

Feedback to the European Commission on the Draft regulatory technical standards under the Prospectus Regulation / ESMA's Final Report (31-62-1002) dated 17 July 2018

The DDV welcomes the efforts and thorough assessment by ESMA in its Final Report – Draft regulatory technical standards under the Prospectus Regulation - dated 17 July 2018 (the "**Final Report**"). We particularly welcome its review and consideration of the responses it received to its Consultation Paper published 15 December 2017.

The DDV and its members have a strong interest in the Prospectus Regulation 2017/1129 (the "**Prospectus Regulation**"), and any delegated acts adopted pursuant to it, operating in such a way as to ensure maximum investor protection and market efficiency. The efficiency of the regulatory framework under the Prospectus Regulation and the functioning of the (base) prospectus regime are crucial for the DDV's members, who rely on it for the issuance of retail structured (debt) products across the EU member states.

The DDV recognises that ESMA has taken a practicable approach while at the same time safeguarding investor protection. However, one major concern remains. Apart from that, we would like to raise some open questions regarding the machine-readable data to be provided to ESMA.

Standard statements / warnings regarding advertisements

Article 12(2) of the draft regulatory technical standards requires the inclusion of a number of statements/warnings regarding advertisements, regardless of the form of advertising ("written or oral").

From the DDV's perspective, this requirement is not postulated at Level 1 of the legislation. The DDV is also of the opinion that, in the interest of consistent regulation, such a requirement has to be uniformly standardized within the MiFID II legislation

With respect to the implementation, for certain advertising material (such as a single line on a website indicating only the new issuance of a structured product), such a requirement would also be highly impracticable and disproportionate in comparison to the potential benefits for investors.

The DDV agrees that advertising has to be balanced and consistent with the regulations. In Germany, this is ensured by the supervisory practices of the national supervisor (BaFin).

For example, in BaFin's MaComp, Section BT 3 "Requirements for fair, clear and not misleading information in accordance with Section 63(3) of the WpHG" (which substantiates Article 44 of the Delegated Regulation), contains the following provisions:

"[...] Moreover, Section 63(6), sentence 2 of the WpHG stipulates specifically for marketing information that the latter must be clearly recognisable as such." (BT 3.1.1, Paragraph 1)

All information made available to retail and professional clients falls under the scope of application of the provisions. Since the Act is based on the premise that the information is made available to the client by the investment services enterprise, it does not matter whether the information originally comes from the investment services enterprise. For this reason, information which is initially provided to the investment services enterprise by a third party and which is then made available to the clients by the investment services enterprise also falls under the scope of application of the provisions.

Example: Marketing materials of an asset management company or an issuer.” (BT 3.1.2, Paragraph 2)

“Information that investment services enterprises make available to professional and retail clients as a rule must be fair, clear and not misleading (cf. Section 63(6) sentence 1 of the WpHG). That means, among other things, that material statements must not be expressed in an ambiguous manner and that material information must not be omitted.” (BT 3.3.1, Paragraph 1)

“Moreover, information must be sufficient for, and presented in a way that is likely to be understood by the group of clients to whom it is made available, or by whom it is likely to be received:

The information must be sufficient so as to be understood by the average member of the group of clients to whom it is addressed. The necessary scope and depth of product descriptions therefore must be geared to the average knowledge of the target group. The more complicated a product or service (including its risks) is, the more explanations the related product information as a rule must contain. If information is addressed expressly and in a clearly recognisable way to only one clearly defined group of clients who can be expected to possess an advanced level of expertise, this may be duly considered when determining the scope and depth of the product description.” (BT 3.3.1, Paragraph 2)

“In particular, it must be ensured that the way in which the information is presented does not disguise, diminish or obscure important items, statements or warnings.

Negative example: Whereas the reader finds the rewards of a product expressly described in the information provided under the header "Benefits of the product", he/she has to deduce the product's associated risks from the characteristics provided under the header "For whom is the product suitable?"

In the first place, it is not clear from the heading "For whom is the product suitable?" that this section contains important information on the product's risks that is of particular importance for the investor. Secondly, the risks must be clearly specified; it is not sufficient that the risks can be inferred or concluded from the product description.” (BT 3.3.1, Paragraph 4)

“In accordance with Article 44(2)(b) of the Delegated Regulation, the potential benefits of an investment service or a financial instrument may be indicated if there is always fair and prominent indication of any relevant risks.” (BT 3.3.3, Paragraph 1)

“Unlike in securities sales prospectuses, reference to risks need only be made if the information emphasises at least one benefit of the presented product. The design should be considered fair and clear where the principle of proportionality applies, i.e. the scope and accuracy in which the benefits and risks are described must be in balanced proportion. The more extensively benefits are highlighted, the more extensively any risks must be addressed. That does not mean that the number of benefits and risks always has to be the same. Where a product has more benefits than risks, these may outnumber the risks in the presentation and vice versa. Also, benefits and risks do not always have to correspond to each other in substance, i.e. like "the two sides of a coin". It is decisive that where all material benefits of a product are specified, reference is also made to all material risks, and that where only particularly important benefits are mentioned, reference is also made to the particularly important risks.” (BT 3.3.3, Paragraph 2)

From the DDV's perspective, a blanket requirement to include the entire range of provided statements and warnings in each and every case is not only unproportional but could even lead to information fatigue for investors. They may receive statements and warnings on multiple occasions (for example, on the PRIIPs KID, which has to be provided prior to the purchase of a security).

Machine-readable data to be provided to ESMA

After an initial review of the numerous reporting fields for the data to be transmitted to ESMA, the DDV has arrived at a non-exhaustive list of questions regarding interpretation and implementation. In principle, the DDV wishes to point out that all of the legally permitted issuances and forms of listing must be able to be accordingly reported. As such, we submit the following questions:

- How are the fields specifically coded? What is the mechanism for covering the option of entering a "not applicable" (NOAP) value (e.g. Nos. 10, 11, 20, 23 & 30)? With certain fields (e.g. No. 24), there are instructions in the field description that the field may not be applicable, but not with other fields.
- No. 27: Clarification is needed whether the "IOWA" and "SOWA" refer only to trading on a regulated market. It is also unclear where to classify admission to a "regulated unofficial market" in accordance with the Deutsche Börse's Trading Regulation for the Regulated Unofficial Market.
- No. 28: The option for "traded on a regulated unofficial market" seems not to be covered, unless this can be defined as "not applicable" (NOAP) in this case.
- Are there limits to the size of the XML data?
- Are the data to be transmitted at the same time as the final terms?

* * * * *

Contact

Deutscher Derivate Verband
Pariser Platz 3
10117 Berlin

Dr Henning Bergmann
Managing Director
Tel.: +49 (30) 4000 475 - 50
bergmann@derivateverband.de

Dr Katja Kirchstein
Senior Advisor
Tel.: +49 (30) 4000 475 - 33
kirchstein@derivateverband.de