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Regarding the Proposal of a new Prospectus Regulation

Dear Mr Lueder,

we have received the draft proposal of a new Prospectus Regulation and would like to share our thoughts about this draft with you. We would appreciate, if you took them into account. Please, do not hesitate to contact me and my colleagues for any further discussions.

[1] Overall, we appreciate the attempt to facilitate capital market finance and support several changes. Among others, the requirement that a summary in the case of a base prospectuses shall only be drawn up when the final terms are published and shall be specific to the individual issue can facilitate the approval process of the base prospectus. Furthermore, the raise of the threshold of the exemption for capital increases up to 20 per cent will help, especially smaller issuers, to fund equity capital. Moreover, we appreciate the facilitations, especially of secondary issuances, like basically the Universal Registration Document, but recommend adjustments for that and other aspects.

[2a] However, we are among others very concerned about the abolishment of the 100.000 denomination threshold per unit, the new definition of home Member State and the restriction and classification of risk categories. These concepts are against the common and well working system of debt security issuances and will elevate the danger of prospectus liability actions to a much higher level than today. **[2b] Beside this, like the current Prospectus Directive the new proposal is too focused on the situation of share issuers.** This focus on equity issues is contrary to the goal of the Capital Markets Union which also intends to facilitate debt finance through capital markets. The new PR should therefore take the specific situation of debt issuances more into account.

[3] The abolishment of the exemption for issuances of debt securities with a denomination per unit amounting to at least 100.000 Euro will not bring liquidity into corporate bond markets. The catalogue of Art. 1(3) of the new PR does not mention a provision like Art. 3(2)(d) PD. Probably, according to question 15 of the Consultation Paper this approach is based on the suggestion that the abolishment of the 100.000 Euro

threshold will make the corporate bond market more liquid. But the lack of liquidity is in a nutshell caused by the requirements of the CRD IV/CRR, which among others are restricting the market making activities of banks, and the ultra low interest rate environment. Solely due to the latter circumstance investors hold their bonds often until maturity. In addition, there is no need for prospectuses in the case of such high denominated units of securities which has been the reason for introducing this threshold in the first place. Such securities are only purchased by institutional investors which are not requiring the same investor protection level as retail investors. It is the correct approach in the current PD to distinguish between the needs of this two total different categories of investors (please see our position paper to the Consultation Paper on the PD[1], p. 20, for further arguments).

[4a] The deletion of (ii) in the definition of 'home Member State' pursuant to Art. 2(1)(k) would prevent issuers from the common practice to approve their prospectuses in another Member State. Art. 19(1) new PR provides an approval by the competent authority of the home Member State. Currently, Art. 2(1)(m)(ii) PD allows to choose the home Member State in the case of issues of non-equity securities whose denomination per unit amounts to at least 1,000 Euro. In Germany almost every large issuer uses this provision to apply for admission to trading in Luxembourg. A change of the home Member State definition in the proposed manner would require to change a well-established process. In contrast to the consultation document this possibility does not lead to unnecessary complexity for issuers and does not cause supervisory divergence. Supervisory divergences make issuers apply for the admission to trading on other markets, but not reversely. In addition, it is up to the issuer to choose its home Member State. If the issuer wants to avoid complexity, it can decide to approve its securities in the Member State where it has its registered office. That is exactly the freedom that was supposed to be the result of the modern prospectus regime. While the idea of the CMU is to integrate financial markets, this approach seems to be very home biased (p. 30 of our position paper). **[4b] Furthermore, the proposed definition of 'home Member State' would constrain the benefit of base prospectuses.** If there are more than one issuer with offices registered in different countries which country should be the home Member State? If the issuer are not allowed to apply for approval in only one Member State, they can not draw up one coherent prospectus document.

[5] The restriction in Art. 16 new PR of presenting risk factors and the classification in high, medium and low risk categories will elevate the danger of prospectus liability actions to a much higher level. Categorising risks in high, medium and low classes are very difficult. This fact and the restriction to specific risks which are material for investment decisions are exposed to wrong assessments. If any of the mentioned or not mentioned risks materialized, the concerned investors would raise prospectus liability claims and bring forward that the risks were wrongly assessed. Therefore, there are two optional reactions: Either issuers classify more risks as high than necessary to prevent claims or they take any effort to avoid the necessity of a prospectus. Both approaches would be a natural reaction to such regulation but are actually against investors' interests and do not match the goals of the Capital Markets Union. In addition, according to our position paper (p. 17 ff.), we are of the view that investor information has to be aligned and streamlined with the different regulatory frameworks like the Transparency Directive 2004/109/EC ('including' the Accounting Directive 2013/34/EC),

[1] https://www.dai.de/files/dai_usercontent/dokumente/positionspapiere/2015-05-13%20Position%20of%20Deutsches%20Aktieninstitut%20to%20the%20consultation%20of%20the%20Prospectus%20Directive%20with%20answered%20survey.pdf.

the Market Abuse Regulation EC 596/2014 and the Prospectus Directive/Regulation. If Art. 19(1) of the Accounting Directive 2013/34/EC does not require a classification and even no restriction to specific risks which are material for taking investment decisions the new PR should not require that, either. Otherwise, there might be different information in official documents about the issuer at the same time.

[6] The restriction to five risk factors in the summary is very difficult in the light of prospectus liability. Although, according to Art. 11(2) new PR, no civil liability shall attach to any person solely on the basis of the summary, the restriction to the five most material risks can be interpreted as misleading or inaccurate if there are either six or more equal material risks, or another risk than one of the five mentioned ones materialises. In both cases the issuer were likely to become subject to prospectus liability actions solely on the basis of the summary without the chance to prevent this.

[7] Beside the former point, regarding the summary we would like to ask for clarification if the six page restriction is also applicable in the case of summaries with more than one issuer. E.g. if there are six issuers and one guarantor it could be very difficult to shorten the key information to only six pages. Since summaries according to Art. 8(7) new PR in the case of base prospectuses are only to be drawn up with the individual issue, perhaps the summary should only contain information about the specific issuer and the guarantor. Even then, it is difficult to shorten the information to six pages. Especially in the case of large issuers with different sectors and several different business activities such a restriction could force issuers to avoid material information. Therefore, the EU Commission should consider to maintain the current approach in Art. 24(1)(2) of the current Prospectus Regulation EC 809/2004 to limit the length of the summary as a percentage (today 7%) of the whole prospectus or by extending the amount of pages (today 15). This would take the specific situation of large issuers more into account.

[8a] In this context we recommend to clarify that final terms do not have to be approved. The wording in Art. 8(7) new PR "when the final terms of the base prospectus are approved or filed" seems to require an approval of final terms which is contrary to the current provisions in Art. 5(4)(b) PD and even in Art. 8(3) new PR. **[8b] In addition, we also would like to ask for clarification if the summary, in the case it only has to be drawn up with the individual issue and therefore as annex to the final terms which are not subject of an approval process, has to be approved?** We raise this question because time to market of the individual issue would extent if the summary has to be approved which is contrary to the idea of the base prospectus regime. **[8c] Moreover, we would like to know if it is intended to maintain the system of A, B and C categories in the base prospectus and final terms** (Art. 2a of the current Prospectus Regulation EC 809/2004)?

[9a] We recommend to adjust the idea of a Universal Registration Document. Art. 9 new PR comprises a facilitation for so-called 'frequent issuers' which are only obligated to have approved a Universal Registration Document for three consecutive years and are allowed to only file the Universal Registration Document in the fourth and the following years. In general, we are not convinced yet that these measures can really facilitate the prospectus approval process because the issuer still has to repeat information which also has to be disclosed as regulated information due to the Transparency Directive 2004/109/EC. Our first appraisal may change if Art. 9(9) new PR becomes more clear (s. below). **[9b] But, the current wording in Art. 10(3) new PR seems to be contradictory to the idea of facilitation.** According to this provision, only filed Universal

Registration Documents have to be included in the approval process if the issuer would like to approve the securities note and the summary (approval of the entire documentation). What should be the benefit of the avoidance of an approval of a Universal Registration Document in the fourth year, if it still has to be approved at a later stage according to Art. 10(3) new PR? **[9c] Moreover, we would like to ask for clarification concerning the meaning of Art. 9(9) new PR?** This provision seems to exempt issuers from the obligation to publish their annual financial report entirely, if they publish a Universal Registration Document within fourth months after the end of the financial year. Respectively, there is a comparable provision for half-yearly financial reports. In general, we appreciate this approach very much but are concerned about some issues. First of all, this would mean that the competent authority has to approve the annual and half-yearly financial reporting in the first consecutive three years, which is not foreseen today. Second, how would the minimum information in Art. 9(1) new PR deal with the provisions on presentation, classification and restriction of risk factors in Art. 16 new PR? Art. 16 new PR requires more than Art. 19 of the Accounting Directive 2013/34/EU. Which provisions are to be complied with by the issuer? **[9d] In addition, the shareholding structure and expectations like they are required by Art. 9(1) new PR to be presented are of primarily interest only of share investors.** Also, frequent issuers are likely to issue debt securities. We recommend to cancel information typically of interest of only share investors. **[9e] Furthermore, how does Art. 13(3) of the new PR suit in this context?** Should the EU Commission be allowed to require minimum information via a delegated act which differ from what the Transparency Directive 2004/109/EC requires? According to Art. 13(3) new PR the information only have to be aligned as much as possible with regulated information. This may raise a conflict to Art. 9(9) new PR, which permits to replace any annual and half-yearly financial report by the Universal Registration Document if it contains what the Transparency Directive 2004/109/EC requires.

[10] We would like to recommend to extent the scope of Art. 14 new PR to the issue of different debt securities if the shares of an issuer are already admitted to trading on a regulated market. At least there should be a proportionate disclosure regime if there is at least one corporate bond already issued and additional bonds with a comparable structure are going to be be issued. The current draft of Art. 14 facilitates only the offer of capital and bond increases (tap issues).

[11] In addition, we would like to ask for clarification concerning the meaning of the different numbers of Art. 18(1) new PR? According to Art. 2(1)(k) of the Transparency Directive 2004/109/EC "regulated information" are financial statements, management reports and the public disclosure of inside information (ad-hoc-statements). Therefore Art. 18(1)(c) new PR already comprises this specific information. We do not understand why financial statements in Art. 18(1)(e) new PR mentioned, in addition? Moreover, what are annual and interim financial information according to Art. 18(1)(d) new PR in comparison with regulated information? Furthermore, do they comprise quarterly reports if they are required by a regulated market or MTF?

[12] Like we have already recommended in our position paper to the draft RTS on prospectus related issues under the Omnibus II Directive (p. 13)[2], ESMA has already accepted in its final report (p. 30, paragraph 93)

[2] https://www.dai.de/files/dai_usercontent/dokumente/positionspapiere/2014-12-19%20Position%20related%20to%20RTS%20concercing%20prospectuses.pdf).

and Art. 14(2)(c) PD permits today, we recommend to include intermediaries and especially paying agents in Art. 20(7) new PR again. This extension would not constrain investor protection.

[13] Regarding supplements in Art. 22 new PR, we recommend to cancel paragraph 4 and to change the expression "whichever occurs later" to "whichever occurs earlier" in the first paragraph. The order to consolidate the prospectus in the case of a supplement would lead to high efforts because the whole prospectus has to be changed and to be reviewed by the issuer and its consultants again. Regarding the expression "whichever occurs later" we still do not understand why there should be two different regulatory frameworks (Transparency Directive and Market Abuse regulation on the one and Prospectus Directive/Regulation on the other side) and which both are applicable at the same time, if the public offer still runs, when trading has already begun (for further details, please see p. 15 of our position paper to the consultation on the PD).

With kind regards

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