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	BSBV 64/Dr.Priester/Sc	3132	12 May 2015

Re: **CONSULTATION DOCUMENT REVIEW OF THE PROSPECTUS DIRECTIVE**

The Division Bank and Insurance of the Austrian Federal Economic Chamber, as representative of the entire Austrian banking, insurance and pension funds industry, appreciates the possibility to comment on the above mentioned Consultation Paper and would like to submit the following position:

First of all we may state that we appreciate the beginning of a process of reconsidering the Prospectus Directive in the light of dependencies with other / sometimes similar rules and regulations which have been set up in recent years.

That is the reason why – at the beginning and right before discussing any details - we would like to propose an intensive screening process to identify, check, compile and compare all existing rules, applicable in similar situations for similar products, all of these aiming to protect the investor and to create a minimum requirement of information and transparency for investors of different "qualities" on the one hand and for regulatory reasons on the other hand.

A huge and in the meanwhile rather unstructured regulatory framework of several directives with respect to /covering "investor information" in different form, added by an enormous number of special rules, technical standards of EBA / ECB, memorandums of national authorities are the reason why "prospectus drafting" and marketing / distribution of investment products became so burdensome and cost intensive, in particular for small issuers.

Bearing in mind, how many directives (Prospectus Directive, UCITS, Transparency Directive, Alternative Investment Funds Directive, MIFID II, PRIIPS, Consumer Right, etc) affect the fields of "investor protection", it is obvious, that all these regulations need to be brought in line in order to avoid burdensome duplications, contradictions and intransparency.

For each of the following questions it has to be kept in mind whether or not the respective change improves the investors´ level of information.

Question 1: Is the principle, whereby a prospectus is required whenever securities are admitted to trading on a regulated market or offered to the public, still valid? In principle, should a prospectus be necessary for:
- admission to trading on a regulated market
- an offer of securities to the public?

The definition of public offer is wide. Therefore an interpretation is often necessary. In this context, the exemptions to the public offer are important. In the current definition, however, there is a differentiation in place between offers "where the obligation to publish a prospectus shall not apply" (Art 3 para 2 lit a to e Prospectus-Directive) and the "exemptions from the obligations to publish a prospectus" (Art 4 para 1 lit a to e Prospectus Directive). As a consequence either the definition of "offer to the public" should be defined precisely or the criteria when a public offer is not given, should be listed in an exhaustive catalogue.
Should a different treatment should be granted to the two purposes (i.e. different types of prospectus for an admission to trading and an offer to the public). If yes, please give details.

Referring to the introduction above, first of all it is necessary to define the goal of this directive.
One goal may be to regard the prospectus primarily as a document to be set up for regulatory reasons, that means to enable the authorities (Financial Market Authority, the Stock Exchange) to assess the issuers and their products in detailed form and to provide specialists in the financial sector with details regarding the issuer, the product and the risks.
So it will be up to the authorities, whether they need such a document any more and in which (simplier form) it could be replaced, e.g. for listing purposes.
In case the Commission regards the prospectus document as key information document for the investor - retail and wholesale - then one should discuss, whether the prospectus in the existing format, language etc. is able to fulfill this task, in particular with respect to the average retail investor in the meaning of consumer protection law.

Coming back to the question:
In our opinion, there does not exist any valid argument for a different treatment and to distinguish between (retail) investor protection in connection with a (first) public offer or an order in the secondary market via the stock exchange.

Issuers, whose securities are admitted to trading on a regulated market, are in accordance with the Transparency Directive in particular required to publish their annual and half-yearly financial reports. Any significant financial news must be immediately disclosed. Any such periodic or ongoing information requirement has been introduced by the European legislator "to lead to a high level of investor protection". In light of the financial transparency of the relevant issuer, investors are, as a consequence, able to make an informed investment decision based on the combination of the issuer's financial reporting under the Transparency Directive with any security related information contained, where available, in the KID.

Question 2a): Costs internal ex external about 100.000 to 200.000 EUR for a non-equity base-prospectus.

Question 2b) about 30% Lawyers, 30% Audit, 30%, Internal Costs, 10% Authority and Other

Question 3:
Only a small percentage of the issuers intends to issue in more than 2 or 3 different countries, as translation costs are very high and for marketing activities in each jurisdiction legal support by a local lawfirm is needed.

Question 5: Would more harmonization be beneficial in areas currently left to Member States discretion, such as the flexibility given to Member States to require a prospectus for offers of securities with a total consideration below EUR 5 000 000?
Yes. More harmonization could be beneficial.

Question 6: Do you see a need for including a wider range of securities in the scope of the Directive than transferable securities as defined in Article 2(1)(a)? Please state your reasons.
No.

Question 7: Can you identify any other area where the scope of the Directive should be revised and if so how? Could other types of offers and admissions to trading be carried out without a prospectus without reducing consumer protection?
Yes, if e.g. the denomination is small and the maximum amount of investment per person is capped. In these cases the financial impact per person is very low and therefore there is no necessity of investor protection. Additionally this exemption may be combined with a threshold for the offer, e.g. less than EUR 3 000 000.

To bring in line the Prospectus Directive with the ongoing European Commission initiative "Building a Capital Markets Union" we propose to reword Art 1 para 1 Directive 2003/71/EC (purpose and scope):

"The purpose of this Directive is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered ***in the primary market*** to the public or admitted to trading on a regulated market situated or operating within a Member State."

E.g. in general – as long as the prospectus is drafted in a foreign language – and in the existing format, it will never be able to meet the requirements of the consumer right (clear and transparent, not misleading information).

One should reconsider the future aim of this document in general, in particular whether we need such a "regulatory document", additionally to PRIIPs, KIIDs, etc. , and in which language such information shall be available, if its drafted for retail investors (public offers) as well.

Question 8: Do you agree that while an initial public offer of securities requires a full-blown prospectus, the obligation to draw up a prospectus could be mitigated or lifted for any subsequent secondary issuances of the same securities, providing relevant information updates are made available by the issuer?

Yes, we agree from a general point of view with such an amendment, because it would make it possible to draw a clear line between initial public offers as opposed to secondary market transactions.

However, we consider the obligation to prepare (additional) prospectuses for subsequent secondary issuances of the same securities as being excessive on the issuers. Assuming that the prospectus is still up-to-date (e.g. by supplementing/updating) also investors do not need a new prospectus, since they are able to make an informed investment decision by combining the (updated) prospectus prepared for the initial public offer with any issuer related information published, e.g., in accordance with the Transparency Directive, and any security related information contained, where available, in the KID.

For these purposes, it should in our view be clarified that (i) no additional prospectus is required in case of a public offering of securities provided that a Prospectus Directive compliant prospectus has already been approved and that (ii) any offering of securities to the public started on the basis of a valid prospectus may be continued even after the validity of the prospectus has expired.

Question 10: If the exemption for secondary issuances were to be made conditional to a fullblown prospectus having been approved within a certain period of time, which timeframe would be appropriate?
There should be no timeframe (i.e. the exemption should still apply if a prospectus was approved ten years ago)
We are of the view that there should be no timeframe stipulated in relation the prospectus.

Question 11: Do you think that a prospectus should be required when securities are admitted to trading on an MTF? Please state your reasons.
No, in our view, no prospectus should be required when securities are admitted to trading on a multilateral trading facility (MTF). Any obligation to prepare a prospectus in the context of a listing should be strictly limited to the admission to trading on a regulated market of a stock exchange.

The reliance of investors in the market integrity and investor protection created by any of the regulated markets of stock exchanges justifies the obligation to prepare a Prospectus Directive compliant prospectus for any admission to trading on such regulated market, but also clearly differentiates these regulated markets from MTFs.

Question 13: Should future European long term investment funds (ELTIF), as well as certain European social entrepreneurship funds (EuSEF) and European venture capital funds (EuVECA) f the closed-ended type and marketed to non-professional investors, be exempted from the obligation to prepare a prospectus under the Directive, while remaining subject to the bespoke disclosure requirements under their sectorial legislation and to the PRIIPS key information document? Please state your reasoning, if necessary by drawing comparisons between the different sets of disclosure requirements which cumulate for these funds.

In general we would like to refer to our introductory remarks regarding a required same level and quality of information for all products. Duplications shall be avoided.
The mentioned exemption would not affect investor/consumer protection in a significant way.

Especially risk factors, which constitute a crucial component of investors reason for the decision, are part of both the prospectus and the KID. Since the requirements of the Prospectus Directive and the PRIIPs KID for the exposition of the same risk factors (market, credit and liquidity risks) differ the obligation of preparing both a prospectus and a KID could rather cause confusion to (potential) investors.

Question 15: Do you consider that the system of exemptions granted to issuers of debt securities above a denomination per unit of EUR 100 000 under the Prospectus and Transparency Directives may be detrimental to liquidity in corporate bond markets? If so, what targeted changes could be made to address this without reducing investor protection?
No; at least not as regards wholesale markets.

Question 16: In your view, has the proportionate disclosure regime (Article 7(2)(e) and (g)) met its original purpose to improve efficiency and to take account of the size of issuers? If not, why?
No, because it is not effective. We do not know any cases in which the proportionate disclosure regime has been applied.

Question 19: If the proportionate disclosure regime were to be extended, to whom should it be extended?
To types of issuers or issues not yet covered? Please specify:
Offers of shares to existing shareholders and exchange offers, e.g. to exchange under CRR grandfathered shares/issues into CRR compliant shares/issues: When offering shares to the market and therefore also to existing shareholders (due to the avoidance of dilution) the offer to existing shares is included in the 150 persons threshold of Article 3(2)(b). For that reason in most of these cases a prospectus is needed and the raising of equity is more difficult and in most cases disproportionate.

Question 20: Should the definition of "company with reduced market capitalisation" (Article 2(1)(t)) be aligned with the definition of SME under Article 4(1)(13) of Directive 2014/65/EU by raising the capitalisation limit to EUR 200 000 000?
In our opinion there is no justified reason for any different treatment / disclosure requirements in light of investor protection.

Question 23: Should the provision of Article 11 (incorporation by reference) be recalibrated in order to achieve more flexibility? If yes, please indicate how this could be achieved (in particular, indicate which documents should be allowed to be incorporated by reference)?
We support the revision of Article 11 (incorporation by reference) to allow for more flexibility. To allow issuers for an incorporation of information by reference (into a prospectus) facilitates the procedure of drawing up a prospectus and lowers the costs for the issuers without endangering investor protection.

Any issuer related information published in accordance with the Transparency Directive, e.g. financial reporting of the issuer, shall no longer be subject to incorporation by reference in the prospectus (i.e. neither by way of a substantial repetition of substance nor by a reference to the documents would need to be included in the prospectus). Any such information is easily available for investors in public data basis.

It should be clarified that also final terms (under a base prospectus) may be incorporated by reference. This would allow issuers to continue the related public offering even after the validity of the original base prospectus has expired. It would in our view be helpful to clarify that also translations of documents, which have been approved by or filed with the competent authority of the home Member State may be used for incorporation by reference purposes.

Question 25: Article 6(1) Market Abuse Directive obliges issuers of financial instruments to inform the public as soon as possible of inside information which directly concerns the said issuers; the inside information has to be made public by the issuer in a manner which enables fast access and complete, correct and timely assessment of the information by the public. Could this obligation substitute the requirement in the Prospectus Directive to publish a supplement according to Article 17 without jeopardising investor protection in order to streamline the disclosure requirements between Market Abuse Directive and Prospectus Directive?
In our view a supplement to the prospectus will not be necessary in case of an ad-hoc publication in accordance with Article 6(1) of the Market Abuse Directive. We support the European Commission's consideration that any ad-hoc publication in accordance with Article 6(1) of the Market Abuse Directive shall substitute the requirement in the Prospectus Directive to publish a supplement without jeopardising investor protection.

If the European Commission, nevertheless, considers a supplement still being necessary, it will be important to waive any approval process in relation to this supplement in order to not jeopardise its ad-hoc character.

Question 27: Is there a need to reassess the rules regarding the summary of the prospectus? (Please provide suggestions in each of the fields you find relevant)
Yes, the summary shall be replaced by KIIDs / PRIPS, etc. (see introduction). Rules regarding the summary of the prospectus should be strongly evaluated against the PRIIPs Regulation. Any security related information in a summary of a prospectus is in our view redundant, since it should already be included in the KID, which will be drawn-up in the local language. As a consequence, we support the consideration to eliminate the prospectus summary, where a KID is produced in accordance with the PRIIPs Regulation.

In any case, we do not see any benefit for investors in duplicating information already contained in the KID in the summary and, consequently, strongly recommend that a summary, if adhered to, should be strictly limited to the essential characteristics of, and risks associated with, the issuer. We propose to either waive, where a KID is produced in accordance with the PRIIPs Regulation, the concept of a summary of the individual issue annexed to the final terms or to amend the current concept so that the host member states may only require a translation of the summary of the individual issue.

Question 28: For those securities falling under the scope of both the packaged retail and insurance-based investment products (PRIIPS) Regulation, how should the overlap of information required to be disclosed in the key investor document (KID) and in the prospectus summary, be addressed?
We suggest to eliminate the prospectus summary (for all securities) / see MIFID II.

In addition we suggest to align the format and content of the prospectus summary with those of the KID required under the PRIIPS Regulation, in order to minimise costs and promote comparability of products.

Question 29: Would you support introducing a maximum length to the prospectus? If so, how should such a limit be defined?
No, it must be in the responsibility of the issuer to describe special risks and products sufficiently.

Instead of taking a quantitative approach, we propose to use qualitative criteria in order to enhance analysability and comprehensibility of prospectuses.

Issuer related information and (parts of) the summary are redundant and the European Commission might conclude to factually limit excessive length of prospectuses and to enhance analysability and comprehensibility of prospectuses by reducing the prescribed information to be included in a prospectus, thereby avoiding duplication of information.

Question 30: Alternatively, are there specific sections of the prospectus which could be made
subject to rules limiting excessive lengths? How should such limitations be spelled out?
Administrative, Management and Supervisory Bodies / required details / disclosure should be reconsidered

In any case the disclosure requirements with respect to tax / translation thereof shall be removed as the tax situation for each individual investor is individual.

Question (31) Do you believe the liability and sanctions regimes the Directive provides for are adequate? If not, how could they be improved?

- **the sanctions regime of Article 25**

The sanctions regime in the prospectus should be limited to civil penalties and compensation damages respectively and furthermore to administrative penalty payments respectively. Criminal offenses, however, should be made impossible by the Prospectus Directive. A criminal offense constitutes a strict punishment. The prevention measures, however, to avoid the public offer of securities without a prospectus can be achieved much more effectively by imposing compensation payments and administrative penalties instead.

However, existing divergent sanction regimes across the Member States are currently generating distortive markets. Therefore, in order to achieve a level playing field among

issuers we need further harmonisation of all legal sanctions Member States are permitted to implement.

Question (32) Have you identified problems relating to multi-jurisdiction (cross-border) liability with regards to the Directive? If yes, please give details.

Please see our answer to Q 31 (uncertainties regarding different liability regimes; entrance barriers to cross border markets).

Question 33: Are you aware of material differences in the way national competent authorities
assess the completeness, consistency and comprehensibility of the draft prospectuses that are submitted to them for approval? Please provide examples/evidence.
Yes, treatment of Prospectus Supplements.

Q 35: Should the scrutiny and approval procedure be made more transparent to the public? If yes, please indicate how this should be achieved.
No.

Question 36: Would it be conceivable to allow marketing activities by the issuer in the period between the first submission of a draft prospectus and the approval of its final version, under the premise that no legally binding purchase or subscription would take place until the prospectus is approved? If yes, please provide details on how this could be achieved.
Firstly, we would like to point out that - based on the existing PD – it is already allowed to publish advertisements even though the prospectus is not yet approved; Art 15 para 2 of the PD 2 states that "Advertisements shall state that a prospectus … *will be published* and indicate where investors are or will be able to obtain it." This should be remained.

However, we appreciate the European Commission's consideration to allow marketing activities by the issuer in the period between the first submission of a draft prospectus and the approval of its final version provided that no legally binding purchase or subscription would take place until the prospectus is approved. This would allow issuers to quickly react on market opportunities as well as investors' demands and to offer versatile products reflecting current market demands and resulting investors' expectations.

Question 39a: Is the EU passporting mechanism of prospectuses functioning in an efficient way? What improvements could be made?
It should be clarified in the revision of the Prospectus Directive that national competent authorities shall line with Art. 17 para. 1 of the Prospectus Directive ("Competent authorities of host Member States shall not undertake any approval or administrative procedures relating to prospectuses.") have no right to challenge the certificate of approval or the approved prospectus. Any additional administrative procedures related to the offering of securities in the relevant host Member States does in practice jeopardize the efficiency of a single passport.

Disclosure requirements with respect to tax / translation thereof shall be removed as the tax situation for each individual investor is individual.

Question 39b: Could the notification procedure set out in Article 18, between NCAs of home and host Member States be simplified (e.g. limited to the issuer merely stipulating in which Member States the offer should be valid, without any involvement from NCAs), without compromising investor protection?

We agree that the notification procedure between national competent authorities of home and host Member States as set out in Article 18 should be simplified. It should be allowed that an issuer simply indicates vis-a-vis the competent authority of its home Member States in which other EU Member State the securities shall be publicly offered, with no competent authorities of any host Member States being involved.

We propose to make use of the upcoming EEAP system supervised by ESMA (please refer to Q&A 44). Any prospectus related information will have to be reported by the national competent authority to ESMA and fed into the data base. Such central information storage would not only be helpful for investors, but would enable the relevant (host) Member States to monitor any passporting of (base) prospectuses into their jurisdictions and to access any related information.

Question 40: Please indicate if you would support the following changes or clarifications to the base prospectus facility. Please explain your reasoning and provide supporting arguments:
a) The use of the base prospectus facility should be allowed for all types of issuers and issues and the limitations of Article 5(4)(a) and (b) should be removed
We support: Since all relevant investor information is already included in the base prospectus costs could be decreased by allowing the base prospectus to all types of issues. Especially a quicker reaction to market development could be achieved. Further the effort (caused by the increased requirements set by the prospectus regime) of both the NCA and the issuer could be reduced and therefore also the financial burden of the economy and the Member States.

b) The validity of the base prospectus should be extended beyond one year.
We support this.

Please indicate the appropriate validity length:
The Prospectus Directive already contains sections enabling the validity of prospectus beyond one year, namely in Art. 9 para 3 with reference to Art. 5 para 4 lit b. of the Prospectus-Directive for certain types of covered Bonds issued in a continuous or repeated manner. In this case the prospectus shall be valid until no more of the securities concerned are issued in a continuous or repeated manner. Based on this already existing validity of prospectus of more than one year, a validity period should be made possible. In many cases the information is still up to date and significant new factors are published via supplements according to Article 16 of the Prospectus Directive, thus all relevant information is available at any time.

c) We support, as it is more transparent for all users and more efficient.

d) We support this proposal.

f) Other possible changes

Consolidated final terms in base prospectus
The consolidation often extend elements in final terms is restricted to certain extent, defined in Art. 26 para 5 of the Prospectus Regulation and clarified in the ESMA Q&A. As a result, not all text elements of the final terms can be consolidated to one text document, since the repeating of information from the Base prospectus is limited due to the interpretation of ESMA. This might lead to the fact, that the final terms of a concrete issue of securities becomes illegible for clients, as certain data are only referred to, but not explicitly written down in one final terms document. Terms and conditions of Base Prospectuses are furthermore very often illegible as well, as they might enumerate many theoretically applicable options next to each other in one section. Especially for retail clients in possible civil court proceedings, these terms and conditions together with the final terms might be considered as not transparent and might therefore cause compensation payments for the issuer or the issuing bank, which should be avoided. Consolidated versions of Final Terms and Terms and Conditions of the securities should therefore be generally possible.

Furthermore, there are concerns on the current disclosure regime of risk factor sections in a base prospectus. By their nature, such sections must be written in general language and general terms at the time when the base prospectus is drawn up. Therefore, they sometimes do not serve its purpose sufficiently in the course of a later issue. In order to address the particular risk of an instrument more specifically more flexibility should be granted by allowing drawing up specific risk factors later on in the final terms. This would also be to the clear advantage of investors. However, by doing so, issuers should not be allowed to include new risk factors in final terms but to specify the existing ones in the course of a concrete issue under a base prospectus.

Question 41: How is the "tripartite regime" (Articles 5 (3) and 12) used in practice and how could it be improved to offer more flexibility to issuers?
The possibility for a tripartite prospectus, comprising the registration document (describing the issuer of the securities), the securities note (describing the securities) and the summary, was created to ensure that frequent issuers of securities had the possibility of the highest levels of efficiency in their prospectus obligations.

However, only stand alone prospectuses can be prepared on the basis of a tripartite prospectus. Thus, issuers engaged in multiple issuance programmes using the base prospectus, which practically are the most frequent issuers of securities, have no possibility to make use of the tripartite format.

Not allowing a base prospectus being prepared as tripartite document, hence, leads to significant inefficiencies for issuers.

We support the concept of a tripartite prospectus and recommends clarifying that also a base prospectus may be prepared as tripartite document - even if the registration document and the securities note were approved by different national competent authorities.

Additionally the system how the summary shall be included / implemented in a tripartite prospectus shall be reconsidered.

Question 42: Should the dual regime for the determination of the home Member State for non-equity securities featured in Article 2(1)(m)(ii) be amended? If so, how?
We are of the strong view that issuers should be allowed to choose their home Member State even for non-equity securities with a denomination per unit below EUR 1,000. For lacks any rationale.

Question 43: Should the options to publish a prospectus in a printed form and by insertion in a newspaper be suppressed (deletion of Article 14(2)(a) and (b), while retaining Article 14(7), i.e. a paper version could still be obtained upon request and free of charge)?

- Art 14 (2) (a) should in any case be suppressed as it appears not to be used in practice anyway.

- We are of the view that the options to publish a prospectus in a printed form and by insertion in a newspaper should be suppressed in the revision of the Prospectus Directive, since both options are only rarely used in practice and have lost their practical relevance.

Question 44: Should a single, integrated EU filing system for all prospectuses produced in the EU be created? Please give your views on the main benefits (added value for issuers and investors) and drawbacks (costs)?

- Yes, but if such an additional database were to be implemented, it should be set up at the lowest possible cost. For this purpose, the existing national OAM as well as the upcoming European EEAP infrastructure should be used in any case, rather than creating a new single PD system. Therefore, prospectus documentation should simply be considered as regulated information according to the Transparency Directive.
  Such EEAP storage of all issuer related information including prospectuses, would enhance transparency around prospectus and the approval / passporting process as well as the accessibility for investors to any related information, thereby enhancing investor protection.

  Such EEAP storage would also ensure that the EU Member States have access to relevant information and data, enabling, e.g. a relevant (host) Member State to closely monitor any passporting of (base) prospectuses into its jurisdiction. Where relevant information is fed into the data base directly by an issuer, the European Commission should also consider treating any such filing of documents by an issuer as publication for the purposes of the Prospectus Directive.

Question 45: What should be the essential features of such a filing system to ensure its success?
Please see our comments to question 44.

Question 48: Is there a need for the following terms to be (better) defined, and if so, how:
a) "offer of securities to the public"
Yes, an accurate determination of “the public” would be welcomed. Especially the borderline between private and public is not definitely clear.
b) "primary market" and "secondary market"?
No.

Question 49: Are there other areas or concepts in the Directive that would benefit from further clarification?
Any issuer related information published in accordance with the Transparency Directive will not have to be repeated in the prospectus.

It should be considered to not limit the period of validity of a base prospectus at all or to extend the validity of the base prospectus to 24 months to at least reduce the administrative burden on issuers.

The investor’s right to withdrawal should be reconsidered generally. E.g. the revision of the Prospectus Directive should be used to clarify that investors shall only have the right to withdraw their acceptances "provided that the information contained in the supplement is detrimental to their assessment of the issuer and the securities". Furthermore, clearly positive changes should not trigger the obligation to draw up a prospectus and no right of withdrawal should apply.

Given the current wording of Art 16 there is a common legal interpretation that terms and conditions (Anleihebedingungen), in particular pay-off structures, cannot be amended or extended in way of a supplement.

We would recommend changing the concept of supplements in order to allow for amending and revising terms and conditions and adding new pay-off structures in way of a supplement. Given the approval requirement for supplements investor protection considerations should be addressed sufficiently and in particular frequent issuers would be put in the position to answer market changes and investor demands far more efficiently."

Yours sincerely,

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