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ESMA

103 Rue de Grenelle

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Re: Your consultation: ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/72/EU

Dear Sir, Madam,

Deutsche Bank welcomes the opportunity to respond to your consultation on possible delegated acts concerning the Prospectus directive.

The introduction of a product specific summary section will help investors gain better insight into a specific product. Also, we agree with your objective of achieving more harmonisation in the format and content of the final terms of a prospectus. However, we are concerned about the degree of inflexibility you propose to introduce in the treatment and content of final terms and summaries.

We believe that the formulistic approach outlined in the consultation paper (CP) will lead to a worse understanding of the securities on offer and may well make the terms less easy to understand for (retail) investors.

The underlying reason for developing a uniform format for final terms is inconsistency in different practices. However, the proposed rules would materially limit the content that can be included in final terms, thus impeding the objective of preserving flexibility of the base prospectus regime and defeating the purpose of the final terms, i.e. to allow issuers to swiftly react to the continuously changing market conditions and investor demand.

Flexibility will also be hampered by the view that "new payout" would automatically mean "new product". We feel that as the features of a product are included in the base prospectus – which would include economic information – a product should not be considered "new" if the economic features do not change.

Rather than the proposed restrictive approach, we feel that diverging practices should be addressed by clarifying the legal basis for using final terms. Additionally, supervisory practices should be strengthened and harmonised.

In particular, we would like to raise the following points:

Comment on n. 25: The determination of those information items within the applicable Prospectus Regulation schedules which can be included only in the final terms

The creation of a limited list of items which may be included in final terms defeats the purpose of those terms. According to the Prospectus Directive and the Prospectus Regulation, the content of

final terms depends on whether or not information can be determined at the time of issuance of the individual securities. This implies that content should be based on the circumstances underlying the respective issuance and should not be subject to a rigid list of admissible items.

While we realise that such a list would allow for a more straightforward assessment of the prospectus and its terms by regulators, we feel the proposed approach would take away any flexibility for issuers to adjust information in specific and varying circumstances. This is not in the interest of investors.

With regard to the proposed information criteria in annex 1 – which you do not discuss in the CP – we note the following:

We do not agree that all proposed Category A items relating to information regarding the securities could not be subject to change and could therefore not be included in final terms. In our view, the large majority of information items which you propose to classify as category A could be subject to change in individual issuances after the base prospectus has been published. For example, in some cases it should be possible to issue subordinated securities under the base prospectus. Also, in certain circumstances the issuer could choose to issue the securities under different legislation. Finally, the time limit on the validity of claims to interest and repayment of principal could be extended or shortened.

The proposed differentiation between category B and C items, both of which would qualify as genuine final terms content, seems artificial and does not necessarily address whether or not the information at hand could only be determined at the time of issuance. For example, the consultation paper proposes to leave the determination of the calculation agent to the final terms only. However, programmes may provide for just one calculation agent for all securities issued. In these cases, it would not be justified only to incorporate this information in the final terms.

We would reiterate the view we expressed in our response to your Call for Evidence on this issue earlier this year, that the level 2 rules should set out in a clear and concrete way the considerations that should underlie the decision on whether or not information can be determined at the time of issuance. This would be a better fit with the level 1 text than the current proposals.

Comment on n.30: The proposed explicit prohibition of a common practice to include the integrated form of the terms and conditions of the securities in the final terms ("integrated conditions" style of final terms)

Central to the rules on prospectuses should be the objective that information is clear and easily understandable for investors so that they can make an informed investment decision. Going down the route of a formulistic approach to the base prospectus, summary and final terms would deviate from this objective.

In this context, we strongly disagree with removing the option of including the integrated form of the terms and conditions of the securities in the final terms. Removing this option, which in some European markets (such as Germany) is a well-established market practice for securities offered to retail investors, would contradict the Directive's objective to further increase the transparency and comprehensibility of securities prospectuses.

The claim that the "integrated conditions" style of final terms would be rendered unnecessary by the summary as the latter would give "a full picture to investors" is not convincing in the context of the EU's overall objective to provide investors with clear information to enable them to invest on an informed basis. The summary focuses on key information (Recital 15 and Art. 5(2) of the Amended Prospectus Directive). If the summary were to provide a more extensive overview of

the prospectus information, there would be no reason to explicitly *exclude* from the legislation that the summary as such triggers prospectus liability (Recital 16 of the Amended Prospectus Directive). Therefore, the retail investor is legally expected to read a base prospectus of several hundred pages plus the relevant supplements thereto so as to get a full picture of a derivative product he is interested in with the help of tick box style final terms, i.e., do the work that is currently done for him by the issuer.

Additionally, the justification of the proposal is done with an incorrect interpretation of the Prospectus Regulation. The consultation paper refers to Art. 26 (5) of the Regulation and argues that this provision allows the replication of *some, but not all of the* information which has been included in the base prospectus according to the relevant securities note schedule. However, this provision, which reads “In the case that the final terms are included in a separate document …”, only applies in the first of the two alternatives mentioned in the previous sentence of Art. 26 (5) (“The final terms … shall be presented in the form of a separate document containing only the final terms …”), whereas the second alternative specified there allows the final terms to be *fully* included into the base prospectus.

As regards the further reference to the amended Prospectus Directive itself, Recital 17 must be read together with Art. 5(4) 3rd subparagraph of the Directive. It clearly only relates to the delimitation with regard to information that requires a supplement to the Base Prospectus. Therefore, an interpretation to the effect that the word "only" would prohibit the reproduction of the relevant parts of the base prospectus has no basis.

Comments on n. 51 to 53: The explicit exclusion of all changes of *pay out formulas* (No. 51) and of *risk factors* from the final terms (No. 52), as well as the prohibition of describing *proprietary indexes* "composed by the issuer" in final terms (No. 53) would substantially devalue the possibility of issuers to adapt to market demand, and would therefore not be in line any more with the intention behind the rules on final terms in the Prospectus Directive.

Payout formulas: As set out above, the content of final terms should depend on the question of whether the information could only be determined at the time of issuance. Accordingly, the reference in the CP to the obligation of authorities “to review algebraic formulas along with … related definitions and descriptions as regards … completeness, comprehensibility and consistency” (no. 49, repeated under no. 51) is not covered by the legal basis for using final terms, as it seems to imply that such information, by its very nature, does not qualify as possible final terms content, even if it could only be determined at the time of issuance.

The CP (under no. 51) further refers to the fact that a new pay out can be interpreted as a new product, and for this reason has to be disclosed in the base prospectus. However, whilst the point could be made that information about a separate (new) kind of product can always be given before the time of issuance of the respective securities, the rules proposed by the CP would also exclude simple variations of products described in the base prospectus, for example by adding a minimum payout amount at the request of potential investors. These market demands cannot always be predicted at the time the base prospectus is drafted and require the kind of flexibility the introduction of a base prospectus was designed to provide.

Therefore, the proposed rules should be amended so as to explicitly allow amendments to payout formulas as long as they only modify the product described in the base prospectus, and do not turn the security into a different product.

Risk factors: In the case of some instruments, it is necessary to include risk factors in the final terms as well as the base prospectus. This would apply, for example, to a market index replicating the performance of a particular market with specific investment risks. A general prohibition of risk factors in the final terms would not be in the interest of investors as they would not be able to make a considered investment choice of certain kinds of underlying within final terms.

Proprietary indices: A base prospectus will generally contemplate products linked to different types of underlyings, among which are indices - some of which are proprietary indices. It is unclear why a distinction should be made between underlyings which constitute indices composed by the issuer and other underlying indices. As some issuers currently sponsor hundreds of custom indices, forcing them to insert an index description for each of their proprietary indices in a base prospectus, will not help investors in finding the information relevant to their particular issue. This information can be provided in the final terms or by reference to a website where information on the underlying asset could be found.

Should the proposed prohibition be upheld, there would need to be a clear statement that new risk factors and the addition of custom indices composed by the issuer may be filed in a supplement to the base prospectus. This is likely to increase substantially the number of supplements to issuance programmes.

Comments on n. 101: We share the view that the summary of an offer must use plain language and present the relevant information in a clear and accessible manner. However, the idea that drafting the summary as if it were a "letter" from the issuer or offeror to the investors seems irrelevant to achieve that aim. "Key information" to be included in the summary should be substantially similar to that provided in a KIID for structured securities.

Questions in the consultation paper:

1. Do you consider the list of "Additional Information" in Annex B complete? If not, please indicate what type of information could be classified as "Additional Information" and to what item they would belong to. Please add your justifications.

2. As for the "additional provisions, not required by the relevant securities note, relating to the underlying" (included in Annex B), please provide the information which could fall under this item.

In the context of the general approach proposed in the CP, at least the following information would need to be added as "Additional Information":

- *Country specific information:* In some cases, additional information is provided in the final terms regarding information relevant to the offer of the particular securities in a specific country. One example is information on the tax situation of the investor beyond the general tax situation required within the relevant annexes to the Prospectus Regulation. Given the variety of possible information, this should be classified as "CAT C".
- *Inducements:* In some countries, many issuers disclose the inducements paid to distributors, to further enhance transparency for investors. This information would have to be classified as "CAT C".

3: Under "CAT. B" items, is the list of details, which can be filled out in the final terms complete? If not, please indicate with your justifications what elements should be added.

In our view, instead of the long list of items eligible for inclusion in the final terms proposed under no. 44, issuers should be allowed to add any kind of specific detailed information as long as it does not consist of legal rules. If this is not allowed, there would be a high risk that information is excluded which adds important detail to the general information contained in the base prospectus.

In addition, we do not agree with the categorisation of some of the items in Annex A to the CP. Should the general approach of the CP be maintained, we feel the following changes should be made to the categorisation:

Annex V/XII:

- 2: As set out in our general remarks regarding the proposed concept, there are cases where a certain underlying may have specific risks not covered by the base prospectus. Accordingly, risk factors should be classified as Cat. C.
- Annex V 4.5 / Annex XII 4.1.6: For the same reason underlying the determination of the payout amount, for which, as set out above, amendments may be needed due to market conditions at the time of issuance, amendments to the ranking of the securities as specified in the base prospectus should be possible under the same condition. Accordingly, this item should be categorised under C.
- Annex V 4.7 (v) – time limit on the validity of claims: As set out in the general remarks above, there may be a need to alter this period for certain securities. Accordingly, this should be made a Cat. C item.
- Annex V 4.7 (xiii) / Annex XII 4.1.2: For the same reasons as set out with regard to the description of risk factors above, there is a need to amend the information given in the base prospectus for certain types of underlying. Accordingly, we think these items should be categorised under C.
- 4.14: One of the key questions that is decided on the basis of market conditions at the time of issuance is in which countries particular securities issued under a base prospectus will be offered or admitted to trading. Subsequently, in our view, it would be excessive to require the base prospectus to contain information on the taxation at source for all potential offering or listing countries. Accordingly, this should be made a Cat. C item.
- 5.2.1: The categories of investors to which securities are offered depend on the market conditions at the time of issuance. This item should therefore be categorised under C.

Additional Information:

- Country(ies) where the offer(s) to the public takes place / Country(ies) where admission to trading on the regulated market(s) is being sought: The countries where particular securities issued under a base prospectus are offered or admitted to trading are decided by market conditions at the time of issuance. For this reason, it should not be necessary to list all potential countries in the base prospectus itself. This would result in all base prospectuses referring to all EEA countries on a standard basis. As for the countries into which the relevant base prospectus has been notified, this should be made Cat. C information.

8: Do you agree with our modular approach?

9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?

10: Do you agree that we have provided sufficient flexibility for issuers and their advisors in drafting summaries – whilst ensuring that summaries are brief and provide the reader with necessary comparability between prospectuses?

We disagree with your general approach in this area.

We would prefer it if the required content of summaries were not based on the information items within the different annexes to the Prospectus Regulation. The proposed "bottom up" approach entails a high risk of summaries that are too long - as a result of having to base them on the single information items within the annexes - and of making the summary less understandable for investors by requiring a specific order and form. Additionally, the proposed rigid requirements for content and order would not allow tailoring of the summary to the specific character of the individual securities, or enable issuers to make a summary easier to understand for investors where a specific financial instrument demands this.

We propose to select the required summary content "top down", i.e. the required content should be determined independently of the security classification system underlying the annexes to the Regulation and based on a real need of the investor to understand the content. While the content should take account of the items defined as key information by the amended Prospectus Directive, it should not just mirror them.

The development of the summary template(s) could be modelled on the Key Investor Information Document (KIID) introduced by the UCITS IV Directive, which also functions as a summary to a full (fund) prospectus. This would, at the same time, ensure close alignment with the likely content of a future KIID for securities as is to be proposed under the initiative on packaged retail investment products (PRIPs).

At minimum, we advise against a strict order of the suggested points within the proposed sections. Although this aims to ensure maximum comparability between different securities, a strictly prescribed order would actually severely impair the summary's readability as it would not necessarily place the information where it makes most sense for the security in question.

We note that for the UCITS KIID, the aim of ensuring comparability has not led to the strict order that is proposed in this CP. Rather, it provides freedom for the drafting of the KIID at the level of the individual information items.

11a: Do you agree that our approach adequately limits the length of summaries?

We do not agree with the statement that the proposed approach adequately limits the length of summaries. On the contrary, we see a substantial risk that summaries would in many cases be too long, given the proposed rigid content requirements which would prevent them taking a holistic approach to the drafting of the summary.

11b: What is "short" for a summary for: (i) an issuer; and (ii) an investor?

11c: Do you think that there should be a numeric limit on the length of summaries? If so, how might that be done?

In our view, the question whether a summary is "short" depends on the individual prospectus. Accordingly, there should not be a numeric limit to the length of summaries. In some cases, a limit would force issuers to leave information which they regard as important for investors out of the summary. This would risk incompliance with the general objective of the summary, as well as

create legal risk. We also note that a numeric limit does not seem to be in line with the detailed rules you propose for the content of the summary.

12a: Do you agree with the proposed content and format for summaries?

We do not agree with the proposal that no additional information may be given in addition to the items contained in the proposed sections A to E. Additional information should pass the specific materiality test applicable to the summary. This would apply to the summary in the same way as it would apply to additional information which is not included in the applicable annexes to the Prospectus Regulation and to the question of whether final terms should be part of the full prospectus. For example, additional provisions relating to the underlying may constitute relevant information for the summary as well.

12b: Are there other pieces of information which should appear in summaries? And are there disclosure requirements in our tables which are not needed for summaries?

- Point B.15: There should not be a requirement to disclose the issuer's competitive position. This would go beyond the requirements for the full prospectus, as the relevant annexes only require the "basis for any statements in the registration document made by the issuer regarding its competitive position".
- Points C.5, C.6, C.9, C.10, C.11, C.12, C.16 to C.21: For debt and derivative securities, these points constitute the core part of the description of the payout or other entitlements investors are entitled to under the respective securities. To require a strict predetermined order of information would impair the summary's readability to a large extent. For example, in many cases it will make sense to combine the required "brief description of how the value of the investment is affected by the value of the underlying instrument(s) …." (C.16) with the overall description "of the rights attached to the securities" (C.5), and to join up the information described under C.16 to C.21 with the other detailed payout information required under C.9 to C.11. Therefore, only a list of items that should be included should be provided, which leaves the exact position of this information to the issuer.

We trust these comments are helpful. Please let us know if we can provide any more detail about these issues.

Sincerely yours,

Daniel Trinder

Global Head of Regulatory Policy