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Implement good ideas to facilitate access to capital markets

Great intentions must also be achieved through practical suitability

Comment on the revision of the Prospectus Regulation proposed by the EU Commission in the EU Listing Act, 14 March 2023

Table of Contents

Introduction

Since 1953, Deutsches Aktieninstitut (identification number: 38064081304-25) represents the entire German economy interested in the capital markets. The approximately 200 members of Deutsches Aktieninstitut are listed corporations, banks, stock exchanges, investors and other important market participants which cumulatively represent 80 percent of the market capitalization of stock corporations listed in Germany. Deutsches Aktieninstitut keeps offices in Frankfurt, Brussels and Berlin. We have followed the legislative process for the Prospectus Regulation from the beginning and have particularly focused on the interests of companies.

1 Summary

The overall objective of the EU-Listing Act is to introduce adjustments to reduce regulatory and compliance costs for companies seeking to list or already listed so as to streamline the listing process and enhance legal clarity, while ensuring an appropriate level of investor protection and market integrity. The proposed amendments to the Prospectus Regulation aim to make it easier and cheaper for issuers to draw up a prospectus. They also seek to introduce sizable simplifications to the prospectus requirements in cases where the issuer is already known to investors and a lot of information is already publicly available (follow-on issuances).

We very much welcome this initiative and its objectives. The publicly available information due to the existing comprehensive reporting and disclosure requirements for listed companies allows the prospectus to be reduced considerably. This benefits investors and companies.

In order to achieve these objectives, we think it is important that the proposed simplifications of the EU Follow-up prospectus are also applied to the base prospectus. In practice, this prospectus is almost exclusively used by issuers for follow-on bond issuances.

In addition, an in-depth analysis of the Proposal reveals that certain changes, likely unintentionally, introduce very significant difficulties, legal ambiguities and liability risks for issuers.

2 Key Issues for Prospectuses in the EU Listing Act

2.1 Risk factors

The requirements for the presentation of risk factors have been revised in Article 16. The obligation to put the most significant risk factors at the beginning has been deleted (see item 2.1.1) and the requirements for the presentation have been specified (see item 2.1.2).

2.1.1 Sequence of Risk Factors

We welcome the deletion of the obligation to put the most material risk factors at the beginning, as the obligation to rank according to materiality is purely speculative and thus adds no value for investors and, on the other hand, creates liability risks for issuers.

2.1.2 Specification of the Presentation of the Risk Factors

The following paragraph was proposed to specify the risk factors:

A prospectus shall not contain risk factors that are generic, that only serve as disclaimers, or that do not give a sufficiently clear picture of the specific risk factors that investors are to be aware of.

In principle, it is understandable to specify in the Prospectus Regulation that risk factors may not be formulated in such a generic manner that they only serve as a disclaimer or do not provide a sufficiently clear picture of the specific risk factor. A similar requirement can already be found in ESMA Guideline 2 (ESMA31-62-1293).

However, if this is now included directly in the Prospectus Regulation, it could open the door to adding additional extensive requirements in the next levels, such as, for example, in the ESMA guidelines. This could lead to a different presentation of risk factors in prospectuses and annual financial reports. The risk factors in the annual financial report follow the accounting rules and are audited accordingly by auditors. If the specifications in the Prospectus Regulation lead to a different presentation of the same risks in the management report, this would be absolutely counterproductive. It is important to not confuse investors by ensuring they do not face different presentations of risk factors in different reports and documents. The same presentation of the same risk factors also promotes comparability and thus serves to protect investors. Furthermore, different presentations of the same risk

factors mean additional and unnecessary efforts, costs and liability risks for issuers. New burdens created without any reasonable justification for issuers need to be avoided. The prime objective of the overhaul of the previous prospectus regime was to facilitate better access to capital markets and to strengthen capital markets. This will not happen if new burdens are established.

For this reason, the harmonization of the risk factors in the annual financial report and those in the prospectus should be clarified in the recitals. Further specifications for the presentation of the risk factors must not lead to a situation where the use of the risk factors from the annual financial report is no longer possible for prospectuses.

2.2 Incorporation by Reference, Article 19

The Commission's proposal includes additions and amendments to Article 19.

2.2.1 Rigid Obligation to Incorporate by Reference

The existing principle of incorporating information by reference is apparently intended to become a rigid obligation. The wording in Article 19 is changed by replacing "may" with "shall". We would rate such a rigid obligation as very critical.

If this means that no limited reference is possible, the entire management report, including all forward-looking statements, would become part of the prospectus. The resulting extension of liability would have far-reaching consequences for the preparation of prospectuses.

However, flexibility is also needed and important in other ways. For example, instead of a reference, a separate representation may be necessary if circumstances have changed since the linked document was prepared. Likewise, incorporation by reference may not be sufficient. For example, the management report does not contain bond-specific risk factors.

It does also not seem necessary to tighten the existing principle, because issuers will incorporate by reference when possible as incorporation by reference allows for potential transmitting errors to be avoided.

2.2.2 Management Report in Annexes

Several of the proposed annexes (e.g. Annex I item IV, Annex II, item III, Annex VII, item IX) include a mandatory incorporation by reference of the entire management report. We expressly oppose this.

The management report often contains forward-looking statements that may already be out of date. This could irritate investors and implies uncertain liability for the company. It must be possible to include only parts of the management report.

We expressly demand to keep the existing principle of incorporation by reference and reject expanding it in the Annexes!

2.2.3 Proposed and Useful Clarifications in Article 19

We welcome the proposed clarification in Paragraph 1b that base prospectuses do not require the publication of a supplement to update the annual or interim financial information.

It would also be appreciated if it were also clarified that the issuer's future annual and interim financial statements are deemed to be incorporated or can be explicitly incorporated by reference if they are made available in the same place as the previous financial information already contained in the prospectus (dynamic reference).

2.3 Sustainability Reporting and ESG Marketing

According to Article 13 (1) (f) and (g), the EU Commission would be authorized to make more specific statements on standardization. In upcoming clarifications, the EU Commission should also consider whether the issuer is required to provide sustainability reporting in accordance with the directive on sustainability reporting and, in the case of non-equity securities, to market them in such a way that conveys that they take ESG factors into account or pursue ESG objectives.

While Recital 23 mentions incorporation by reference for equity securities, it states the following for non-equity securities:

Moreover, the Commission should be empowered to set out a schedule specifying the ESG-related information to be included in prospectuses for non-equity securities that are advertised as taking into account ESG factors or pursuing ESG objectives.

This wording is unclear. Additional requirements or publication obligations regarding ESG would be not useful. It would create confusion for investors and lead to new unnecessary costs and possibly liability risks for the issuer due to differing presentation obligations. In any case, an assertion that a standard, such as the EU Green Bond Standard, is used should suffice.

Also, the references to the new Sustainability Reporting Directive (Directive 2022/2464 - CSRD) should only apply to companies if it has been implemented in their respective Member State. Recital 23 refers to Directive 2013/34/EU, as does the proposed amendment to Article 13. This appears difficult, as the existing rudimentary sustainability disclosure prior to CSRD implementation lacks standardization and substantive audit assurance. The current sustainability disclosures therefore do not appear suitable for capital market disclosure, as they may lead to an expectation gap and resulting liability risks.

2.4 Limitation on Number of Pages

The Commission's proposal includes several limitations on the number of pages. For example, according to Article 6(4), the prospectus for shares and equity-like securities is to be limited to 300 pages. On a positive note, according to Art. 6 V, the page number limitation does not include the summary, information incorporated by reference and information required due to a complex financial history or due to a significant financial commitment as defined in Art. 18 EU 2019/980.

However, the page number limitation still seems highly questionable, as the size and complexity of the issuer's business model, the number of its subsidiaries, the complexity of its affiliates, its legal and regulatory framework and any litigation may vary significantly.

Aiming for shorter prospectuses is understandable, however, this can only be reasonably achieved by having fewer requirements. This is in line with the objective of the Commission proposal of facilitating the preparation of prospectuses by taking into account periodic and ongoing disclosure and reporting requirements (compare page 7 Commission proposal, COM(2022) 762 final). In contrast to this, a page number limitation is counterproductive as it can lead to essential information either missing or being presented in an abbreviated form. This is neither in the

interest of investors nor of companies, who are threatened with liability risks as a result.

If these disadvantages are to be accepted, national supervisory authorities should at least have to be given the opportunity to make exceptions to page limits.

2.5 New EU Follow-up Prospectus

A new short-form EU Follow-up prospectus (max. 50 pages) is proposed for follow-up issues. It is designed to ensure that companies can take full advantage of the benefits of accessing public capital markets, including easier and faster access to additional equity and debt capital through follow-up offerings.

From our point of view, the goal of avoiding unnecessary administrative work and unnecessary costs for companies while observing other disclosure requirements is exactly right and is expressly welcomed. Decreasing the comprehensive disclosure requirements for listed companies allows the prospectus to be reduced considerably. This benefits investors and companies.

2.5.1 Structure of EU-Follow-up Prospectus

The EU Commission's proposal introduces a new prospectus that includes deletions of existing requirements for secondary issues. Structurally, the EU follow-up prospectus is not based on the base prospectus used in practice, but is based on the EU growth prospectus. As the EU growth prospectus has not yet been widely accepted in practice and as established companies mainly finance themselves through bonds, the market acceptance of this newly proposed prospectus is unclear and therefore, will bring no added value to bond issuers. Instead of removing the simplifications solely for secondary issuance, for the benefit of regular bond issuers the base prospectus should be simplified in accordance with the streamlining of the EU follow-up prospectus. This could make financing much easier for many companies and would make the capital market itself much more attractive.

! The proposed facilitations must be designed in a way that bond issuers can use them in practice!

2.5.2 Page Limitation

We do not support limiting the number of pages to 50 pages. This limitation is too rigid, even if the summary, information incorporated by reference and information that is required due to a complex financial history or due to a significant financial obligation within the meaning of Article 18 EU 2019/980 do not fall under the number of pages limited pursuant to Article 14b VI.

The page number limitation should not be included as a meaningful reduction in length can only be achieved through the streamlining and removal of requirements. Flexibility is important to ensure that investors can make an informed decision and that issuer liability does not become exorbitant.

This reasoning also applies to the page number limitation to five pages for summaries. The summary must not contain any references or cross-references, but must nevertheless be clearly understandable for investors (Art 7 XIIb).

2.5.3 New Liability Risks

In the current simplified prospectus for secondary issuances, the information contained is to be written and presented in a form that is easy to analyse, concise and understandable, and that enables investors to make an informed investment decision. However, the proposed Article 14b (3) goes beyond this and requires that this be done in particular with regard to retail investors.

Even if it is unclear whether the proposed changes were intended to create a new standard, there is a significant risk that this new emphasis will result in an increase in liability risk in some member states. We are critical of this. The objective should be to harmonize liability and not to cause a further divergence between different liability regimes. We strongly recommend not to include “especially retail investors” in Article 14b (3) and we would also urge for a clarification that even a retail investor may reasonably be expected to have a certain baseline of knowledge.

We strongly recommend not to include “especially retail investors” in Article 14b (3) as well as an accompanying clarification that even a retail investor may reasonably be expected to have a certain baseline of knowledge!

Also, changing the wording in paragraph 2 from "which is necessary to enable investors to understand" to "that investors need to understand all of the following:" could lead to liability concerns and should therefore not be implemented.

Another example of a possible increase in liability is the responsibility statement in paragraph 3 of Annex V.

Overall, care should be taken when drafting new regulations to ensure that the established wording is only changed when it is clearly and undoubtably necessary. Another example of inconsistent wording is: “describe the main risks” in Annex I-III and “description of the material risks” in Annex IV-V.

Care should be taken to ensure that established wording is only changed if this appears necessary.

2.5.4 Processing time of the supervisory authorities

We welcome the proposed reduction for the time limit on approval of the EU-Follow-up prospectus from 10 to 7 working days. Any reduction in approval time speeds up the process and would be preferable to issuers.

2.6 Extension of time to withdrawn

According to Article 17(1), acceptances to purchase or subscribe securities may be withdrawn within three instead of two working days after the final price or amount of securities to be offered to the public has been filed.

This extension of the time to withdraw increases the floating state of the primary transaction and significantly increases the transaction risk for the company. This is a substantial contradiction to the cited objectives of the proposal. Specifically, the Commission has asserted that one of the primary objectives of the proposal is to make it easier for SMEs to access the capital market. This cannot be accomplished with additional transaction risk. Therefore, this extension of the deadline should not be implemented under any circumstances.

The proposed extension of time to withdrawn in Article 17 (1) would be in a direct contradiction to one of the primary objectives of the EU-Listing Act: enabling and ensuring easy access to the capital market!

2.7 New Prospectus Exemptions for Fungible Securities

Article 1(4) and (5) of the Prospectus Regulation contain extended exemptions from the prospectus requirement. According to these exemptions, fungible securities that are already admitted to trading on the same regulated market or an SME growth market do not require a prospectus to be drawn up. This applies not only in the case of admission, but also for a public offering. We welcome this.

If 40% of the already admitted capital is reached, a summary document of maximum 10 pages must be published. The page number limitation is not suitable at this point, as only practice will show what minimum information is expected and required by investors.

Annex IX also requires e.g. a declaration of continuous compliance with the reporting and disclosure obligations during the entire period of admission. The added value for investors appears questionable here, as these obligations are already monitored and subject to a severe sanction regime. For the companies this means liability risks. This increased liability risk is especially large because the entire period of admission can be very long, particularly for established companies. Any minor infringement against the obligations may also not be relevant in connection with the transaction.

It is also unclear what impact the wording that the prospectus "does not contain any omissions affecting the informative value" will have. Such requirements should only be included if considered absolutely necessary, as it calls into question the overall practicality. If a prospectus is not considered practical, issuers will likely avoid its use.

2.8 Facilitation only as an option

We expressly welcome the proposed facilitations. However, we also consider it very important that these are only an option and not mandatory. A voluntary prospectus must always be possible, which means that instead of the 10-page document or instead of an EU follow-up prospectus, a standard prospectus must always be possible.

It must not be forgotten that the prospectus must also meet the expectations on the demand side of the respective market. For this reason, it is very important that sufficient flexibility remains for the issuer.

2.9 Other comments on the proposed changes

- Article 23 (4a), (8): The text is based on the already existing recital 36. A strict prohibition of product-related supplements is known to be problematic. For example, new MREL requirements (Minimum Requirement for Own Funds and Eligible Liabilities) or possibly new proprietary indices could then no longer be included in a base prospectus by means of a supplement. We would therefore propose to include exceptions for special cases already in the text of the prospectus regulation (e.g. supplement permissible in case of legal changes or inclusion of new underlyings, e.g. proprietary indices).

- Article 17(2) now states that there is no obligation to supplement the offer if the final offer price does not deviate by more than 20% from the stated maximum price. This seems sensible as it means more flexibility for issuers and avoids delays in closing an offer. Otherwise, investors would have to wait for the revocation period to expire or securities would have to be allotted more favorably within the initial price range. Investors are nevertheless sufficiently protected as they can limit their highest order price.

- In Article 21, the possibility for investors to request the prospectus in paper form has been removed. This seems timely and reasonable.

- According to Article 27, the prospectus can be written exclusively in English. This also seems timely and reasonable. In addition, drawing up the summary solely in English should be considered as well. In any case, it should be possible to draft the prospectus in two languages under the same prospectus ID.

- The requirement to include a capitalization and indebtedness statement currently required for equity securities in Annex 11, point 3.2 of Delegated Regulation 2019/980 has been deleted. This is very welcome.

- The prospectus exemption for small issues has been increased from EUR 8 to 12 million and is no longer an option for member states. Member States are allowed to require substitute documents as long as this does not impose an unreasonable burden. We welcome this.

- For the prospectus exemption in Article 1(4)(j) and (5)(i) for non-equity securities issued continuously and repeatedly by credit institutions, the threshold has been increased from EUR 75 million to EUR 150 million. We also see this extension as positive.

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