

**Feedback to the European Commission on the Draft of the Delegated Regulation supplementing the Prospectus Regulation dated 28 November 2018**

19 December 2018

The DDV welcomes the opportunity to comment on the European Commission's proposed draft Delegated Regulation supplementing the Prospectus Regulation dated 28 November 2018 (the "**Draft Delegated Regulation**").

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 has participated already in prior consultations, including the consultation papers on the draft technical advice on the format and content of the prospectus and on scrutiny and approval, both published on 6 July 2017. On 5 July 2018, the DDV has sent already comments to the Commission on ESMA's Final Report (31-62-800) dated 28 March 2018 (the "**ESMA's Final Report**").

In the following we want to highlight issues addressed in ESMA's Final Report, but not or differently reflected in the Draft Delegated Regulation and address issues raised earlier by the DDV not taken into account in the Draft Delegated Regulation. Taking the advanced stages of the lawmaking procedure into account we have focused on key points and hope that those points can still be taken into account.

***General approach as regards the minimum content and format of the prospectus and cover note.*** We welcome the approach of the Commission to clearly define the scope and applicability of the respective annexes setting out a comprehensive list of which annexes are applicable to what type of securities (Art. 2 to 23 of the Draft Delegated Regulation, for example a table of combinations is no longer included in the Draft Delegated Regulation, see Annex 27 in ESMA's Final Report). As regards the format of the prospectus, Art. 24 to 27 of the Draft Delegated Regulation are restricted to key provisions. It seems that the rationale behind this is to reduce complexity and restrict the rules to the absolute necessary. We welcome this approach.

However, in case information requirements for certain types of securities are different compared to other types of securities then it should continue to be possible to use the more stringent registration document schedule (cf. ESMA's Final Report Art. C.3). Similarly, it should be possible to use the retail non-equity securities note instead of the wholesale non-equity securities note.

The Commission has also decided to not take forward the suggestion in the ESMA Final Report that a length limit on prospectus cover notes should be imposed (cf. ESMA's Final Report Art. D.3). We welcome this approach. However, it should be clear that a cover note as such is still permissible.

***Predictability of prospectus approval procedure, proportionality and derogations.*** Pursuant to Recital 22 and Art. 40 of the Draft Delegated Regulation competent authorities are allowed to consider, where

necessary, additional criteria for the scrutiny of prospectuses in order to adapt that scrutiny to the specific characteristics of a prospectus. Such a generic provision is unjustified because the criteria for prospectus scrutiny listed in Art. 36 to 38 of the Draft Delegated Regulation are already comprehensive. Furthermore, one of the objectives of the revised prospectus regime in the form of a Regulation rather than a Directive was to enhance convergence of supervision. Ensuring a consistent level of investor protection and level playing field requires that the criteria defined in the Draft Delegated Regulation are uniformly applied without exceptions. Only then the predictability of prospectus approval procedures is guaranteed.

In ESMA's Final Report the principle of proportionality was included in Art. O which included also certain derogations and Art. G.4 of ESMA's Final Report allowed also to omit information when such information is not pertinent to the Issuer. If the Commission decides to continue to pursue the approach to allow the application of criteria in addition to those laid out in Art. 36 to 38 of the Draft Delegated Regulation, then all the derogation and exemption in ESMA's Final Report should be applied as well. It is important to ensure that the principle of proportionality is applied in a balanced way.

***Proposed requirement to include expenses and potentially implicit costs in the prospectus (Annex 13, Item 5.3.1(c) of the Draft Delegated Regulation).*** As regards the disclosure of expenses, the Draft Delegated Regulation continues to make reference to the PRIIPs Regulation. This goes back to ESMA's Final Report pursuant to which expenses included in the price (so called implicit costs) charged to the subscriber or purchaser should be disclosed (cf. Question 40 of ESMA's Final Report).

Having in mind the quite comprehensive information cascade with cost disclosure in the PRIIPs KID as well with cost disclosure under the MiFID II rules, DDV wants to question the added value of an additional cost disclosure in rather static securities prospectuses. DDV is especially concerned however that no methodology has been proposed by EMSA in its Final Report for the determination of such implicit costs. If the European Commission agreed to ESMA's proposal, guidance on the determination of such implicit costs are necessary in order to ensure a level playing field across issuers in Europe avoiding inconsistent disclosure and potential double regulation – also considering potential further guidance from ESMA.

The DDV proposes the disclosure of product costs pursuant to Article 50(2)(b) of the Commission Delegated Regulation (EU) 2017/565 since

1. MiFID II has a wider scope in terms of the financial instruments covered, and also covers non-PRIIPs.
2. The MiFID II cost calculation that is to be transmitted to distributors as an input factor for their cost disclosure is conducted in-house more often, so the data for cost disclosure in prospectuses is already available – in most cases regardless whether an issuer is explicitly subject to MiFID II rules. This considerably lowers the efforts required for practical implementation thus leading to a more proportional provision.

***The reference to additional information items in Annex 27 which can be included in final terms should be amended making clear that the inclusion of those information items is not mandatory (Art. 26(4) of the Draft Delegated Regulation).*** In ESMA's Final Report there was an explicit statement that the final terms shall include the additional information items "on a voluntary basis" only (cf. ESMA's Final Report Art. I.2(b)). We assume that the same is intended under the Draft Delegated Regulation and would also be in line with the current legal practice under Art. 26 (5) of Regulation 809/2004 using the word "may" rather than "shall". In order to keep the voluntary nature of this provision we suggest to

adapt the wording accordingly, since the administrative law of some Member States would possibly stipulate a deviating handling.

**Indication of information items in margins of the prospectus (Art. 24(6) of the Draft Delegated Regulation).** In the Draft of the Delegated Regulation the Commission has newly included a provision which requires to indicate in the margin the relevant information items set out in the Annexes to this Regulation to which the respective information corresponds. Such a provision was not included in ESMA's technical advice. The way it is drafted this would also apply in case that a cross-reference is not required pursuant to Art. 24(6) because the order in which information is presented corresponds to the order in the Annexes. It should be left also to the discretion of the entity responsible for the prospectus to either prepare a cross-reference list or indication the information items in the margins (if the order is deviating from the Annexes).

**The wording for "Category B" information items should be more precise (Art. 26(2) of the Draft Delegated Regulation).** Same as in ESMA's Final Report (Art. H.1(a)), the definition of "Category B" should make reference to "general principles related to the information required" which have to be included in the base prospectus. This has not been picked up in the Commission's draft what makes the distinction from "Category C" information items difficult.

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