



National expertise for a strong Europe

National Competent Authorities should remain responsible for the approval of securities prospectuses

Deutsches Aktieninstitut's and BDI's key statements on the intention of the EU Commission to shift partially the prospectus supervision to ESMA, Article 9 EU Commission proposal, amending Regulation (EU) 2017/1129, page 235 of the proposal, 23 November 2018.

Shifting of competences on scrutiny and approval of prospectuses

The EU Commission proposes to transfer the approval and the advertisement powers of certain prospectuses under the Prospectus Regulation from National Competent Authorities (NCAs) to ESMA. This, inter alia, relates to prospectuses for wholesale non-equity securities (wholesale prospectus). The implementation of such transfer of competences faces significant concerns, which has not been remedied by the EP draft report.

In our view, the proposals of the EU Commission endangers established procedures in the professional bond market.

Regarding the issue at hand, the EU Commission justifies its proposal with a lack of harmonization and possible risks through supervisory arbitrage. However, in our view, there is neither significant lack of harmonization nor, more importantly, potential risks resulting there from. The Commission has not shown any evidence that would support the justification mentioned above. Legislation should however not be based on assumptions, it must be based on evidence.

And even if there were a lack of harmonization, ESMA would already have sufficient tools to react (eg peer reviews or, if necessary, guidelines). In addition, ESMA and the EU Commission are currently still working on the level 2 and 3 measures of the Prospectus Regulation, which are ultimately intended, and are the tools which EU law provides, to harmonize. It is well-known that the harmonization of new regulations requires time. Only in this way market specific features can be adequately taken into account.

We are deeply convinced that retaining competences of the NCAs in this context is very meaningful and important. When drawing up a base prospectus it is standard procedure to incorporate certain documents like financial statements, articles, certificate of incorporation by reference. Depending on the country of origin, the language of these documents might differ from that of the prospectus because of local laws and regulations. If supervision were to be centralised at ESMA this fact could prove to be an issue since different NCAs each accept a different set of languages. However, at present, issuers are free to choose where to seek approval for a wholesale prospectus. This choice is strongly influenced by the question to what degree languages are accepted by the NCA in a particular place. Such problem is most pronounced for multi issuer programs. Still more generally, we see the risk that an additional burden of translation would have the effect of a non-tariff-barrier and could hold potential issuers from using the capital market as source of funding.

The variety of language regimes which exists among NCA is a very good example how efficient the current system of multiple NCAs is for the market development in Europe. Specialization, excellence in a particular field and burden sharing in oversight is a strength of the European capital markets which should be preserved. We mustn't forget that the competition to attract capital is global. The ability to respond timely and flexible to market participants' needs is in the end a decisive factor when it comes to fund investments and to create jobs in Europe.

Not least because of better fitting language regimes a few Member States have emerged as centers for the approval of wholesale prospectuses, where national regulators are highly experienced in this particular field. Important structures, know-how and efficiency have been formed at those locations. The existing certainty and predictability of the approval process, speed of procedures and cost efficiency is very important for the professional market. Even with great effort, it may prove difficult, if not impossible, that ESMA could fulfill these requirements even in the medium term. In light of the upcoming challenges, such as United Kingdom's exit from the Union (Brexit), it is important to build on established structures instead of creating additional disruptions and risks.

In addition, the approval competence of ESMA in this context would trigger inefficiencies in supervision and unnecessary burdens for issuers and the respective NCA: for example, under current practice, a prospectus is often used for both retail and wholesale markets. In such cases, a subsequently used prospectus for retail investors would result in a new approval procedure at NCA level. This means unnecessary burdens on both sides and inefficient supervision. More problems with double supervision arise when supplements have to be made.

Effective supervision is ensured if it is conducted closely in the respective markets and takes into account the specific national market conditions. It should be noted that the vast majority of new issuances are only available in one or a few Member States. Here, a prospectus check by the NCAs is more appropriate as they know the specifics of their national market and the market participants. This also allows the NCAs to react quickly and appropriately to changes. Therefore, it does not make sense to create completely new structures and additional resources at ESMA in these areas, as supervisory convergence is already ensured with the existing instruments (such as the implementation of peer reviews and the adoption of guidelines). As a result, potential regulatory arbitrage is already effectively countered. In addition, the harmonization of new regulations also takes time, so that market-specific features can be taken into account sufficiently.

Therefore, we do not see any necessity nor added value to grant ESMA the competences mentioned above. Rather, we do fear negative consequences, if those competences were conferred to ESMA. We therefore urge the co-legislators in the upcoming negotiations to remove the respective competencies.

Associations

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

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The Federation of German Industries (BDI) (transparency register no.: 1771817758-48) transports the interests of German industry to the political leaders. It supports companies in global competition. It has a wide network in Germany and Europe, in all important markets and in international organizations. BDI ensures the political flanking of international market development and provides information and economic policy advice for all industry-related topics. BDI is the leading organization of German industries and industry-related service providers. It speaks for 39 industry associations and more than 100.000 companies with around 8 million employees. Membership is voluntary. 15 state representations represent the interests of the economy at regional level.

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