Comments on

Commission proposal on a DELEGATED REGULATION supplementing Regulation (EU) 2017/1129 as regards the format, content, scrutiny and approval of the prospectus and repealing Commission Regulation (EC) No 809/2004

Register of Interest Representatives
Identification number in the register: 52646912360-95

Our ref
Ref. GBIC: 413-EU-PROSP
Ref. DSGV:7108

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Berlin, December 21, 2018

The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent more than 1,700 banks.

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I. General Remarks

The German Banking Industry Committee welcomes the Delegated Regulation (DR) proposed by the Commission. The draft includes many of the points proposed in ESMA's Final Report. At the same time, the discretionary scope for the parties subject to the requirements set out in the Prospectus Regulation ((EU) 2017/1129, PR) is left untouched. This balanced approach creates a solid basis that must and will prove itself until the next evaluation in 2022.

Notwithstanding the above, we would like to draw attention to a few points that, in our view, require readjustment.

Please find our detailed remarks below.

II. Detailed Comments

1. Delegated Regulation

a. Recital 22, Article 40

Recital 22 in conjunction with Article 40 of the DR sets out that competent authorities should be able to develop additional criteria for the scrutiny of prospectuses in order to ensure investor protection. This requirement contradicts the objectives of the Prospectus Regulation.

In addition to promoting supervisory convergence and market efficiency, this Regulation also already aims to strengthen investor protection and establish a Capital Markets Union (Recitals 60 and 87 of the PR). Since these objectives can be achieved more effectively at the level of the European Union, a decision was taken to regulate prospectus law in the form of a Regulation. Last but not least, this already ensures a consistently high level of investor protection in all Member States. There is therefore no reason to abandon this level playing field and create incentives for special national approaches again.

In addition, the question also arises to the extent to which the opening clause is supposed to strengthen the internal market. The result would be that small and medium-sized enterprises in particular in the Member States would have to bear different levels of expenses and hence also significantly different refinancing costs. Diverging competitive framework conditions are unsuitable for ensuring a functioning European internal market.

The proposed provision would contradict the central objective of the PR to create a uniform legal framework for prospectuses throughout the European Union (cf. Recital 5 PR: objective to foster supervisory convergence).

We therefore suggest deleting the relevant passages in the Delegated Regulation.

b. Articles 9, 13, 16

We understand the regulatory approach to mean that an issuer must meet different information requirements depending on the type of security. For example, the scope of the information contained in the registration document and the securities note differs in the areas of equity, debt and secondary issuances. However, issuers should be able to use a registration document and/or a securities note that meets the higher information requirements in case of information content requirements happen to be less demanding. This concept is already laid down in some articles and the annexes linked to them. For

example, an issuer should also be able to prepare a registration document and/or a securities note from the equity or debt area for secondary issuances and to use it correspondingly.[1] Regardless of the combination chosen, the simplifications applicable to the summary should apply to secondary issuances. This combination option would enable the consistent presentation of the relevant documents, pick up on the underlying concept of consistent presentation from the URD, enable issuers to use existing documents, reduce the examination effort for the competent authorities and, as a result, strengthen investor protection.

In light of this, Articles 9, 13 and 16 of the DR should contain a reference to the annexes containing more extensive information components.

c. Article 17

Art. 17 stipulates the inclusion of additional information in order to enable the investor to make an informed judgement about the issuer in cases of a complex financial history or significant financial commitments of the issuer in respect of Art. 6 (1) PR.

A similar regulation currently exists in Article 4a of (EC) 809/2004. This regulation clarifies that the additional information are financial information of a company other than that of the issuer. This regulatory regime for issuers has proven itself in practice for many years. We assume that Art. 17 also refers exclusively to financial information.

Nevertheless, the wording of the law is ambiguous. It can be understood to mean, that not only additional financial information is to be included in the prospectus, but any type of information (“all relevant information”). This is disproportionate in its generality, would overload the prospectus and would not provide any additional benefit for the investor.

We are therefore in favour of clarifying, that Art. 17 is only meaning financial information. As it is currently the case in Art. 4a (EC) 809/2004.

d. Article 26

We understand Article 26 (4) DR to mean that the information listed in Annex 27 can be included voluntarily in the Final Terms by issuers, in accordance with the current clear legal wording (Art. 26 (5) of Regulation 809/2004 “may”). However, the provision is introduced by the word “shall”. This word is used in the administrative law of some Member States to describe a relationship of rules and exceptions. The rule is the situation described in the law. The competent authorities may only deviate from this in exceptional cases. This outcome makes no sense in this context and is presumably not intended. The voluntary nature of the information should therefore be stressed by using the word “may”.

[1] Example: Use of a registration document or URD according to an Annex for Equity or Debt combined with the securities note according to an Annex for Secondary Issuances, or a registration document according to an Annex for Secondary Issuances combined with a securities note according to an Annex for Equity or Debt.

2. Annexes

a. Annex 6

Annexes 6 and 7 govern the requirements for the registration document for non-equities respectively wholesale non-equities.

- **Item 1.2 (2nd paragraph)**

Since the requirements set out in Annexes 6 and 7 do not differ in terms of content, a scope restriction similar to Item 1.2 in Annex 7 should be included at the beginning. This increases clarity for the parties applying the legislative requirements and does not affect the higher level of investor protection required in the private customer/retail business compared with the institutional/wholesale business.

- **Item 1.5**

It can be assumed that base prospectuses under Article 25 (1) DR will be used for the majority of “non-equity” products in future.

It is therefore all the more important to ensure that the wording of the Regulation does not leave any questions unanswered. There should be a clarification for this type of base prospectus about whether the statement to be made relates to the base prospectus as a whole or in fact only to the registration document contained in the base prospectus.

For reasons of convergence and clarity, it would be appropriate in this respect for the party applying the legislative requirements to use a uniform structure and uniform wording, as is already the case in paragraphs (a) to (c) of Annex 13, Item 1.5.

- **Item 7.1, (b)**

In the event of significant changes in a group's financial performance in the period between the last periodic report and the publication of the registration document, a corresponding trend information must be prepared. The term “financial performance” is discussed in paragraph 267 of ESMA’s Final Report of 28 March 2018. There was already criticism in the relevant consultation that neither the term “financial position” nor the term “financial performance” are defined in the prospectus regime (paragraph 254 of the above-mentioned Final Report). ESMA responded that both terms are known, for example that the term “financial position” is already used in Article 6 of the PR and the term “financial performance” in the CRR (EU) No. 575/2013 (Article 259(3)(i) of the CRR: however, this refers to “past and future financial performance”). In any case, the CRR does not provide an adequate definition of financial performance. In PR, the term “financial position” is indeed used unanimously (Art. 6 (1) lit. a) PR and Art. 9 (1) PR). The term “financial performance” is – as described – not reflected in PR. Moreover, there is no uniform use in PR of the presumed synonyms of the so-called “financial performance” (Art. 6 (1) lit. a) PR: “profits and losses ... and prospects”; Art. 9 (1) PR: “earnings and prospects”).

In order to avoid uncertainties among users, it is advisable to clarify these terms; preferably in the recitals. An explicit reference to the IFRS regime, which knows the terms “financial position” and “financial performance”, would be conceivable in this respect. But it is precisely in this case that the clarification called for above would be needed, since small and medium-sized institutions partly carry out their accounting in accordance with national accounting standards (German Commercial Code: HGB)and

therefore operate outside the IFRS regime and do not work with the legal terms used there. Alternatively, the wording of item 7.1, (b) could also be adapted to take up the PR formulations referred to in Art. 7 (1) DR (Art. 9 (1) PR: “earnings and prospects”). Only in this respect would there be convergence between PR and DR.

- **Items 8.1, 8.2 (1st paragraph)**

For the sake of clarity, it should be added for parties subject to the legislative requirements that the “profit forecasts” or “estimates” can be included voluntarily, similar to what ESMA describes in paragraph 250 of its Final Report of 28 March 2018.

- **Items 11.5, 11.5.1**

In our view the title and the following text contradict each other. The text would have to refer to the “issuer” – or a wording similar to Item 11.4.1, according to which individual institutions and group scenarios would be considered equally.

b. Annex 7

For Annex 7, the comments made under a. apply, with the necessary modifications (applies to Item 1.5; Item 7.1, (b); Item 8.1, 1st paragraph; Item 11.4 and 11.4.1).

c. Annex 13, Annex 15, Annex 26

- **Item 5.3.1 c), Item 4.4.3**

Annexes 13, 15 and 26 govern the presentation of expenses. If an issuer is subject to Regulation (EU) No 1286/2014 and/or Directive 2014/65/EU, it is our understanding that it can choose the methodology used to disclose the product costs.

However, the wording can also be interpreted in such a way that the costs must be prepared in accordance with both methodologies and reported side by side. Since both cost disclosures are derived from different bases, they can lead to different outcomes. In turn, a divergent presentation of different costs would be misleading for investors. This outcome must be avoided.

It should therefore be stated in the DR – that in cases where the issuer is the addressee of both regulations – the disclosure of costs should only be made in accordance with Regulation (EU) No 1286/2014 or Directive 2014/65/EU.

In addition, it would be in the interests of investor protection if the legislator would increase the comparability of costs in cases where the issuer is the addressee of both regulations by deciding for one way to disclose costs. In this context, we consider using the cost disclosure in Directive 2014/65/EU more appropriate.

d. Annex 27

Investors should receive the information that is relevant for their investment decision. This is the only way to effectively overcome information asymmetries. We generally welcome the (partly new) requirements in this respect for the final terms listed in Annex 27.

- **Item 1**

Item 1 now requires complex derivative securities to be explained. It should be clarified here that this relates solely to a description of how the products work. The reason is that the word “Example(s)” could also be misunderstood to mean that performance scenarios have to be presented.

- **Item 5**

In our view, the country in which a base prospectus was notified is not relevant for an investment decision. Since this information has no added value for the investor, Item 5 should be deleted without replacement.

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