intermediaries to its obligations, that of the short selling regulation is to exempt some from certain of these obligations, especially the transparency obligations in the case of net short positions.

In addition, the market-making concept is referred to in the draft regulation of 29 January 2014 on structural measures improving the resilience of EU credit institutions, aiming at enhancing financial stability by means of structural reform of large banks. Market-making is defined as "a financial institution's commitment to provide market liquidity on a regular and on-going basis, by posting two-way quotes with regard to a certain financial instrument, or as part of its usual business, by fulfilling orders initiated by clients or in response to clients' requests to trade, but in both cases without being exposed to material market risk".

Issue 12: Overlaps, duplications and inconsistencies

Due to the amount of evidence we are giving, we have divided this point in three subcategories.

(Issue 12.1) Inconsistencies

- The discussed Financial Transaction Tax is diamentral to an internal financial market like in mind of the Capital Market Union

The Financial Transaction Tax (FTT) creates a hurdle for private and corporate investments and corporate risk management. The direct and indirect costs of the FTT will ultimately be borne by the end-users of capital markets (private households and companies of the real economy). It thereby clearly threatens the investment in capital markets.

In addition, the original FTT proposal of the EU Commission makes derivatives transactions subject to taxation, even if used for risk management purposes. Both a significant increase in hedging costs and a decline in the provision of hedging services will most likely be the consequence. This obviously stands in sharp contrast to the European Market Infrastructure Regulation (EMIR) which recognizes the beneficial role of derivatives in corporate risk management.

Also, the FTT project stands in sharp contrast to the vision of a CMU as it will clearly have an disintegrating effect on the EU capital markets in terms of liquidity, price setting and cross-border flows of funds.

Therefore, Deutsches Aktieninstitut would like to reinforce its view that the FTT legislative project should be stopped.

- ESMA regulatory standards on EMIR are contrary to the intention of the level 1-text regarding the hedging exemption

In the context of derivatives regulation EMIR non-financial counterparties are only obliged to clearing, if their derivatives stock, which is not held for hedging operational risk, exceeds certain thresholds. For calculating the clearing thresholds it is according to recital 31 EMIR crucial to refer to the "sum of all net positions and exposures". In ESMAs` regulatory draft for clearing thresholds, the gross reference was subsequently established, which ran clearly counter level 1-text.

Emission allowances should be acknowledged as privileged transactions under the MiFID II ancillary activity exemption.

- ESMA RTS on MiFID II are contrary to level 1-text regarding commission-based distribution services

Regarding commission-based distribution services, the EU legislator's decision in the Level 1-MiFID II-text was to allow the co-existence of commission-based distribution alongside the independent advice based on adequate information about the nature of the distribution channel. Whether a ban on commission-based distribution services is introduced or not, should be ultimately left to the Member States. However, the list of negative criteria tabled by ESMA in order to assess the legitimacy of inducements would, if applied to dealing commissions, lead to an effective ban of the commission-based distribution services in Europe.

This outcome clearly conflicts with the Level 1-text and should be amended.

- ESMA RTS on MiFID II are contrary to the level 1-text regarding investment research qualified as inducement

ESMA also qualifies investment research provided to portfolio managers as inducements under MiFID, even though such treatment will probably have major implications for the research market in Europe. Such push from the ESMA's side disregards the intention of the EU institutions which have not touched upon the question of research in the course of the MiFID II legislative proceedings.

Given the relevance of the issue for the research coverage of European undertakings, especially in the SME sector, and for the quality of services by European portfolio managers, it should be clear that the decision upon the regulatory approach to research requires the involvement of the EU legislative bodies.

- The rules for prospectus supplements (Art. 16 Prospectus Directive 2003/71/EC) are inconsistent to the rules of the disclosure of inside information (Art. 17 Market Abuse Regulation (EU) No. 596/2014)

According to Art. 16 Prospectus Directive, supplements have to be published between the time when the prospectus is approved and the final closing of the offer to the public or, as it may be, during the time when trading on a regulated market begins, whichever occurs later.

Because of the expression "whichever occurs later", the point when a public offer ends can be uncertain. Does the public offer continue or even arise when the intermediary banks offer the new bonds to their investors? At this time, the bonds are already issued and already traded. Market Abuse Regulation and Transparency Directive both typical laws of secondary markets meet the provisions of the Prospectus Directive, a primary market law. In this case, the above mentioned conflict of supplements and inside information disclosure occurs.

When new information is deemed to be capable to affect the assessment of securities, in almost every case, it fulfils the criteria of an inside information and therefore the requirements of Art. 17 Market Abuse Regulation. Hence, the issuer has to publish a supplement and to disclose an inside information.

However, these two disclosures are inconsistent. A supplement has to be approved within seven days by the national competent authority. In principle the inside information has to be disclosed as soon as possible. However, the disclosure of an inside information might be delayed if several conditions are met. Supplements cannot be delayed. This could result in a situation where the issuer wants to delay the disclosure of an inside information but cannot do it because of the obligation to publish a supplement, especially in case the company is a frequent issuer.

Therefore, the issuer usually will do both publish the supplement and disclose the inside information. However, while the inside information got disclosed immediately, the supplement has to be approved with the consequence of the right to withdraw for the investors.

As a result, the investor may notice the disclosure of inside information and can subscribe for securities of the issuer. After approval (usually a working day or two days later) the supplement will be published. In the next two following days, the investor has the right to withdraw, independently of whether the new information was material for him and independently of whether he has already noticed the disclosed inside information before he took the decision to invest.

Hence, with the disclosure of inside information the investor can speculate on the development of the securities price. Therefore, when the conditions of an inside information is fulfilled, the right to withdraw should not be applicable. These examples imagine the intertwining scope of primary and secondary market law. Deutsches Aktieninstitut recommends making a clear distinction between their obligations, to enhance legal certainty in this area.

- RTS on prospectus related issues under Omnibus II is in regard of so-called APMs contrary to the Prospectus Directive as level 1-rule

With respect to the accompanying advertising of public offers of securities, ESMA and now the EU Commission have breached the normative content of Art. 15 para. 4 Prospectus Directive. The requirement Art. 12, para 1 (d) of the new regulation that so-called Alternative Performance Measures (e.g. the figure “Ebit”) must not be mentioned, if they are not in the prospectus, can`t be derived from Art. 15, para. 4. The level 1-rule of Art. 15, para 4 Prospectus Directive only requires that information given in advertisements is consistent, but not that the issuer is not allowed to give more information than contained in the prospectus. This might result in strange situations, where the issuer is not allowed to answer questions of investors in personal 1o1s. If they are asking for figures not written in the prospectus, for example the EBIT of 6 years ago, the issuer were due to this rule not allowed to give information although it is consistent with the annual statements of 6 years ago.

The delegated regulation comprising these RTS should allow using any APM as long it is consistent.

- EBA rules for capital adequacy regulation are against the intention of CRR/CRD IV

The European Banking Authority (EBA) has just submitted a draft Guideline on the so-called CVA risk (risk of changes in the creditworthiness of a counterparty) with regard to derivative positions. The CRR stipulates in Art. 382 para. 3 that banks do not have to allocate capital against CVA risk deriving from positions they have with companies of the real economy, provided the relevant non-financial counterparty have not exceeded the clearing threshold of EMIR. This exemption is important in order to avoid that the hedging of financial market risks by non-financial companies is restricted or made more costly. Against the level 1-text EBA argues now, that the CVA risks stemming from derivative positions with non-financial counterparties should be buffered with own funds under certain conditions in so-called Supervisory and Evaluation Review Process (SREP).

This would de facto make the exemption of the level 1-text useless and would increase costs of hedging as well as reduce the availability of hedging instruments. From our point of EBA is overstepping the competences granted according, so that the Guideline should be redrafted.

We recommend towards EBA not to issue a Guideline on CVA-risks that would de facto contradict the legislator’s intention regarding CVA risks of derivatives of the real economy. If EBA does not alter its view we recommend to clarify on level 1 that Art. 104 para. 1 of the CRD IV cannot be used to countervail existing exemptions of the CRD IV/CRR package

- A differianted description of risks in a prospecuts according to Art. 16 of the proposal of the EU Commission

In the case of the issuance of securities of an issuer whose securities are already admitted to trading on a regulated market, the prospectus regime requires specific information which also other rules, like the Accounting or Transparency Directive are already requiring. Different provisions for the same topic include the risk of different reporting which confuses the market and therefore any investor. Such inconsistencies would deepen if risks in a prospectus have to be categorized while risks in the management report have not. However, the provision to categorize risks will make issuers to categorize almost every risk as a high risk to prevent action clauses due to prospectus liability.

Therefore, we recommend to abolish this proposal as a whole.

- Treatment of emission allowances: Inconsistency between the MiFID II ancillary activity exemption and the requirement to hold emission allowances provided by the EU Emission Trading Scheme (ETS)

The treatment of emission allowances is very problematic under the recent approach to define the ancillary activity under Art. 2(1)j MiFID II. In contrast to commodity derivatives, emission allowances are not acknowledged by the Level 1 text as privileged transactions (transactions which are not covered by the scope of the ancillary activity thresholds). This is inconsistent as companies are required by law according to Directive 2003/87/EU to hold/purchase emission allowances. Therefore, companies holding emission allowances for regulatory purposes are at risk to become a licensed firm under MiFID. This situation should be properly addressed within the threshold calculation. It is a paradox situation that a company is qualified as an investment firm due to its compliance with regulatory requirements.

Emission allowances hold to comply with the ETS requirements should be acknowledged as priviliged transactions under the ancillary exemption according to MiFID II.

- Inconsistencies in the possibility to provide ancillary services (Art. 6(4) AIFM and Art. 34 MiFID II and Art. 16 UCITS IV)

Ancillary activities covered by the AIFM directive do not correspond to that falling under MiFiD II or UCITS IV. Art. 6(4) AIFM specifies that only by way of derogation, Member-states may authorise an external AIFM to provide the following ancillary services: portfolio management, investment advice, safe-keeping and reception and transmission of orders.

Art. 34 MiFiD II provides that investment firms authorized in accordance with the directive may freely provide investment services and/or perform investment activities as well as ancillary services within their territories, provided that such services and activities are covered by its authorisation.

Similarly, Art. 16 UCITS IV makes provision for the option to provide ancillary services (portfolio management, investment advice, safe-keeping and reception and transmission of orders).

Since an entity authorised as an AIFM may not be authorised under MiFID II, an AIF manager may only be authorised in accordance with UCITS IV, provided that he undertakes financial activities covered by UCITS IV.

In other words, there are differences in the treatment of AIF and UCITS managers, which are likely to affect the cross-border development of ancillary services linked to collective fund management.

(Issue 12.2) Overlaps

- In the case of the issuance of securities accompanied by a prospectus of an issuer whose shares or debt securities are already admitted to trading on a regulated market there are two different regimes to disclose company informations like risks, corporate governance aspects etc.

If a prospectus is necessary but the issuer’s shares or debt securities are already admitted to trading on a regulated market, the issuer (for example) has to describe the administrative, management, supervisory bodies and board practices (Annex I. 14-16; Annex IV 10., 11). However, the issuer is already reporting the composition and operation of its administrative, management and supervisory bodies according to the Accounting Directive Art. 20(1)(f) (2013/34/EU).

Two different provisions of the same topic include the risk to differing descriptions which is why we recommend to reduce prospectuses in the case of security issuances of issuers whose securities are already admitted to trading on a regulated market to information which has not already been published.

(Issue 12.3) Duplications

- Multiple reporting of the same derivatives transactions

The obligation to report derivative transactions is laid down both by Art. 26 MiFiR and by Art. 9(1) EMIR. In addition, regulation 1227/2011 (REMIT) sets out specific reporting requirements for energy derivatives. Art. 9 EMIR creates an obligation for Member states to report all derivatives transactions to a trade repository. MiFiR requires all derivatives contracts subject to the central clearing obligation under EMIR and deemed sufficiently liquid to be executed on an organised trading venue. The reporting requirements are those prescribed in Art. 26 for non-equity instruments.

Both texts impose similar disclosure requirements for listed derivatives. While the scope of the information to be provided varies form one text to the other, reflecting differences in objectives (EMIR aims at limiting counterparty risks; MiFIR seeks to ensure the stability and integrity of European financial markets), the fact remains that “listed” derivatives transactions are subject to a double reporting, albeit with differing arrangements.

Additional reporting requirements do not make sense and are redundant from our point of view.

Issue 13: Gaps

No comment.

2.4 Rules giving rise to possible other unintended consequences

Issue 14: Risk

No comment.

Issue 15: Procyclicality

No comment.

Deutsches Aktieninstitut

Deutsches Aktieninstitut actively contributes to the shaping of German and European capital markets and their legal framework. It represents the entire German economy interested in capital markets. Its approximately 200 members include listed corporations, banks, stock exchanges, investors and other important market participants. Deutsches Aktieninstitut offers its members a broad expertise in capital market topics combined with a unique network. Primary focuses of Deutsches Aktieninstut are well-functioning primary and secondary markets, good corporate governance within companies and a better economic literacy of the general public. Thus, it analyzes fundamental issues of capital markets and processes regulatory requirements into comprehensible and manageable formats. This is achieved through internal forums for opinion building and public events in which capital market knowledge and practical experiences are shared and communicated. Founded in 1953, it runs by now offices in Frankfurt, Berlin and Brussels. Furthermore, since 2013, it hosts the secretariat of the Regierungskommission Deutscher Corporate Governance Kodex.

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