

Statement of
Gruppe Deutsche Börse

on the amendment of Regulation (EU) no. 596/2014 and (EU) 2017/1129 to promote the use of SME
growth markets

25 July 2018

Introduction:

We express our gratitude for the opportunity to give a first assessment of the draft amending the regulation (EU) no. 596/2014 (“**MAR**”) and (EU) 2017/119 („**Prospectus Regulation**“).

Overall, we welcome the proposal to further increase the attractiveness of the growth markets for small and medium-sized enterprises (“**SME**”; “**SME Growth Market**”) as part of finalising the Capital Market Union (“**CMU**”). CMU is the key to preserve and increase competitiveness and attractiveness of EU capital markets and a key catalyst for the Jobs and Growth agenda and therefore remains of critical importance.

SMEs in Europe still face a funding bottleneck. Deutsche Börse aims to close that gap in the funding escalator to growth capital for SMEs. Scale, a new exchange segment of Deutsche Börse to enhance access to investors for SMEs and growth companies and therefore supposed to be registered as SME Growth Market, expands existing ecosystems for corporate financing. Scale was designed for companies with tried and tested business models (Key Performance Indicators in its terms and conditions). Nevertheless, it is difficult to attract IPO’s as there are numerous factors which cause problems in this regard. We do see a competition between the regulated market and the SME Growth Market because the entry barriers are partly lower for the regulated market and there are not enough incentives, which support the SME Growth Market to counter that. However, our goal is to attract trustworthy and stable companies for our growth market, which is why we keep certain requirements mandatory for Scale (KPIs). It is a crucial aspect to increase liquidity in the Growth Markets, so we would support concepts, which go in this direction. In addition, existing regulatory burdens in particular MAR and MiIFD prevent some companies from going public in the SME Growth Markets. Other burdensome factors are restrictions for institutional investors when investing in the SME Growth Markets as they are considered as high-risk segments. Particularly, in Germany also the lack of equity culture could be named as an additional reason.

Therefore, it is appropriate to further simplify access to the capital market for SMEs and, as a result, to make technical adjustments to the European regulatory framework. We consider the conceptual implementation – namely to reduce administrative and legal requirements and costs for the issuers and to increase the liquidity of the various equity instruments in SME Growth Markets without endangering market integrity or investor protection – reasonable and expedient. Nevertheless, we consider the proposed changes do not go far enough. In particular, the following statement explains this consideration in detail and in addition proposes further remarks, which we wish to be taken into account.

Article 1: amendement of Regulation (EU) no. 596/2017:

1. Amendment Article 11

Reporting duties resulting out of Article 11 of MAR do not only apply on issuers but also on third parties having legal relationships with them or being their authorized representative. The smaller size an issuer has, the more obligations resulting out of MAR and therefore obligations due to market sounding, will be outsourced/awarded externally to those third parties, as the issuer itself does not have enough resources to comply. We are questioning whether those fewer requirements the third party has to meet for the issuer automatically result in a cost reduction for this mandate.

2. Amendment of article 13

a) Section 12

Deutsche Börse offers a market-making program on its MTF “Open Market”, including Scale. The market-making program is available to investment firms who provide liquidity continuously to the market by fulfilling certain minimum requirements. The investment firms apply either for the role of the regulated market maker according to MiFID II or for the role of a Designated Sponsor. A Designated Sponsor is a regulated market maker with stricter requirements. Both, the Market-Makers and the Designated Sponsors, admitted at Deutsche Börse as liquidity provider, fulfill the criteria of a regulated market-maker in accordance with MiFID II and are registered as such at BaFin. Moreover, Designated Sponsors and Market-Makers act in a way and are subject to strict regulations, so that German jurisprudence and literature consider their behavior per se to be tamper-proof.¹ BaFin has not yet determined an admissible market-practice in Germany.

In order to become a Designated Sponsor, the trading member has to conclude a private-law contract with Deutsche Börse. Such contract contains certain minimum requirements that must be met by the Designated Sponsor including a maximum spread, a minimum quotation volume, and participation rates during auctions and continuous trading. In principle, a Designated Sponsor can manage several securities and one security can be managed by several designated sponsors. Concluding a contract with Deutsche Börse is the regular occurrence of a Designated-Sponsor whereas a Market-Maker regularly applies for admission publicly.

Due to the contract concluded with Deutsche Börse, the Designated Sponsor is obligated to provide liquidity continuously during the trading day in the instruments he has registered for. Deutsche Börse monitors the behavior of the Designated Sponsors continuously. In case a Designated Sponsor does not fulfil its criteria, the contract will be withdrawn in the respective instrument. In addition, the market surveillance (“Hüst”) ensures that the regulated Market Makers and Designated Sponsors comply with the exchange rules.

Nevertheless, the issuer has the opportunity to influence the liquidity of its securities itself.

- (i) If an issuer is managed by a Designated Sponsor due to the Designated Sponsor’s own interests (based on a contract with Deutsche Börse), the issuer needs to evaluate the advantages and disadvantages of an additional contract with another Designated Sponsor or a Market-Maker. On the one side, an additional contract directly concluded by the issuer may have better notice periods (and provides additional liquidity), but also produces higher costs on the issuer’s side. On the other side, the issuer can forego this additional opportunity, rely on the managing obligation of the Designated Sponsor due to its contract with Deutsche Börse and therefore waives the security of a long-term managing relationship, but also saves additional costs.

¹ Up to now, BaFin did not recognize those Designated Sponsors or Market-Makers as admissible market-practice in accordance with Article 13 (2) of the Market Abuse Regulation (“MAR”) as they are considered to be tamper-proof in the first place. If the behavior of those Designated Sponsors or Market-Makers were considered to be manipulative due to Art. 15, 12 of MAR, BaFin would need to notify those Designated Sponsors and Market-Makers as admissible market-practice because an admissible market-practice is no longer seen as exclusion from market-manipulation but as justification. Only the ability to recognize Designated Sponsors and Market-Makers as permissible market-practice is no longer sufficient.

- (ii) However, if an issuer is not managed by a Designated Sponsor due to the Designated Sponsor's own interests (based on a contract with Deutsche Börse), there is no other possibility to create more liquidity than applying for a contract with a Designated Sponsor or a Market-Maker itself at its own expenses.
- (iii) In both cases, the Designated Sponsor or Market-Maker is subject to the same strict guidelines concerning their behavior as if they had a contract with Deutsche Börse in order to be tamper-proof. This is also ensured and monitored by Hüst.

As such self-initiated contracts of issuers are less attractive for Designated Sponsors or Market-Maker in SME-specialized markets, we do not have any objections against and do not see any disadvantages through such new liquidity contracts as an additional option for issuers to gain liquidity. Nevertheless, we need to be sure that no additional administrative expenses are created hereof and that those standardized liquidity contracts are not mandatory. Therefore, we urge the Commission to recognize and support the diversity of liquidity practices in the Member States (where markets provide for other solutions) and not to blockade or paralyze them.

If this is the case, a standardized liquidity contract can be seen as a "direct competitor" to those usually self-initiated contracts with Designated Sponsors or Market Makers as we expect them to not be bound to the same strict regulations. We understand the difference between future liquidity contracts of liquidity provider and issuers and our current liquidity systems (contracts of Designated Sponsors/Market-Makers and issuers) will be the underlying conditions: Designated Sponsors/Market-Makers are bound to much stricter regulations, as they need to be considered as tamper-proof. The liquidity providers under those new liquidity contracts will not be bound to the same strict regulations, as they do not need to be considered as tamper-proof. With the new standardized form, dictated by the EU, they will "just" be accepted like an admissible market-practice. Nevertheless, we cannot assess the impact of such liquidity contracts on the issuer side as details of those liquidity contracts are still unclear.

b) Section 13

Moreover, it is difficult to assess whether liquidity providers actually feel a greater incentive to enter into such a liquidity contract with the issuer as we do not know how such standardized form looks like. It depends on the content of the specifications included in the contract whether the attractiveness for liquidity providers actually increases.

3. Amendment of article 17

We consider a justification of delay upon request as a relief for the issuer only insofar, as this reduces the practical effort concerning the first reporting. Nevertheless, issuers cannot be sure when and how long the competent national authority is able to request additional reasoning afterwards and how extensive they have to reply to the request.

4. Amendment of article 18

We support a regime with a list of permanent insiders since smaller companies usually have less employees who have access to insider information and in most cases, it is always the same circle of employees, which will have access to inside information.

5. Amendment of article 19

We support the plan to extend the deadline for the disclosure of management transactions. Nevertheless, we propose to not only extend the deadline for the issuers itself to publish the information about management transactions publicly but also for the PDMRs and persons closely associated to notify their transactions to the issuer in the first place. As we proposed 5 days as an appropriate notification period length for PDMRs and persons closely associated, we would appreciate to extend both time limits to a total of 7 days.

Article 2: amendment of Regulation (EU) 2017/1129

We support a concept of enhanced permeability for uplisting processes from an SME Growth Market to regulated markets.

To further strengthen the introduction of the EU growth prospectus regime we propose to allow issuers whose securities have been traded on an SME Growth Market for a certain period of time and who made use of the EU growth prospectus to be admitted to trading to a regulated market without the need to prepare a regular prospectus. This would support the minimum disclosure regime for SMEs and reduce burdens and costs for SMEs to list on a regulated market. In addition, having alleviations for an uplisting process is a long established procedure, which has been introduced by the Prospectus Regulation in 2003, laid down in sec. 4 para. 2 no 8 WpPG. Such exemption from the obligation to set up a prospectus and providing a summary document instead has proven itself as a practicable solution and is worthy of preservation.

This concept could also be set up in different forms. We would also appreciate a minimal solution, which may be in a form that uplistings will be exempted from the prospectus requirement where an issuer has already presented an “ordinary” prospectus (EU growth prospectus) when entering the SME Growth Market. However, this may undermine the function of the EU growth prospectus even more. So, we believe the preferred approach should be to make use of the EU growth prospectus in connection with a certain period of time where the issuers has been successfully listed on the SME Growth Market as a door opener for regulated markets. In detail, we would suggest an amendment to the proposed provision such as:

- (i) if an issuer is admitted to trading more than 3 years to a SME Growth Market and already filed an EU growth prospectus this issuer will be exempted from the obligation to file another (simplified) prospectus;
- (ii) if an issuer is admitted to trading less than 3 years to a SME Growth Market and already filed an EU growth prospectus this issuer has to file a simplified prospectus such as being needed for secondary emissions.

The new regulation equates the requirements for an uplisting with those of a capital increase/secondary emission. It should be noted, however, that there is a significant difference between a technical uplisting without actual change in traded capital to a capital increase with secondary emissions. In this case, those issuers who favour an uplisting would be faced with burdens, which are made to regulate new emissions, not existing emissions. Therefore, they would be faced with disproportional burdens in comparison to issuers on regulated markets.

In any case, there should be a specific process for using the EU growth prospectus when stepping up from SME Growth Markets to regulated markets. Issuers listed in an SME Growth Market have to fulfil extensive transparency obligations, e.g. the annual report, half year report and ad-hoc disclosures and after a certain time will have proven themselves to be transparent and compliant company. When considering the alleviations of the EU growth prospectus, this is an issue, which should not remain unnoted. For issuers growing during the time listed in the SME Growth Market, the next logical step would be an uplisting into the regulated market.

Additional suggestions

- (i) Reporting obligation of managers' transactions (EUR 5.000,00): Since the threshold results from the addition of all trades, multiple trades (buying and selling) can already lead to a reporting requirement even in small positions. In view of the small amounts involved, this puts a disproportionate burden on the administrative effort and costs which, in such small positions, is not justified by the transparency of the capital market. Therefore, such small amounts do not lead to the danger of market abuse or insider dealing. If the threshold is too low, reportings that are not relevant will be triggered which also has a negative impact on market transparency as investors can no longer adequately assess the relevance of individual reporting.
- (ii) Investors: from our view, it is also necessary to create alleviations and incentives for investors at the same time as for issuers. As investing on SMEs are considered to be high-risk business there are severe restrictions for institutional investors (10% limits and in particular for pension funds special limits) which have to be reduced to raise investment opportunities and therefore increase attractiveness on investor's side.

Conclusion:

We hope that our comments, ideas and suggestions will be included in the further process of amending the current requirements to promote SME Growth Markets. We are available for further questions and additional discussions.