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Consultation Paper dated 15 March 2013 regarding ESMA's Consultation Paper Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus

Dear Sir or Madam,

Please find enclosed the formal response of Deutscher Derivate Verband (DDV) to your consultation paper dated 15 March 2013 regarding ESMA's Consultation Paper Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus.

We remain at your disposal to discuss these matters further.

Yours sincerely

Dr. Hartmut Knüppel
CEO and Member of
the Board of Directors

Christian Vollmuth
Managing Director

Deutscher Derivate Verband

RESPONSE

TO

ESMA'S CONSULTATION PAPER DATED 15 MARCH 2013

REGARDING ESMA'S CONSULTATION PAPER DRAFT REGULATORY TECHNICAL STANDARDS ON SPECIFIC SITUATIONS THAT REQUIRE THE PUBLICATION OF A SUPPLEMENT TO THE PROSPECTUS

This position paper constitutes the response by the Deutscher Derivate Verband e.V. ("**DDV**") to the European Securities and Markets Authority ("**ESMA**") in connection with the Consultation Paper dated 15 March 2013 regarding ESMA's Consultation Paper Draft Regulatory Technical Standards on specific situations that require the publication of a supplement to the prospectus (the "**Consultation Paper**").

DDV represents issuers of derivative securities in Germany: Barclays, BayernLB, BNP Paribas, Citigroup, Commerzbank, Deutsche Bank, DZ BANK, Goldman Sachs, Helaba, HSBC Trinkaus, HypoVereinsbank/Unicredit, LBB LandesBank Berlin, LBBW, Royal Bank of Scotland, Société Générale, UBS and Vontobel. It was founded in Frankfurt am Main on 14 February 2008 and has its offices in Frankfurt and Berlin. DDV is active in both Berlin and Brussels. It aims to improve the general understanding of structured products and to increase the product transparency in the derivatives market as well as investor protection. Together with its members, DDV advocates the establishment of industry standards and self-regulation. As a political advocacy group DDV is involved in national and European legislative initiatives by issuing position papers and petitions.

DDV members have established various issuance programmes for retail structured products targeting not only the German market but also many other EU member states and for which the prospectuses are not only approved by the Bundesanstalt für Finanzdienstleistungsaufsicht (BaFin) as the German competent authority for prospectus approval, but also by other competent authorities within the EU. In terms of the number of base prospectuses approved, final terms filed and passporting requests, the activities of DDV members represent a significant proportion of the German and potentially also the EU market.

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Response

DDV appreciates the opportunity to comment on the Consultation Paper.

DDV and its members have an interest in the European prospectus law operating in such a way as to ensure maximum investor protection and market efficiency. The efficiency of the regulatory framework under the Prospectus Directive ("**PD**"), the Prospectus Regulation ("**PR**") and any Regulatory Technical Standards relating to prospectuses as well as the functioning of the base prospectus regime are crucial for DDV's members who rely on it for the issuance of their retail structured products across the EU member states.

In this context, DDV is particularly concerned with the proposals regarding mandatory supplements set forth in the Consultation Paper in V.II.i. (publication of new annual audited financial statements), V.II.iii. (profit estimate for an annual financial period), and V.II.ix. (any judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the prospectus). We think that these proposals should not be implemented in case of debt securities and in particular not in case of structured products where the value of the securities is primarily dependent on the value of the underlying (e.g. commodity, index) and where the value of the securities is not dependent on the credit-worthiness of the issuer of the structured product as long as the issuer is not insolvent. These concerns will be dealt with in more detail in the following.

V.II.i. Publication of new annual audited financial statements

Q2: Do you agree that the publication of audited annual financial statements systematically triggers the obligation to prepare a supplement? If not, please state your reasons.

Q6: What do you assess the cost estimate to be to comply with this requirement?

Response to Q2 and Q6:

We do not agree that there should be a systematic requirement to prepare a supplement for published audited annual financial statements for the following reasons.

1) A systematic requirement to prepare a supplement for any annual or interim financial statements would contradict the wording and purpose of Article 16 PD which requires a supplement only if a significant new factor has occurred which is capable of affecting the assessment of the securities. It is the judgment of the issuer whether a new factor is significant and whether it is capable of affecting

the assessment of the securities. Financial statements which do not differ a lot from earlier financial statements or which do not deviate from trend statements made earlier will not affect the assessment of the securities. This is true especially for structured products where the value of the securities is primarily dependent on the value of the underlying and not on the issuer of such securities or its credit-worthiness as long as it remains solvent.

2) Due to the before-mentioned reasons, Annex XI PR which is relevant for the issuance of debt securities and structured products of banks clearly states that audited financial information may not be older than 18 months from the date of the registration document (Annex XI no. 11.4.1.) and that a registration document needs to include interim financial information only if the registration document is dated more than 9 months after the end of the last audited financial year (Annex XI no. 11.5.2). These provisions illustrate that the mere fact that new financial statements have been published does not trigger the necessity of a supplement – at least not if their publication does not affect the assessment of the securities.

3) Equity offerings can be timed in a way that they do not fall into a period in which new financial statements are published since equity offerings only last for a few weeks. Thus, if the ESMA request were implemented for equity offerings only, the harm might not be as big as applying it also to debt securities and structured products. Contrary to equity prospectuses, for debt securities and structured products many issuers use base prospectuses for an entire year. Regarding base prospectuses, ESMA's proposal would affect each and every base prospectus several times during its lifetime – even though the conditions of Article 16 PD in many cases would not be fulfilled.

4) Since according to Article 16 PD, any supplement triggers a right of the investor to return its securities to the issuer (i.e. gives it a put option), regardless of whether the new factor set forth in the supplement is positive or negative, any request for mandatory or systematic supplements has to be made with utmost care. This is true in particular in case of structured products where the value of the securities may decrease simply due to a decreased value of the underlying. In this case, giving a put option to the investor would mean that the risk of the investor relating to the performance of the underlying which is inherent in structured products would be transferred unduly to the issuer. A systematic supplement requirement at the time of the publication of new financial statements would even give the investor a possibility to speculate against an issuer because investors know when financial statements of a company are published. Knowing that they would be allowed to return securities bought shortly before the publication of the financial statements if the securities

performed badly for reasons totally unrelated to the financial statements would encourage them to speculate against the issuer. Considering the latest development in computerised trading, especially established by hedge funds, the EU legislator would, by implementing such a systematic supplement, provide hedge funds with a tool to establish computerised trading systems linked to triggers such as the publication of financial statements and the value of the securities at the time of such publication. Such a trading system would be able to send automated return notices to issuers. Taking into account the ability of hedge funds to leverage their speculations, billions of Euros could be used by hedge funds in such risk-free and unduly speculations against the issuer. Thus, the EU would provide a tool which, if "weaponised" by hedge funds, would harm issuers massively. Therefore, in the case of new financial statements, a systematic supplement is not acceptable.

5) Furthermore, since issuers of structured products have many base prospectuses covering their universe of products, a systematic requirement to prepare a supplement for published audited annual financial statements would lead to unreasonable costs for the preparation of supplements to all these base prospectuses even in cases where there is no impact on the securities. These costs to the issuer are further increased by the possible return of securities as a consequence of a supplement. Structured products which performed badly simply due to the performance of their underlying but not because of the event mentioned in the supplement could be returned (even if the event is positive). These costs could be extremely high for the issuer and would be totally unjustified.

Q5: Do you believe that there should be a systematic requirement to prepare a supplement for interim financial information? If yes, please provide reasons.

Q6: What do you assess the cost estimate to be to comply with this requirement?

Response to Q5 and Q6:

We do not agree that there should be a systematic requirement to prepare a supplement for interim financial statements for the following reasons.

1) Please refer to the reasons set forth above in connection with published audited annual financial statements. The same reasons apply here. In addition, the reasons set forth hereinafter apply.

2) Interim financial statements generally are not significant within the meaning of Article 16 PD. This is true especially for structured products where the value of the securities is primarily dependent on the value of the underlying and not on

the issuer of such securities or its credit-worthiness as long as it remains solvent.

3) The costs might be four times the already high costs for the publication of systematic supplements in connection with annual financial statements. Since issuers of structured products have many base prospectuses covering their universe of products, a systematic requirement to prepare a supplement for any new financial statements would therefore lead to extremely high unreasonable costs.

V.II.iii. Profit estimate for an annual financial period

Q10: Do you agree that there should be a systematic requirement to prepare a supplement for a profit estimate in relation to the annual financial period? If not, please state your reasons.

Q11: Do you agree that the systematic requirement to prepare a supplement for annual profit estimates covered by e.g. Annex I, item 13.2 subparagraph 1 (referring to profit estimates for which a report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

Q12: Do you agree that the systematic requirement to prepare a supplement for financial information relating to the previous financial year covered by e.g. Annex I, item 13.2 subparagraph 2 (referring to profit estimates for which no report of an auditor is required) should apply to a prospectus drawn up in accordance with all the schedules referred to in paragraph 54 or should this requirement be limited to equity securities? Please state your reasons.

Q13: Do you believe that there should be a systematic requirement to prepare a supplement for interim profit estimates? If yes, please provide reasons.

Q14: What do you assess the cost estimate to be to comply with this requirement?

Response to Q10-Q14:

We do not agree that there should be a systematic requirement to prepare a supplement for any profit estimate referred to in questions Q10-Q14 for the following reasons.

1) A systematic requirement to prepare a supplement for any profit estimate would contradict the wording and purpose of Article 16 PD which requires a supplement only if a significant new factor has occurred which is capable of

affecting the assessment of the securities. It is the judgment of the issuer whether a new factor is significant and whether it is capable of affecting the assessment of the securities. For debt securities and structured products, even the published audited financial statements often do not affect the assessment of the securities (please see above). A profit estimate affects the assessment even less. This is true especially for structured products where the value of the securities is primarily dependent on the value of the underlying and not on the issuer of such securities and/or its financial statements and profit estimate.

2) Equity offerings can be timed in a way that they do not fall into a period in which profit estimates are made since equity offerings only last for a few weeks. Thus, if the ESMA request were implemented for equity offerings only, the harm might not be as big as applying it also to debt securities and structured products. Contrary to equity prospectuses, for debt securities and structured products many issuers use base prospectuses for an entire year. Regarding base prospectuses, ESMA's proposal would affect each and every base prospectus at least once during its lifetime – even though the conditions of Article 16 PD in most cases would not be fulfilled.

3) Due to the before-mentioned reasons, Annex XI PR which is relevant for the issuance of debt securities and structured products of banks clearly states

   - that only audited annual financial information plus published quarterly and half yearly financial information need to be included into a prospectus and that audited financial information may not be older than 18 months (Annex XI nos. 11.1., 11.4., 11.5.) and

   - that the insertion of a profit estimate is voluntary, i.e. it is not mandatory – (Annex XI no. 8: the issuer may choose whether or not to include a profit estimate in a (base) prospectus); and only if the issuer chooses to include a profit estimate, the prospectus needs to contain a report by independent accounts.

4) If the Prospectus Regulation stipulates that the issuer may choose whether or not to insert a profit estimate into a prospectus, issuers cannot be requested to publish a supplement in case of a profit estimate. Otherwise issuers would be allowed to publish a prospectus without profit estimates, while immediately following approval of the prospectus they would have to insert the profit estimate by way of a supplement. This does not make any sense. If ESMA requested that a profit estimate would already have to be included already in a prospectus if the profit estimate were available at the time of the drafting of the

prospectus, this would definitely violate the supremacy of the Prospectus Regulation which clearly states that the insertion of profit estimates is voluntary.

5) Since according to Article 16 PD, any supplement triggers a right of the investor to return its securities to the issuer (i.e. gives it a put option), regardless of whether the new factor set forth in the supplement is positive or negative, any request for mandatory or systematic supplements has to be made with utmost care. This is because investors could benefit from the fact that there is usually a time lag between the occurrence of the event requiring a prospectus supplement and its publication as the supplement has to be approved by the competent authorities. Investors would be allowed to return securities bought within such period if the securities performed badly for reasons totally unrelated to the occurrence of the event supplemented. This would encourage them to speculate against the issuer. This is true in particular in case of structured products where the value of the securities may decrease simply due to a decreased value of the underlying. In this case, giving a put option to the investor would mean that the risk of the investor relating to the performance of the underlying which is inherent in structured products would be transferred unduly to the issuer. Therefore, in the case of profit estimates, a systematic supplement is not acceptable.

6) Furthermore, a systematic requirement to prepare a supplement for a profit estimate would lead to huge unreasonable costs for the preparation of the supplements and the audit report required pursuant to Annex XI no. 8.2 PR in case of the insertion of profit estimates into a prospectus via a supplement. These costs to the issuer are further increased by the possible return of securities as a consequence of a supplement. Structured products which performed badly simply due to the performance of their underlying but not because of the event mentioned in the supplement could be returned (even if the event is positive). These costs could be extremely high for the issuer and would be totally unjustified.

V.II.ix. Any judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the prospectus

Q29: Do you agree that issuers should always prepare a supplement for any judgment or concluding event, even if subject to appeal, in governmental, legal or arbitration proceedings already disclosed in the prospectus? If not, please indicate your reasons.

Q30: Do you agree with the triggering elements as set out in Paragraph 87? If not, please indicate your reasons.

Q31: ESMA does not make a distinction between equity and debt securities. Do you believe such a distinction should be made? If yes, please state your reasons.

Q32: What do you assess the cost estimate to be to comply with this requirement?

Response to Q29-Q32:

We do not agree that there should be a requirement to always prepare a supplement for any judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the prospectus for the following reasons.

1) A requirement to always prepare a supplement for any judgment or concluding event of governmental, legal or arbitration proceedings already disclosed in the prospectus would contradict the wording and purpose of Article 16 PD which requires a supplement only if a significant new factor has occurred which is capable of affecting the assessment of the securities. It is the judgment of the issuer whether a new factor is significant and whether it is capable of affecting the assessment of the securities.

   - In most cases an issuer will set up reserves in its financial statements for a litigation if it may result in a high payment obligation of the issuer. As soon as reserves are set up, the risk is reflected already in the financial statements. As a consequence thereof, changes to the original judgement by any other judgment or event do not affect the assessment of the securities any longer – even not in the case of equity securities.

   - Even if no reserves are set up for a litigation in the financial statements, it may well be that a new judgment or any concluding event which is not a final judgment does not affect the assessment of the securities at all. This is true especially for structured products where the value of the securities is primarily dependent on the value of the underlying and not on a single judgment against or in favour of the issuer.

   - Furthermore, it is possible that even a final judgement does not affect the assessment of the securities at all – again, at least in case of debt securities and structured products.

   - At the time of the drafting of the prospectus, it is often difficult to predict whether or not a single litigation is material or not. In order to avoid prospectus liability, issuers tend to include a litigation if they are not certain whether it is material or not. However, each and every change to such a single litigation, will certainly not be significant within the meaning of Article 16 PD.

- In particular, if the prospectus contains a list with several proceedings because only the total amount of the proceedings was considered significant by the issuer, a change in one of these proceedings most likely will not affect the assessment of the securities.

2) Since according to Article 16 PD, any supplement triggers a right of the investor to return its securities to the issuer (i.e. gives it a put option), regardless of whether the new factor set forth in the supplement is positive or negative, any request for mandatory or systematic supplements has to be made with utmost care. This is true in particular in case of structured products where the value of the securities may decrease simply due to a decreased value of the underlying. In this case, giving a put option to the investor would mean that the risk of the investor relating to the performance of the underlying which is inherent in structured products would be transferred unduly to the issuer. Therefore, in the case of a single new judgment, a mandatory supplement is not acceptable.

3) Furthermore, a mandatory requirement to prepare a supplement for a single new judgment would lead to huge unreasonable costs for the preparation of the supplements, especially since there may be many new judgments during one year during which a base prospectus is valid. These costs to the issuer are further increased by the possible return of securities as a consequence of a supplement. Structured products which performed badly simply due to the performance of their underlying but not because of the event mentioned in the supplement could be returned (even if the event is positive). These costs could be extremely high for the issuer and would be totally unjustified.