Deutsches Aktieninstitut

Simplifications are needed

Level 2 should not lead to more requirements than foreseen by the Prospectus Regulation.

Deutsches Aktieninstitut's comments on the Commission draft delegated regulation regarding the format, content, scrutiny and approval of prospectuses – 20. December 2018.

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

Deutsches Aktieninstitut very much welcomes the intention to facilitate capital market access while ensuring adequate investor protection. Strengthening capital markets in Europe has become even more important in a phase of new challenges such as the decision of the United Kingdom to leave the European Union.

The objective was to reduce administrative burdens and costs that seem unnecessary and to make the regime more appropriate for small and medium-sized enterprises and companies with reduced market capitalisation. Furthermore, it was intended to shorten the prospectus for the sake of appropriate investor protection and to avoid dilution by unnecessary explanations.

Unfortunately, we see the objectives of the revision of the prospectus law jeopardized: It should not be overlooked that there have been introduced new burdens at level 1 such as the limitation of the number of risk factors and the risk categorization, which both may lead to legal uncertainty for issuers and potentially misleading information for investors.

In order to achieve the above-mentioned objectives, the new burdens at level 1 must therefore be compensated on the one hand and, on the other hand, further alleviations have to be achieved. In this context, it is important for issuers to have sufficient flexibility to include only the information that is appropriate for their securities.

Deutsches Aktieninstitut welcomes the opportunity to be part of improving the prospectus regime and is therefore pleased to provide feedback to the Commission's draft delegated act to be adopted under the Prospectus Regulation (EU) 2017/1129 as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market. On the basis of the draft proposal, we have the following comments:

Recital 22

A high level of investor protection should be ensured. Competent authorities should therefore be allowed to consider, where necessary, additional criteria for the scrutiny of prospectuses in order to adapt that scrutiny to the specific characteristics of a prospectus.

The prospectus Regulation defines in Article 2 (r) approval as "*the positive act at the outcome of the scrutiny by the home Member State's competent authority of the completeness, the consistency and the comprehensibility of the information given in the prospectus*". The "level 1" regulation defines only 3 criteria to be taken into account in the scrutiny of prospectuses. Therefore, competent authorities therefore cannot take into account additional criteria.

Recital 23

Some issuers are involved into very specific business activities that require a profound knowledge of the activities concerned to have a full understanding of the securities issued by those issuers. Competent authorities should therefore be able to require, where appropriate and in line with the proportionality principle, that those specialist issuers include in the prospectus specific information about those activities that goes beyond the information required from non-specialist issuers.

Article 13 of the Prospectus Regulation stipulates that "*In particular, when setting out the various prospectus schedules, account shall be taken of the following: … (e) where applicable, the specific nature of the activities of the issuer*". The issue of specific business activities of the issuer is therefore already addressed in a comprehensive manner on Level 1. After fulfilling the requirements set out under Article 13, the issuer in question should not face additional disclosure requirements requested by national competent authorities. Such powers of national competent authorities lack a legal base in level 1- especially as the powers are framed in a general and unspecific manner, leaving a large margin of discretion to the benefit of national competent authorities."

Article 25

Format of a base prospectus

Paragraph 6 allows national supervisory authorities to request a cross-reference list. Where no list of cross-references is requested, the information contained in the draft base prospectus, as referred to in paragraph 7, shall indicate in the margin

the relevant information item set out in the Annexes to this Regulation to which that information corresponds.

In our view, it shall also be possible for the issuer to create voluntarily a cross-reference list under paragraph 6 and then not apply paragraph 7. The requirements of paragraph 7 could otherwise lead to unnecessary burdens for issuers.

Recital 26

To enable competent authorities to search for specific terms or words in submitted documents and thus to ensure an efficient and timely scrutiny process of the prospectuses, draft prospectuses and accompanying information should be submitted in searchable electronic format and through electronic means acceptable to the competent authority.

Not all documents are available in searchable electronic format (scans of old documents, for instance). The requirement to submit documents in searchable electronic format should be limited to the draft prospectuses and should not apply to accompanying documents.

Article 17

Complex financial history and significant financial commitment for issuers of equity securities

Article 17.2 (b) of the draft delegated act should be clarified ("*(b) all relevant information referred to in the Annexes that would be relevant for that entity if it were the issuer of the equity security*"). Paragraphs 2(d) of article J of ESMA technical advice should be included in the draft delegated act: this paragraph ensures that additional information requested by competent authorities are proportionate considering efforts and costs necessary to produce the information ("*The ability of the issuer to obtain financial or other information relating to another entity with reasonable effort.*").

Article 18

Non-equity securities that are exchangeable for or convertible into shares

For the sake of clarity and although the level 1 regulation defines exchangeable and convertible securities as equity securities, article 18 should clearly specify all the applicable annexes. It is also unclear whether the working capital statement and capitalisation and indebtedness table are required in addition to information referred in item 2.2.2 of annex 16 mentioned in paragraph 1. We understand, reading article 19 that, in this case, Annex 16 also applies except for item 2.2.2.

Article 19

Securities giving rise to payment or delivery obligations linked to an underlying asset

For the sake of clarity, article 19 should specify all the applicable annexes. Furthermore, articulation between articles 18, 19 and 20 is not clear and makes the building block system complex whereas the initial objective was to simplify.

Article 26

Categories of information to be included in the base prospectus and the final terms

The drafting of the Commission regarding "Category B" information seems to be more stringent ("*shall be included in the base prospectus, except where that information is not known*") without any justification given. We consider that current drafting as included in ESMA technical advice should be maintained.

Article 37

Criteria for the scrutiny of the comprehensibility of the information contained in the prospectus

We disagree with paragraph 2 and consider that it should be removed because it is not foreseen by the level 1 regulation ("*2. For the purposes of the first paragraph, competent authorities may, on a case-by-case basis and in addition to the information referred to in Article 7 of Regulation (EU) 2017/1129 and Article 28 of this Regulation, require that certain information provided in the draft prospectus be*

included in the summary."). The content of the summary is defined in detail in level 1 in order to be standardised and ensure comparability and the Prospectus regulation does not refer to level 2 for additional provisions.

Article 39

Scrutiny of the information contained in the prospectus of special issuers

Article 13 of the Prospectus Regulation stipulates that "*In particular, when setting out the various prospectus schedules, account shall be taken of the following: … (e)where applicable, the specific nature of the activities of the issuer.*" It should therefore not be possible that additional disclosure requirements applicable to specialist issuers can be requested by national competent authorities, see further explanation above to Recital 23. Therefore, we disagree with article 39 and consider that it should be deleted.

Article 40

Additional criteria for the scrutiny of the information contained in the prospectus

The Prospectus Regulation defines approval as "*the positive act at the outcome of the scrutiny by the home Member State's competent authority of the completeness, the consistency and the comprehensibility of the information given in the prospectus*". The criteria are defined on a limited basis in the Prospectus regulation in Article 2 (r). Competent authorities therefore cannot take into account additional criteria when scrutinizing prospectuses. Therefore, we disagree with article 40 and consider that it should be deleted.

Annex 6

Retail non-equity registration document

In its technical advice, ESMA acknowledges that the treatment of profit forecast and estimates should be different for equity and non-equity securities registration document. As regard non-equity securities: "*ESMA's is of the view that it is for the issuer to determine whether, or not, it is necessary to include outstanding profit forecasts and profit estimates in the registration document…*" (§ 250, ESMA Final report, Technical advice under the Prospectus Regulation). Therefore, the requirement under item 8.1 of section 8 of annex 6 should be different than the requirement for equity securities: the requirement to provide a statement

regarding profit forecasts/estimates published and still outstanding, but no longer valid, should only apply in case the issuer has decided to include these forecasts/estimates in the prospectus. Otherwise regardless of the decision of the non-equity issuer not to include the profit forecast and estimate a change to the outstanding forecast/estimate would trigger a requirement to update the prospectus. Even in case the forecast and estimate is not relevant and was not included in the prospectus.

Annex 8 Secondary issuances non-equity registration document

Material contrats

In item 12.1, Material contracts, it was forgotten to limit the requirement to contracts, "*which could result in any group member being under an obligation or an entitlement that is material to the issuer`s ability to meet obligations to security holders in respect of the securities being issued.*" This important limitation is included in Annex 6, *Retail non equity registration document*, item 13.1 and Annex 7, *Wholesale non equity registration document*, item 12.1. It clarifies that e.g. for debt issuances the contract must be relevant for the issuer`s ability to meet its obligation under the securities. There is no justification for a broader requirement to include material contracts in secondary non-equity issuances compared to primary non-equity issuances. It seems to be a simple mistake that the wording for secondary equity issuances (Annex 3 for *Secondary issuances **equity** registration document*, item 14.1) has been copied in Annex 8 without the limitation required for non-debt issues.

Annex 19

Pro forma information

The final wording of item 1.1 point (a) (iii) is not clear and differs from ESMA technical advice. As a matter of fact, ESMA technical advice would require: "*an explanation that it* [the pro forma information] *illustrates the impact of the transaction as if the transaction had been undertaken at an earlier date selected for purposes of the Illustration*". This statement about the objective of pro forma information was meant to be factual and informative. The drafting put forward by the Commission is totally different and confusing. The initial wording should be retained.

As regard point (b) (ii), the columnar format including accounting policy adjustments could prove very complex to establish and result in unreadable tables. Where, for instance, the concerned entities have different reporting dates, this

requirement could result in displaying 5 columns which would significantly impaired comprehensibility of the information. We consider therefore that the current requirement to include only historical unadjusted information, pro forma adjustments and the resulting pro forma information should be maintained. Additional information could be provided in the annexes regarding in particular accounting policy adjustments.

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