Deutsche Börse Group

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Response

to

European Securities and Markets Authority (ESMA)

Consultation Paper

On ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU

Frankfurt / Main, 15 July 2011

Introductory remarks

Deutsche Börse Group appreciates the opportunity to respond to ESMA's consultation paper on ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU.

Deutsche Börse Group operates one of the most efficient stock exchanges in the world and a listing at Deutsche Börse helps companies to profit from all the advantages of a one-stop-shop listing. Further to this, Scoach Europa AG ("Scoach") operates together with Deutsche Boerse AG the Frankfurt Stock Exchange for trading in retail structured products and structured bonds.

Germany is one of the largest markets for structured products worldwide. Exchanges in Germany compete globally with other markets for structured products, particularly with the Swiss market for structured products (largest market in terms of outstanding volume) as well as the fast-growing markets in Hong Kong and Korea (largest turnover).

Scoach is very interested in the fact that the recently amended Prospectus Directive ensures both investor protection and flexibility for issuers. Market participants rely on the proper functioning of the Prospectus Directive for the issuance of retail bonds and structured products on a pan-European basis.

Both the base prospectus and final terms are used heavily today as they allow issuers to react to continuously changing market conditions and still give investors the necessary information at the time of the issuance of a specific financial product. We are concerned that the proposals in the Consultation Paper may reduce the flexibility of issuers (therefore also investment opportunities for investors) as well as the transparency and readability of the documentation. Cross-references in the final terms referring to options listed in the base prospectus may have a negative impact on the readability of the final terms or even make it impossible for an investor to understand the final terms without looking at the (potentially very long!) base prospectus.

We are concerned that increasing administrative costs for issuers (and therefore investors) as well as less flexibility for issuers might drive interest of retail investors further away from securities traded on regulated and supervised markets towards instruments traded on less regulated platforms such as Contracts for Difference (CFDs) or similar non-securitized financial products.

It is important to keep in mind that, depending on the demand and the needs of the clients, more than 1.000 different payout structures are traded on the European markets for structured products. We expect that the general proposal, i.e. that each payout structure requires a separate base prospectus, would lead to a dramatic increase in efforts and costs, in the number of approval processes by the competent authorities and in the number of required documents. We believe that at least minor amendments (e.g. adding a minimum payout or a cap) should be possible in the future and therefore be excluded from this requirement.

We elaborate on questions raised in the ESMA's consultation paper in more detail below.

Detailed remarks

Q1: 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 (CAT A, CAT B or CAT C, as defined in Part 3.III). Please add your justifications.

Information on inducements paid to distributors should be added in order to enhance transparency for investors. (CAT C)

Some product specific risk factors might be unknown at the time of the drawing up of the prospectus and should be added. (CAT C)

If products are offered in a specific country, specific information for investors in this country will be very helpful to increase transparency. (CAT C)

Q2: As for the "additional provisions, not required by the relevant securities note, relating to the underlying", please provide the information which could fall under this item.

Q3: 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.

The differentiation and the reasons for the differentiation between CAT B and CAT C described in the Consultation document items are not clear to us.

In general, we believe that the explicit restriction of CAT B items to "amounts, currencies, dates, time periods, percentages, reference rates, screen pages, names and places" may have a negative impact on the flexibility to react to changing market conditions.

At least the following items should be CAT C items:

A description of the rights attached to the securities (4.6 and 4.1.7), the explanation how the value of the investment is affected by the value of the underlying (4.7(xiii) and 4.1.2), the description of market disruption or settlement disruption events (4.7(x) and 4.2.3), provisions relating to interest payable (4.7 (ii)), adjustment rules with relation to events concerning the underlying (4.7(xi) and 4.2.4), country-specific information on taxes on income from the securities (4.14 and 4.1.14), the various categories of potential investors to which the securities are offered (5.2.1) and a description of an underlying index - regardless whether the index is composed by the issuer or not (4.2.2). Adding product specific risk factors should be possible.

Q4: Based on the instructions given in this document, could you please estimate the increase of the number of supplements to be approved in per cent?

We estimate the number of different payout structures traded in Germany to be greater than 1.000. More than 50 national and international issuers list securities in Germany. It is very likely that due to client demand or historical developments, additional and different structures are traded in other European countries. This might give a rough indication of the expected increase in the number of supplements.

Q5: Based on the instructions given in this document, could you estimate the increase of the relevant costs?

We believe that the increase in costs for issuers will be substantial. Additional costs will result from administrative fees for a potentially huge number of additional supplements, translation of issue specific summaries and legal and/or internal costs for the redrafting of all currently available base prospectuses and final terms.

Q6: Do you agree with the proposed mechanism of combining the summary with the final terms? If not, please provide your reasons and an alternative suggestion.

Q7: Please estimate any possible costs that this mechanism would imply for issuers.

Q8: Do you agree with our modular approach?

We are concerned that a prohibition to repeat text from the main part of the prospectus will affect the comprehensibility of the summary.

For the same reason, we do not agree that there should be a strict order within the sections.

Q9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?

Q10: Do you agree that we have provided sufficient flexibility for issuers and their advisers in drafting summaries – whilst ensuring that summaries are brief and provide the reader with the necessary comparability between prospectuses?

Q11a: Do you agree that our approach adequately limits the length of summaries?

No, we are concerned that many summaries will be significantly longer under the new content requirements.

Q11b: What is "short" for a summary for: (i) an issuer; & (ii) an investor?

We believe that documents of more than 10-15 pages are hardly read by retail investors.

Q11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?

No, there should be no numeric limit. The length of the summary may vary substantially and depends on the product type and on the number of products covered by the summary.

Q12a: Do you agree with our proposed content and format for summaries?

The proposed content may lead to very long summaries, reducing the willingness of investors to read the documents. It should be possible to add important issue-specific information or risk factors to maximize the benefits and the transparency for investors using the summary.

Q12b: 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?

For some securities such as structured products the requirement of a strict order of the different items may affect the readability of the summary.

Q13: Is there a need to augment Point B.9 with additional disclosure requirements, such as key assumptions, or to state that the forecast is reported on in the main body of the prospectus?

Q14: Do you agree with our proposal for amending Article 3, 3rd paragraph, Prospectus Regulation?

From our point of view, it should be avoided that final terms need an approval by the competent authorities in the future.

Q15: Could you estimate the change in costs that will arise from the proposals in this document for summaries? Proportionate disclosure regime regarding rights issues

Q16: Do you agree with the proposal to consider that "near identical rights" should have the same characteristics than pre-emption rights? Do you agree with the definition given in paragraph 117? Are there any other characteristics which should be taken into account?

No objections whilst equivalence is guaranteed. Additional characteristic to be taken into account is equal treatment of shareholders.

Q17: Do you agree that there should be only one single proportionate regime and not two separate regimes, one for regulated markets and one for MTFs?

Yes, as long as the general obligation to draw up a prospectus remains existent, that is to say an obligation to draw up a prospectus is necessary for a public offer in the regulated market and on the MTF and for the admission of securities to the regulated market.

Q18: Do you agree with the proposal to consider that appropriate disclosures requirements for MTFs would include, as a minimum, obligations to publish:

- annual financial statements and audit reports within 6 months after the end of each financial year,

- half-yearly financial statements within a limited deadline after the end of the first six months of each financial year, and

- inside information?

According to our understanding, reporting requirements for MTFs should not generally be implemented, but issuers who fulfil certain transparency requirements should be privileged when a prospectus is drawn up. Basically we have no objections to appropriate disclosure requirements for MTFs subject to existing reporting requirements. As to insider information, issuers who are not statutorily obliged to ad hoc-disclosure but who voluntarily disclose information comparable to insider information should also be able to benefit from the privileged prospectus regime.

Reporting obligations according to national reporting standards will be taken into account and are permitted.

Q19: What should be the maximum deadline for publishing half-yearly financial statements?

3 months.

Q20: For issuers listed on MTFs where there is no disclosure requirements on board practices and remuneration, do you agree that this information should be included in the prospectus?

Yes.

Q21: Are there any other disclosure requirements not listed above which should be required for MTFs?

Q22: Regarding the appropriate rules on market abuse, do you agree that there should be

provisions in order to prevent insider trading and market manipulation? Do you consider it necessary to require that the rules of the MTFs fully comply with the provisions of the Market Abuse Directive?

In principle, we agree that there should be provisions in order to prevent insider trading and market manipulation. However, as to the provisions regarding insider trading we would like to point out that particularly ad hoc-disclosure should not be applicable for MTFs. Some SMEs already have difficulty shouldering the burden of admission on a MTF. If this act triggered even greater burdens, such SMEs would lose access to markets altogether. Additionally, our opinion is that companies admitted to MTFs are sometimes not aware of the fact that their shares have been listed. The disclosure of such information could therefore not be insured by the issuer. Thus, according to our opinion the requirements of the Market Abuse Directive should not fully apply to financial instruments when they are admitted to trading on a MTF.

Q23: Are there any other EU Directive or Regulation not listed in paragraph 122 which should be taken into account?

Q24: As regards MTFs with appropriate disclosure requirements and market abuse rules, do you agree that in order to benefit from the proportionate prospectus, issuers should be required to make available their periodic and ongoing disclosures in a way that facilitates access to information by posting them on their websites?

Yes.

Q25: Do you agree with the approach proposed in order to determine which items to delete from Annexes I and III of the Prospectus Regulation?

Yes.

Q26: Do you agree with the proposed items which could be deleted from Annex I (Minimum Disclosure Requirements for the Share Registration Document) and Annex III (Minimum Disclosure Requirements for the Share Securities Note) of the Prospectus Regulation?

The information „history of share capital" is an essential information for investors and can therefore not be deleted.

Q27: Do you consider that the language regime could be a concern in terms of investor protection in case of passporting? Do you consider that the proportionate disclosure regime should be conditional upon compliance with the language requirements of Article 19 of the Prospectus Directive?

Yes, because the ground for the proportional disclosure is that information is available to potential investors within the frame of transparency obligations. Premise for this assumption though is that the information is available in an international common language.

Q28: In case of issuers listed on regulated markets, do you consider that disclosures on remunerations required by item 15 of Annex I of the Prospectus Regulation are redundant with information already made available to shareholders and the public in general and could therefore be deleted from the proportionate prospectus for rights issues?

Q29: Considering the objective to enhance investor protection, do you agree that information regarding the issuer's activities and markets and historical financial information can not be omitted?

Yes.

Q30: Do you consider that, in order to reduce administrative burden, incorporation by reference could be a solution? Do you have any suggestions to improve the incorporation mechanism?

Yes. The documents which are incorporated by reference have to be available together with the prospectus. They have to be up to date and contain the information if and to what extent they have been reviewed.

Q31: Do you agree with the proposals to require basic and updated information regarding the issuer's principal activities and markets?

Yes.

Q32: Do you agree with the proposal to require only the issuer's historical financial information relating to the last financial year?

Yes.

Q33: Do you agree with the proposal to redraft certain items of Annexes I and III of the Prospectus Regulation as proposed in paragraphs 132 to 134? Are there any other items which should be redrafted?

Q34: Do you agree with the proposal to include a statement in the proportionate prospectus drawing attention to the specific regime and level of disclosure applicable to rights issues?

Yes.

Q35: Do you agree with the schedule for rights issues presented in Annex 2 of this consultation paper?

Generally yes.

Q36: What are the costs for drawing up a full prospectus? What are the most burdensome disclosure requirements? Can you provide any data? Can you assess the costs that the proposed proportionate prospectus will allow issuers to save? Proportionate disclosure regime regarding SMEs and issuers with reduced market capitalisation.

Q37: Do you agree that a full prospectus should always be required for an IPO and for initial admission to a regulated market (as described in paragraph 141 above)?

Yes.

Q38: Do you agree with the proposal summarized in the table in paragraph 141 ?

IPOs, regardless whether on a regulated market, MTF or OTC, should always fulfil full standards of the Prospectus Directive. Subsequent public offerings on a regulated market or a MTF with similar disclosure rules could cope with a proportionate prospectus.

Q39: Do you agree that there should be only one schedule for a proportionate prospectus for both unlisted and listed SMEs and Small Caps or do you believe that further consideration should be given to having a separate regime for unlisted companies, dealt with under the proposed revision to MiFID?

We prefer a system which is focussed on whether there will be a public offer or an admission to the regulated market. We object to distinguish between obligations for SMEs and Small Caps, as it is not recognizable why investors should be less worthy of protection.

Q40: Can you provide data on the average costs for SMEs and Small Caps to draw up a prospectus? What are the most burdensome parts of a prospectus to produce?

100-300T€.

Q41: Do you consider that the three items identified in paragraph 147 (the OFR and the requirements to include a statement of changes in equity and a cash flow statement when the audited financial statements are prepared according to national accounting standards and to produce interim financial statements when the registration document is dated more than nine months after the end of the last audited financial year) could be omitted without lowering investor protection?

No/For subsequent offerings, yes.

Q42: Do you agree with the items ESMA proposes to delete and to redraft listed in Annex 4 and the proportionate schedule for the share registration document presented in Annex 5?

No/For subsequent offerings, yes.

Q43: Are there any other items which could be deleted or redrafted? Please justify any suggestions, including, if possible, the costs that would be saved and the impact on investor protection.

Q44: Taking into account the items which ESMA proposes to delete or redraft as per Annex 4, do you consider the proportionate disclosure regime for SMEs/Small Caps could strike the right balance between investor protection, the amount of information already disclosed to the markets and the size of the issuers?

Q45: Given the number and nature of the items ESMA proposes to delete and to redraft listed in Annex 4, do you consider the proposal would suppose a significant reduction of the costs to access financial markets for SMEs and Small Caps? Can you estimate the costs that the proposed proportionate prospectus will allow SMEs and Small Caps to save? Proportionate disclosure regime regarding credit institutions and other issuers.

Q46: Do you agree with the proposal to require historical financial information covering only the last financial year for credit institutions issuing securities referred to in Article 1(2)(j) of the Prospectus Directive?

Q47: "In performing its work on the proportionate disclosure regime, ESMA has sought to identify all possible omissions with regards to content of prospectuses as part of this Consultation Paper, however do you believe that further omissions are possible particularly with respect to the areas indicated in the request for advice by the Commission?"

Final Remarks

We appreciate the opportunity to respond to this ESMA consultation.

Generally, we welcome that disclosure requirements are reviewed, especially with regard to companies which are already listed on the regulated market and therefore are subject to extensive transparency requirements. We disagree with a proportionate disclosure requirement for SMEs and Small Caps. Due to the current market structure SMEs already have the possibility to choose between different transparency levels. Beyond that we fully

agree with ESMA´s critical remarks on this issue.

On the issue of base prospects, we urge ESMA to reconsider its proposals related to the design of base prospects and final terms against the background of potential negative consequences in terms of the flexibility for issuers, the transparency and readability of the documentation, and last but not least the investment opportunities for investors.

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