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DANISH BANKERS ASSOCIATION

DANISH SECURITIES DEALERS ASSOCIATION

The Danish Bankers Association ("DBA") and Danish Securities Dealers Association's ("DSDA") response to the Consultation Document on the Review of the Prospectus Directive (the "Consultation Document")

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Key Points

Review of the Prospectus Directive is needed

The DBA and DSDA (hereafter "the associations") support the European Commission's initiative to review the Prospectus Directive.

The associations find that a complete review should include an in-depth analysis on the effects other regulatory initiatives have had on the prospectus regime and what local regulatory issues and practices hinder a harmonized European regime.

Level Playing Field encourages Cross-Border Investments

The associations support initiatives that create a level playing field and identify specific areas where the EU capital markets are fragmented and hinder cross-border investments in Europe. The associations think gold-plating by individual Member States should be avoided.

However, it is important to be aware that regulation alone cannot ensure a level playing field. A uniform application of the rules throughout the EU is also necessary. Currently the Member States' national competent authorities ("NCAs") have very divergent practices while the rules are the same. Especially, it is important that the competent authorities operate within the same timeframes.

Simple and Flexible Rules benefit the Investors as well as Issuers

The current regime does not ensure the appropriate balance between investor protection and the administrative burdens for issuers. The current regime has been way too complex and has led to an overload of information to the investor.

Consequently, the prospectus framework does not protect the investors properly contrary to the purpose of the regulation. Instead, it has created an unnecessary administrative burden for issuers.

The associations think that the proper balance could be achieved by simple and flexible regulation. Therefore, the associations encourage the European Commis-

sion to focus on simplifying the regulation and making it as flexible as possible in order to support economic growth without jeopardizing investor protection.

In this context the associations would like to stress that it is of utmost importance that the wholesale exemption and its benefits are maintained. The wholesale exemption allows banks to offer securities throughout the EU, without the passporting requirement or the translation of the prospectus summary. This kind of cross-border offering is in line with the overall goals of the Capital Markets Union ("CMU").

Furthermore, the associations would like to stress that the summary regime has not fully achieved its objectives of being short, simple, clear and easy to understand for investors. The summaries are too extensive and do not promote investor protection. Consequently, there should be no requirement to produce an issue specific summary. The summary could be replaced by a Key Investor Document ("KID") or the like.

Proper alignment with other Regulation is necessary
Since the adoption of the prospectus regime, a number of interrelated financial regulatory reforms have been adopted in order to promote investor protection (e.g. MiFID, MiFIR, PRIIPS, UCITS, TD and MAR). The regulation is not aligned and is the source of significant burdens and inefficiencies. The CMU should therefore establish a seamless disclosure regime that avoids unnecessary burdens for issuers while it maintains a high level of investor protection.

Expanding the Prospectus Requirements to Non-PD Regulated Markets or Platforms will add unnecessary Administrative Burdens
The advantage of most of these markets is facilitating the access to capital. The current regime is very streamlined, flexible and smooth combined with high standards. The associations believe expanding the prospectus requirements to other venues will cause unnecessary administrative burden and entry barriers for Small and Medium-sized Enterprises ("SMEs") looking for raising capital.

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DBA/DSDA Response to the Consultation Document

Below you will find the associations' response to the questions in the Consultation Document. A number of questions have been omitted, since the associations do not have an opinion about them or the questions are not relevant due to a previous response.

(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
  In principle, yes. However, see our comments below.
- an offer of securities to the public?
  In principle, yes. However, see our comments below.

- 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.?
  No, the existing regime seems appropriate.

(2) In order to better understand the costs implied by the prospectus regime for issuers:

a) Please estimate the cost of producing the following prospectus
   - equity prospectus
   - non-equity prospectus
   - base prospectus
     Approx. £100,000 for the base prospectus and £30,000 to £35,000 for any update.
   - initial public offer (IPO) prospectus

The costs depend on the size of the issue, market conditions, timing etc.

b) What is the share, in per cent, of the following in the total costs of a prospectus:
   - Issuer's internal costs: [enter figure]%
   - Audit costs: [enter figure]%
   - Legal fees: [enter figure]%
   - Competent authorities' fees:
     Approx. EUR 7,000

Other costs (please specify which): [enter figure] %
Banks' and financial advisors' fees.

(3) Bearing in mind that the prospectus, once approved by the home competent authority, enables an issuer to raise financing across all EU capital markets simultaneously, are the additional costs of preparing a prospectus in conformity with EU rules and getting it approved by the competent authority are outweighed by the benefit of the passport attached to it?

There might be additional costs in relation to the translation of the summary into the local language. The requirement to translate the summary is considered burdensome and unnecessary. However, the benefits of the pass-porting regime outweigh the costs.

(4) The exemption thresholds in Articles 1(2)(h) and (j), 3(2)(b), (c) and (d), respectively, were initially designed to strike an appropriate balance between investor protection and alleviating the administrative burden on small issuers and small offers. Should these thresholds be adjusted again so that a larger number of offers can be carried out without a prospectus? If yes, to which levels? Please provide reasoning for your answer.

a) the EUR 5 000 000 threshold of Article 1(2)(h):
   - Yes, from EUR 5 000 000 to EUR [*enter monetary figure*]
   - No
   - Don't know/no opinion
     No opinion.

   Textbox: [justification]

b) the EUR 75 000 000 threshold of Article 1(2)(j):
   - Yes, from EUR 75 000 000 to EUR [enter monetary figure]
   - No
   - Don't know/no opinion
     No opinion.
   - Textbox: [justification]

c) the 150 persons threshold of Article 3(2)(b)
   - Yes, from 150 persons to [**500**] persons
   - No;
   - Don't know/no opinion

In relation to calculating whether the threshold has been reached the mere approach to potential investors counts. Therefore, a higher threshold seems justified in order to alleviate the administrative burdens on small issuers and small offers.

d) the EUR 100 000 threshold of Article 3(2)(c) & (d)
   - Yes, from EUR 100 000 to EUR
   - No
   - Don't know/no opinion

No opinion.

(5) Would more harmonisation 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. The associations are in favour of a level playing field in Europe. Gold plating by individual Member States should be avoided.

(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.

(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?

No.

(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. There is no need for an on-going prospectus requirement with respect to such offers, because once the securities are admitted to a regulated market the on-going disclosure regimes under the Market Abuse Directive and the Transparency Directive provide the necessary infor-

mation. The position is similar for securities listed on exchange regulated markets, because in general those markets also impose on-going disclosure obligations on issuers.

(9) How should Article 4(2)(a) be amended in order to achieve this objective ? Please state your reasons.
The 10% threshold should be raised to [] %
The exemption should apply to all secondary issuances of fungible securities, regardless of their proportion with respect to those already issued. **Yes.**

(11) Do you think that a prospectus should be required when securities are admitted to trading on an MTF? Please state your reasons.

Yes, on all MTFs
Yes, but only on those MTFs registered as SME growth markets
No

No. The associations do not agree with the proposal that the prospectus requirement should be expanded to non-PD regulated markets or platforms. The advantage of most of these markets is facilitating the access to capital. The current regime is very streamlined, flexible and smooth combined with high standards. The associations believe expanding the prospectus requirements to other venues will add unnecessary administrative burden and entry barriers on SMEs looking for raising capital.

(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. A simpler/more flexible set of rules is desirable for all issuers irrespective of the denomination per unit. Investor protection is secured through other sets of rules (e.g. MiFID).

It is of utmost importance that the wholesale exemption and its benefits are maintained. The wholesale exemption allows the banks to offer securities throughout the EU, without the pass-porting requirement or the translation of the prospectus summary, a process which is repeated for each update of the program documents. As this type of cross-border offering is in line with the overall goals of the CMU, it is our view that the wholesale exemption should be maintained.

The associations encourage the European Commission to take into account that the liquidity in the corporate bond markets is not a result of the denominations of the securities, but a result of efficient market making activities. The participation of market makers remains critical to supporting liquidity and the overall functioning of the secondary markets in addition to the size of issuance. With the current ESMA plans on non-equity transparency pose a risk for any capital market funding for SMEs. The exemption for subsequent fungible tranches of securities already

listed, for which a prospectus was prepared for the original tranche, may have a positive impact on the liquidity since it would operate positively on the size of the total issued amounts.

(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?

Yes. The existing disclosure regime seems appropriate. However, the information to be provided by the issuer depends on which type of investors the offer of securities is targeted at and their demands.

(17) Is the proportionate disclosure regime used in practice, and if not what are the reasons? Please specify your answers according to the type of disclosure regime.

a) Proportionate regime for rights issues

Yes. The existing disclosure regime seems appropriate. However, the information to be provided by the issuer depends on which type of investors the offer of securities is targeted at and their demands.

(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)?

Yes. It should be possible to incorporate any information that has been filed with or approved by the NCA in the prospectus by reference, irrespective of whether it has been filed by virtue of a legal obligation or voluntarily.

(24) (a) Should documents which were already published/filed under the Transparency Directive no longer need to be subject to incorporation by reference in the prospectus (i.e. neither a substantial repetition of substance nor a reference to the document would need to be included in the prospectus as it would be assumed that potential investors have anyhow access and thus knowledge of the content of these documents)? Please provide reasons.

Yes. Since the information is readily available, there is no reason to incorporate the information in the prospectus.

(b) Do you see any other possibilities to better streamline the disclosure requirements of the Prospectus Directive and the Transparency Directive?

Yes. The scope of the directives should be aligned. The definitions in the Directives should also be aligned.

(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?

Yes. The associations support the European Commission's consideration of 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. Any issuer related information published in accordance with the Transparency Directive will not have to be repeated in the prospectus. If the obligation to publish a supplement is repealed, it should be addressed under which circumstances the investor has the right of cancellation.

(26) Do you see any other possibility to better streamline the disclosure requirements of the Market Abuse Directive and the Prospectus Directive?

Yes. The scope of the directives should be aligned. The definitions in the Directives should also be aligned.

(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)

a) Yes, regarding the concept of key information and its usefulness for retail investors
   Yes.
b) Yes, regarding the comparability of the summaries of similar securities
   Yes.
c) Yes, regarding the interaction with final terms in base prospectuses
   Yes.
d) No.
e) Don’t know/no opinion

The associations agree with the European Commission’s assessment that the summary regime has not fully achieved its objectives of being short, simple, clear and easy for investors to understand. The summaries are too extensive and do not promote investor protection. The summary could be replaced by a KID.

(28) For those securities falling under the scope of both the packaged retail and insurance-based investment products (PRIIPS) Regulation1, how should the overlap of information required to be disclosed in the key investor document (KID) and in the prospectus summary, be addressed?
By providing that information already featured in the KID need not be duplicated in the prospectus summary. Please indicate which redundant information would be concerned: [textbox]

a) By eliminating the prospectus summary for those securities.
   Yes.

[1] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) (OJL 352, 9.12.2014, p. 1)

b) By aligning 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
c) Other: [textbox]
d) Don't know/no opinion

The summary could be replaced by a KID for all kind of issues.

(29) Would you support introducing a maximum length to the prospectus? If so, how should such a limit be defined?

Yes, it should be defined by a maximum number of pages and the maximum should be [figure] pages

Yes, it should be defined using other criteria, for instance: [textbox]

No

No. A better approach would be to rethink the use of the supplements and the final terms and to introduce a more flexible prospectus regime. The ability to use supplements to address issues not covered in the base prospectus is one of the most important improvement areas under the current regime. This is particularly the case with structured products: Limiting the length might cause a need to make different prospectuses for different underlying products. That would neither benefit the issuer nor the investor. Should the European Commission opt for limiting the length of certain sections, the associations point out that the sections on risk description and issuer description as the only potential sections where limitation would work.

(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?

The risk section could be made subject to rules which only require a description of specific risk factors present at the time the prospectus is drawn up.

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

Yes.

(33) Are you aware of material differences in the way the NCAs assess the completeness, consistency and comprehensibility of the draft prospectuses that are submitted to them for approval? Please provide examples/evidence.

Yes. The timeframe for approval of a prospectus differs from jurisdiction to jurisdiction. There are also differences in relation to the substantive treatment of prospectuses. A more pragmatic approach from the competent authorities would be prudent.

(34) Do you see a need for further streamlining of the scrutiny and approval procedures of prospectuses by NCAs? If yes, please specify in which regard.

Yes. It is important to ensure a uniform application of the rules throughout the EU. Currently the NCAs have very divergent practices all the while the same rules apply to all. Especially, it is important that the competent authorities operate within the same timeframes. Furthermore, it is important that the competent authorities have a pragmatic approach when assessing the completeness, consistency and comprehensibility of the prospectuses.

(35) Should the scrutiny and approval procedure be made more transparent to the public? If yes, please indicate how this should be achieved.

No. The associations do not think that it would be beneficial to make the scrutiny and approval procedure more transparent to the public, in particular not in consideration of investor protection.

(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.

Yes. This is already regulated in MAR and other regulation.

(37) What should be the involvement of NCAs in relation to prospectuses? Should NCAs:

a) review all prospectuses ex ante (i.e. before the offer or the admission to trading takes place) **a**
b) review only a sample of prospectuses ex ante (risk-based approach)
c) review all prospectuses ex post (i.e. after the offer or the admission to trading has commenced)
d) review only a sample of prospectuses ex post (risk-based approach)
e) Other
f) Don't know/no opinion

Please describe the possible consequences of your favoured approach, in particular in terms of market efficiency and invest protection.

The current (ex-ante) approval process works well. However, the NCA's should be subject to shorter deadlines in order to reduce the approval process.

(38) Should the decision to admit securities to trading on a regulated market (including, where applicable, to the official listing as currently provided under the Listing Directive), be more closely aligned with the approval of the prospectus and the right to passport? Please explain your reasoning, and the benefits (if any) this could bring to issuers.

Yes. The decision to admit securities to trading should be more aligned with the approval process. The associations have experienced that regulated markets comment on topics without legal basis.

(39) (a) Is the EU passporting mechanism of prospectuses functioning in an efficient way? What improvements could be made?

Yes. The requirement to translate the summary should be revoked.

(b) 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?

Yes. The notification procedure between NCAs of home and host Member States as set out in Article 18 should be simplified.

One possible concept might be 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, without any involvement of the competent authorities of the host Member States. To implement such simplification, the associations propose establishing an integrated EU filing system/central information storage supervised by ESMA. Any prospectus related information, e.g. the prospectus itself, the certificate of approval and any effected pass-porting will have to be reported by the NCA to ESMA and fed into the data base (either by the NSA, ESMA or the actual issuer).

(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:

B: The validity of the base prospectus should be extended beyond one year in order to reduce costs. For this proposal to have any real impact it would have to be combined with a review of the restrictions in respect of the use of supplements.

(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?

a) No, status quo should be maintained.
b) Yes, issuers should be allowed to choose their home Member State even for non-equity securities with a denomination per unit below EUR 1 000. **Yes.**
c) Yes, the freedom to choose the home Member State for non-equity securities with a denomination per unit above EUR 1 000 (and for certain non-equity hybrid securities) should be revoked.

The issuer should be allowed to choose home Member State regardless of the denomination per unit. There is no reason to limit the liberty of choosing home Member State.

(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)?

Yes.

(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. The Officially Appointed Storage Mechanisms (OAMs) can be used along with the Pan European Network of OAMs. This will result in easy access to all prospectuses within the EU. The NCA should be obliged to file the prospectuses (not the issuer).

(45) What should be the essential features of such a filing system to ensure its success?

All prospectuses should be filed in the OAMs and should be easily searchable.

(50) Can you identify any modification to the Directive, apart from those addressed above, which could add flexibility to the prospectus framework and facilitate the raising of equity or debt by companies on capital markets, whilst maintaining effective investor protection? Please explain your reasoning and provide supporting arguments.

Yes. There should be no requirement to produce an issue specific summary. The summary could be replaced by a KID or the like. The obligation to produce a KID or the like should apply to all kinds of issues.

(51) Can you identify any incoherence in the current Directive's provisions which may cause the prospectus framework to insufficiently protect investors? Please explain your reasoning and provide supporting arguments.

Yes. The regulation has led to an overload of information to the investor. Consequently, the prospectus framework does not protect the investors properly. The prospectus framework should be properly aligned with other investor protection regulation (MiFID, etc.).