



20 August 2012

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Dear Sir or Madam,

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

Deutsche Bank welcomes the opportunity to comment on the technical advice that ESMA proposes to submit to the European Commission on possible delegated acts concerning the Prospectus Directive (PD).

We broadly agree with the proposals set out in the consultation paper, however as a general comment, we would like to point out that from the Continental European perspective convertible or exchangeable debt securities (the "Securities"), in principle, are issued as private placements to institutional investors only and are subsequently listed on a market not defined as a regulated market under MiFID and the PD. Therefore, no prospectus of any kind is required for either marketing/offering or listing purposes and submitted for approval to any competent authority within the meaning of the Prospectus Directive 2003/71/EC dated 4 November 2003, as amended by Amendment Directive 2010/73/EU dated 24 November 2010.

The practical impact of the prospectus preparation for the Securities seems limited however, it is preferable to reach legal certainty on the questions raised in the Consultation Paper. Our comments and response to the questions are in the attached Annex.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'AP' followed by a stylized flourish.

Andrew Procter
Global Head of Government and
Regulatory Affairs



Detailed comments on CP questions

Q1: Do you agree that the Prospectus Regulation should be amended in order to create a legal basis for the provision in Annex XVIII according to which only the disclosure requirements in item 4.2.2 of Annex XII are applicable to underlying shares already admitted to trading on a regulated market?

If not, please provide the reasoning behind your position.

We agree that the Prospectus Regulation should be amended to create a legal basis for the disclosure requirements.

Q2: In your experience, what information is included in prospectuses relating to debt securities convertible or exchangeable into third party shares not admitted to trading on a regulated market with regard to the underlying shares?

Do you believe that in such a case Annex XIV, except item 2, should be applied relating to third party shares not admitted to trading on a regulated market?

If not, please provide the reasoning behind your position.

The compliance with Annex XIV in such cases may be difficult for the Issuer of such Securities. For example, information such as item 1.10 of Annex XIV may only be received from the third party having issued the underlying shares (also see our response to Q3). Hence, the question is whether compliance with item 4.2.2 of Annex XII would be sufficient. We would agree with ESMA inserting a new and clarifying provision as suggested in item 35.1.3 d) of the Consultation Paper subject to the adjustment of such clarification.

Q3: Do you consider it necessary to clarify in the Prospectus Regulation the disclosure regime applicable to the issuer of the underlying shares not admitted to trading on a regulated market when it is an entity belonging to the same group of the bonds' issuer?

If not, please provide the reasoning behind your position.

Yes, a clarification would be helpful as to whether a share registration document in relation to the issuer of the underlying shares (i.e. not being the issuer of the Securities) is required.

We suggest a distinction be drawn between cases where the issuer of the underlying shares is part of the same corporate group as the issuer of the Securities and cases where the two issuers are not part of the same corporate group. In cases where the issuer of the Securities is not the issuer of the underlying shares or is outside of the corporate group, it will be difficult for the issuer of the Securities to prepare a reliable registration document without involving the issuer of the shares appropriately. In such circumstances, it would not be desirable to involve the issuer as they are cautious to give certain representations, such as the knowledge of any inside information or the compliance with certain US legal requirements, and therefore would likely struggle to publish a respective prospectus resulting in potential prospectus liability. We are of the opinion that a description of the underlying shares in accordance with item 4.2.2 of Annex XII would be sufficient.

Where the issuer of the underlying shares is part of the same group as the issuer of the Securities, the preparation of a registration document may be possible, considering that in most cases the issuer of the Securities will be a finance company of a group with the issuer of the shares being the parent company of such group. However, the provision of information to potential investors by way of a registration document in relation to the issuer of the shares is in our view not required if the shares are already admitted to trading at a regulated market. Therefore, a registration document in relation to the issuer of the shares is not necessary



where case the shares are already listed at a regulated market. In such cases, the description of the underlying shares in accordance with 4.2.2 of Annex XII also is sufficient.

Q4: Do you agree that the text of recital 7 should be clarified in order to avoid any confusion as regards the prospectus regime applicable to “other securities giving access to the capital of the issuer by way of conversion or exchange”?

If not, please provide your reasons.

We agree that the text of recital 7 should be clarified in order to avoid any potential confusion in this regard.

Q5: Do you agree with ESMA’s interpretation of the current legal framework concerning prospectus disclosure requirements for convertible or exchangeable debt securities? If yes, please feel free to provide additional arguments.

If not, please explain and justify your interpretation.

We generally agree with ESMA’s analysis regarding the current status quo of the required prospectus content. However, we would like to comment on the requirements to ensure they reflect the investors’ needs and adequately take into account the issuer’s interests and its access to the available and relevant information on the underlying shares:

- a) the registration document regarding the issuer of the Securities should follow Annex IV/IX respectively, XI depending on the denomination or the issuer being a bank;
- b) for the securities description Annex V/ XIII should be complied with depending on the denomination of the Securities;
- c) where the underlying shares are admitted to trading at a regulated market the information in accordance with item 4.2.2 of Annex XII needs to be provided;
- d) where the underlying shares are *not* admitted to trading at a regulated market, a distinction should be drawn between:
 - i. where own shares or group shares are the underlying, in which case the information in accordance with Annex XIV (ex item 2) needs to be provided;
 - ii. where third party’s shares are the underlying, in which case information in accordance with item 4.2.2 of Annex XII needs to be provided (see above Question 2)
- e) no additional information is required as regards the issuer of the underlying shares (e.g. in accordance with Annex I).

Q6: Do you agree with ESMA’s proposal of limiting the application of items 3.1 and 3.2 of Annex III to debt securities convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belonging to its group which can be converted or exchanged within 12 months since the date of their issuance?

If not, please provide the reasoning behind your position.

We agree with ESMA’s proposal to limit the application of items 3.1 and 3.2 of Annex III to debt securities convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belonging to its group which can be converted or exchanged within 12 months since the date of their issuance.



Q7: According to your experience, what are the costs for drawing up the working capital statement and updating information on capitalization and indebtedness, as required by items 3.1 and 3.2 of Annex III? Can you provide any data?

Deutsche Bank is not typically involved in the preparation of the working capital statements and updating information on capitalisation and indebtedness. This is normally the responsibility of the issuer.

Q8: Do you agree with ESMA's interpretation of Article 29.6 of the Second Directive, according to which exchangeable debt securities are not necessarily within its scope?

Please provide the reasoning behind your position.

We agree with ESMA's interpretation of Article 29.6 of the Second Directive, according to which exchangeable debt securities are not necessarily within its scope.

The wording of Article 29 (6) of the Second Directive 77/91/EEC dated 13 December 1976 suggests to cover exchangeables, being Securities which are exchangeable into existing shares of a company not being the issuer of the Securities, because it says "all securities which are convertible into shares or which carry the right to subscribe for shares" and therefore does not limit the conversion element to shares of the issuer of the said securities. However, only those securities which are convertible into new shares or which carry the right to subscribe for new shares issued by the issuer of the securities, i.e. for capital raising purposes, pose the question for rights issues because new (contingent) capital of the issuer is being concerned and dilution issues have to be addressed. Exchangeables on the other hand, concern existing shares of a company not being the issuer of the Securities but held by the issuer of the Securities and do not pose any rights issues or dilution issues because they are not issued by the issuer of the Securities for capital raising purposes.

Q9: Do you agree with ESMA's view to consider rights issues of debt securities convertible into issuer's shares within the scope of Article 7.2(g) of the Prospectus Directive and by consequence be able to take advantage of the new provisions of the Delegated Regulation relating to the proportionate disclosure regime, provided that conditions envisaged by the above article are fulfilled?

If not, please provide the reasoning behind your position?

We agree with ESMA's view in this regard.