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EuropeanIssuers' comments on the EU Commission's new action plan on the Capital Markets Union: "A capital markets union for people and businesses" as well as on the Council conclusions on the Commission's CMU action plan

I. Foreword

EuropeanIssuers welcomes the European Commission's efforts to establish a Capital Markets Union by having released a new action plan in September 2020. We equally welcome the commitment of the Council to bring the Capital Markets Union forward, as reflected in the Council conclusions on the Commission's CMU action plan in December 2020.

Fostering European capital markets has become even more important this year for a number of reasons. First, the ongoing Covid-19 pandemic has had a negative impact on European companies. Strong capital markets can facilitate a swift economic recovery. Second, European capital markets need to be strengthened, because UK as Europe`s largest capital market left the European Union which will at least increase uncertainty about future capital flows and access to capital pools.

Against this background of pressing issues, we would have cherished for the CMU action plan to be more ambitious. This relates first to the timeline, as many proposed actions will be initiated too late. Secondly, the EU Commission should focus much more on the company's perspective. The CMU is ultimately about financing projects undertaken by companies, which is why companies' needs should be put in the center of any initiative. This is rightly emphasized by the ECOFIN Council conclusions of 2 December 2020 that state that funding of the economy should have highest priority.

For companies being able to raise capital as swiftly as possible, the regulatory environment should be simplified.[1] Administrative burdens on all listed companies must be reduced and reporting requirements streamlined. In the same vein, more needs to be done to reduce hurdles for SMEs and other companies to enter into organised capital markets.

Also, regulatory coherence needs to be ensured: the EU Commission should refrain from promoting measures that act against the establishment of the CMU. This relates for example to the introduction of a financial transaction tax, currently discussed as an EU own resource in the context of the EU budget negotiations. EU policy makers should furthermore thoroughly assess which initiatives on sustainable finance can contribute to strengthening capital markets in Europe and which will be counterproductive in this regard. In this context, we draw attention to the fact that many companies are facing enormous challenges to survive economically the Covid-19 crisis, which is why policy makers should reflect on streamlining or postponing the introduction of detailed and burdensome non-financial reporting requirements.

[1] See overview on existing regulatory impediments in Oxera Consulting LLP study "Primary and secondary equity markets in the EU", mandated by the European Commission, November 2020 (https://www.oxera.com/publications/primary-and-secondary-equity-markets-in-the-eu/).

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Last, we regret that the CMU Action Plan forgets largely about debt issuance. A way to incentivise more issuance is for example to privilege warehousing of SME bonds or loans which then can be repackaged into larger, diversified portfolios. Finally, the EU should support more private initiatives based in the EU, which approach the barriers already identified by Giovannini but not solved yet in a more practical hands on way.

II. Comments on selected action points

Below you will find our comments on selected points of the action plan.

Action 1: Making companies more visible to cross-border investors

"The EU Commission intends to set up a European single access point (ESAP). This platform shall provide seamless, EU-wide access to all relevant information (including financial and sustainability-related information) disclosed to the public by companies, including financial companies".

EuropeanIssuers believes that a European Single Access Point could be beneficial in order to provide better access to financial and non-financial information.

However, the European Single Access Point should be conceived and used to collect data already stored with national OAMs, therefore allowing investors to save time and money and showcase public companies' efforts in terms transparency. This is the right scope. As rightly pointed out by the Council, the European Single Access Point should therefore avoid creating disproportionate or additional reporting burden for companies. To avoid disproportionate reporting obligations the following conditions must be accepted:

- The introduction of the ESAP must be limited to requirements that already now are to be filed with the national OAM. Currently, filing requirement exist mainly with respect to certain obligations under the TD and the MAR. Thus, it must be avoided that additional pieces of regulation will come in the scope of the ESAP or even worse additional information or filing requirements will be created.
- The European Single Access Point must furthermore not be used to introduce new reporting formats which for example could happen with argument of necessity of technical harmonisation. As can be observed with the introduction of iXBRL for the filing of the annual financial report, the change of the format may cause significant implementation costs for issuers.
- While companies are in favour of a harmonised non-financial reporting framework to stop the proliferation of various initiatives, this process will take time and the ESAP should carefully adapt its architecture to consider the lacking maturity of non-financial information, which is largely qualitative. Companies also consider that non-financial information cannot be, at this stage, processed in an automated way, due to lacking maturity and standardisation. Finally, we believe that the introduction of the ESAP is not the first priority out of the different actions proposed, especially in light of the current adverse economic situation.

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Action 2: Supporting access to public markets

"In order to promote and diversify small and innovative companies' access to funding, the Commission wants to assess, by Q4 2021, whether the listing rules for public markets (both SME growth markets and regulated markets) could be further simplified".

The present action point lacks in ambition:

- First of all, European companies need relief from bureaucratic listing rules at this very moment, as they are currently exposed to extreme challenges due to the COVID-19 crisis. The Covid-19 Capital Markets Recovery Package only addressed a very small range of issues and certainly does not provide companies with sufficient alleviations. The intention to assess listing rules by Q4 2021, is thus too late. However, we support the Recovery Prospectus introduced by the Capital Markets Recovery Package put forward by the Commission and adopted by the co-legislators. We consider, subject to an assessment of this measure, that the Recovery Prospectus should be established as a permanent measure and should apply to all issuers and all type of securities (equity and debt alike).
- Secondly, we deem important to not only assess the listing rules and its impact on SMEs. Whilst SMEs are particularly affected by burdensome regulatory requirements, it should not be underestimated that companies of all sizes have to cope with overburdening rules. This deprives them to allocate resources to business activities that are more important than complying e.g. with sometimes duplicative reporting requirements that provide no added value. It also makes capital markets less attractive, which is why companies might either refrain from listing or delist- as it could be observed during the last years.
- Thirdly, the intention to assess does not necessarily mean that the EU Commission believes that simplification is needed and that simplification will be pursued. The EU Commission had mandated Oxera Consulting LLP to conduct a study on "Primary and secondary equity markets in the EU", which detected in its publication in November 2020 various existing regulatory impediments in EU capital markets regulation that make listing less attractive or that can trigger companies to de-list.[2] We thus strongly believe that the time for assessment is over. The EU Commission should instead take action to alleviate companies from overburdening regulatory requirements that contribute substantially to the lack of attractiveness of capital markets. In this regard, we think that a special focus should be drawn to burdens and inconsistencies deriving from various reporting requirements under EU legislation. There is a need to streamline and simplify existing reporting requirements and ensure their consistency prior to imposing new ones. We invite the EU Commission in this regard to follow up on the Fitness Check on supervisory reporting as well as the fitness check on public reporting requirements conducted in 2018 and 2019. The importance not to overburden companies with reporting requirements also relates to not imposing new disproportionate burdens. This should in particular be borne in mind when introducing new non-financial reporting

[2] Oxera Consulting LLP study "Primary and secondary equity markets in the EU", mandated by the European Commission, November 2020 (https://www.oxera.com/publications/primary-and-secondary-equity-markets-in-the-eu/)

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requirements in the upcoming review of the non-financial reporting directive and the EU taxonomy.

Against the background presented above, we encourage the EU Commission to speed up its original timeline and to substantially enlarge the scope of this action point. This would be also in line with the ECOFIN Council conclusions of 2 December 2020 that urge the EU Commission to accelerate its work *"on facilitating access of corporations, in particular SMEs, to financing on capital markets by streamlining and simplifying the current rules for listing on regulated markets and admission to trading facilities…". In our opinion, this should apply both to equity and debt listings.*

In this respect, a wider set of companies should be targeted, by way of enlarging the current definition of SMEs, and, all trading venues, both MTF and regulated markets, should be concerned by the regulatory simplification.
As to the definition of SME, a clear indication comes from the Final Report of the High-Level Forum on the Capital Markets Union (HLF, 2020) according to which all publicly listed companies on any type of market whose market capitalisation is lower than one billion euros should be defined as Small and Medium Capitalisation Companies (SMCs).

As to the simplification of listing rules, the new Action Plan correctly considers both SME growth market and regulated market and envisages the possibility to adopt a special IPO transitional period of up to a maximum of five (5) years – for first time issuers in any trading venue. The provision of an IPO transitional period mainly aims at encouraging SMEs to access public market, be it for the first time or in case of a transition from a SME Growth Market to a Regulated Market. This is the approach followed by the Final Report of the High-Level Forum on CMU which recommends that all listed companies on regulated markets, including those transitioning from SME Growth Markets, fitting the definition of SME, would benefit from a transition period of up to maximum of 5 years for the application of certain elements of relevant legislation, notably on MAR and Prospectus, but additional alleviations could be considered regarding to Transparency, take-over, and corporate governance.

In Annex I you will find more detailed proposals for alleviations we deem necessary to make capital markets more attractive for companies.

Action 4: Encouraging more long-term and equity financing from institutional investors

"The Commission will seek to remove regulatory obstacles for insurance companies to invest long-term, without harming financial stability and policyholder protection. It will also seek to provide for an appropriate prudential treatment of long-term SME equity investment by banks. Furthermore, it will assess possibilities of promoting market-making activities by banks and other financial firms".

To encourage more long-term and equity financing from institutional investors we agree that targeted changes as part of the review of Solvency II, could help to further promote long-term investment by insurance companies. In the same vein, we support to apply flexibility embedded in Basel III in the

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review of CRR/CRD to ensure the appropriate prudential treatment of long-term SME equity investments by banks.

Action 7: Empowering citizens through financial literacy

"The EU Commission intends to conduct a feasibility assessment for the development of a dedicated EU financial competence framework by Q2 2021, building on relevant existing frameworks. The Commission wants to also assess the uesfullenes of a horizontal omnibus legislation requiring Member States to promote formal, non-formal and/or informal learning measures that support the financial education of consumers, in particular in relation to responsible investing".

EuropeanIssuers supports the proposed measures. We believe that increased financial education of investors would achieve the protection they need rather than by increasing disclosure requirements for companies. Investors should be put in a position to evaluate and compare financial instruments and to make informed and sensible investment decisions.

Those investors, which feel comfortable with that, should have the option to decide for its own and waive the documentation and information rights granted by the regulation. This is why we side with Council conclusions that encourage the EU Commission to streamline existing disclosure rules for the various capital markets products.

Action 8: Building retail investors' trust in capital markets

"*The Commission intends to assess the applicable rules in the area of inducements and disclosure and will put forward a legislative proposal to amend MiFID II by Q4 2021/Q1 2022 to reduce the administrative burden and information requirements for a subset of retail investors".*

EuropeanIssuers' members have observed in the past decade that investor protection rules have become overwhelming, confusing and led to legal uncertainty with detrimental effects on the promotion of capital markets. This not only relates to retail, but also to institutional investors.

The introduction of the unbundling rules e.g. increased the cost pressure among brokers followed by a significant staff reduction. Inevitably, the quantity of research declined. This is especially a problem for SMEs. Today, after the introduction of the unbundling rules, SMEs have much more difficulties to obtain broker-coverage than before. Compared to larger stock-listed companies, where research is provided by brokers and thus largely available, many SMEs have to purchase research, a trend, which is significantly reinforced by the unbundling rules. Furthermore, we got the impression that due to the cost issue broker replace more and more experienced analysts by analysts having less expertise. As a result, quality of research has declined.

Unfortunately, this trend contradicts the highly welcomed efforts of the European Commission to improve access to capital markets for SMEs and should be remedied as fast as possible. Therefore, we very much welcome the exemption agreed in the capital markets recovery package of issuers with a market capitalisation of up to 1 bn. Euro from the unbundling rules. We at the same time ask the

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Commission to extend the scope to issuers with a lower market capitalisation and make the rules permanent.

Under the PRIIPs regulation the legislator should clarify that all corporate bonds, especially those with a "make-whole-Clause" are not within the scope. It would thereby follow recently agreed exemptions for bonds with no other embedded derivative than a make whole clause from product governance requirements in the Capital Markets Recovery Package (MiFID II Quick-Fix). A simple call option should not make a bond a PRIIPs either, even without make whole clause.

Action 9: Supporting people in their retirement

"In order to strengthen the monitoring of the state of play as regards pension adequacy in Member States, the Commission will seek to identify the relevant data and methodology for developing pension dashboards with indicators. Furthermore, in order to facilitate access to individualised pension information and raise people's awareness as regards their future retirement income, the Commission will seek to develop best practices for the set-up of national tracking systems. Last, the Commission will launch a study to analyse auto-enrolment practices and may analyse other practices to stimulate participation in occupational pension schemes, with a view to developing best practices for such systems across Member States".

Responsibilities for social security and therefore also for the overall design of old-age provisions still rest with the individual member States. However, sustainability in retirement pension policy remains top of the political agenda within most EU Member States.

Although the adequacy of pensions highly relates to features in the sole responsibility of member states (e.g. tax structure, role of capital markets, included subgroups of the population) we very much welcome the actions proposed by the European Commission. A dashboard with indicators could provide member states an overview about the status quo of their pension system, a comparison with other member states, and a guidance for further steps needed to ensure future pension adequacy. This holds also true for the "best practices" regarding a tracking system and the auto-enrolment or similar instruments.

Action 12: Facilitating shareholder engagement

"To facilitate investor engagement, in particular across borders, the Commission will assess: (i) the possibility of introducing an EU-wide, harmonised definition of 'shareholder', and; (ii) if and how the rules governing the interaction between investors, intermediaries and issuers as regards the exercise of voting rights and corporate action processing can be further clarified and harmonised. The Council encouraged the EU Commission in its conclusions to assess the benefits and drawbacks of a harmonised definition of "shareholder".

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A) Shareholder definition

Currently, the notion of shareholder is defined by the applicable corporate law, meaning that determination of the shareholder depends on the Member state of issuance. While the definition may differ among Member states, it refers in the vast majority of them to the end-investor concept having invested his own money directly into a share.

By design, the shareholder rights directive is based on the end-investor concept: this is the person at the end of the custody chain, not acting as an intermediary, that holds securities on a securities account provided by the "last intermediary" which is the intermediary providing the securities account to the person holding shares on their own account.

We therefore do not see the need to harmonising the concept.

If policy makers, however, propose to harmonise the definition, it should be defined as the "person having invested (own) money directly into a share" who should be entitled to receive and exercise the rights enshrined in a security under the applicable company laws of the country where the issuer is incorporated.

B) Corporate Actions

Also regarding corporate actions, EuropeanIssuers sees room for improvement:

IR 2018/1212 only contains a generic rule on corporate actions, i.e. all events initiated by a public company that bring or could bring an actual change to the securities—equity or debt—issued by the company like mergers, share splits, dividend payments, spin-offs, etc.
Here several aspects merit further work, especially:

- The information coming from the issuer on corporate action other than general meeting related corporate actions which serves as the "golden source" should be harmonised so minimum standards are complied with. The issuer is best positioned to describe the nature of the corporate action and this information should be treated like general meeting information, to be created by the issuer (and its agent) and then forwarded by all intermediaries down to the end investor without the need for altering or amending except specific information an intermediary would want to use for differentiating specific services for its competition.
- The harmonisation of rules on corporate action processing should be done via amendments to SRD 2.

C. Virtual shareholder meetings

EuropeanIssuers proposes a new analysis of the way in which General Shareholder meetings take place, including the full online procedure and voting. We propose an analysis of the framework considering the advancement in technology relating to online GSMs. We do encourage, as before, that the members states allow for the option between the full online, full offline or hybrid GSM.

However, practices implemented in various member states have lead some issuers to being discouraged in their desire to ensure a full online GSM. As such, we require further analysis in regard to what standards have to be met for online GMs, while also promoting flexibility and opt-in mechanisms for issuers. We also encourage clear protection for issuers which opt for such a meeting. Such clarity at European level would ensure that the full online option becomes truly viable for the majority of issuers.

Action 15: Investment protection and facilitation

"The Commission will propose to strengthen the investment protection and facilitation framework in the EU. The Council encourages in its conclusion in the short term to propose a Union framework that clarifies, strengthens and supplements the rules on cross-border investment in the European Union".

EuropeanIssuers welcomes this initiative. Corporate cross-border investments within the EU are a crucial cornerstone for the functioning of the Internal Market. Unfortunately, in a number of Member States the legal standards as defined by EU law are not always fully respected and implemented. Discrimination and unfair treatment of foreign companies from other EU Member States still occurs. Furthermore, some Member States lack effective and independent judicial protection. For many investors, the resulting lack of legal certainty is an obstacle for cross-border investments in Europe.

To ensure protection of European investments and to strengthen the investment climate, the establishment of a binding dispute settlement mechanism based on EU law and at EU level is of utmost importance. It would ensure a level playing field of European investors and those from third countries, such as the United States and the United Kingdom. It would also be beneficial to codify existing EU substantive rules on investment protection (including jurisprudence) and further supplement/specify these rules to level up investment protection within the internal market.

For this, The EU Commission will however need the firm support of EU Member States. We thus urge the Council to collaborate constructively with the EU Commmission following its committment in the Council conclusions of 2 December 2020.

Action 16: Supervision

"The Commission will work towards an enhanced single rulebook for capital markets by assessing the need for further harmonisation of EU rules and monitoring progress towards supervisory convergence. It will take stock of what was achieved in Q4 2021 and consider proposing measures for stronger supervisory coordination or direct supervision by the European Supervisory Authorities (ESAs).

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The Commission is also carefully assessing the implications of the Wirecard case for the regulation and supervision of EU capital markets will act promptly and decisively to address any shortcomings that are identified in the EU legal framework".

EuropeanIssuers considers that there is no silver bullet for fraud. The regulatory framework related to statutory audit has been significantly strengthened by the Audit Directive and the Audit Regulation, which include options for Member States. The consequences of the Wirecard case should not be exaggerated and negatively impact public companies with robust internal control systems. In particular, the Commission should not overreact and adopt additional requirements in this field that could deter companies from listing or drive them to delist. For example, following the implementation in 2002 of the Sarbanes-Oxley Act (SOX) in the US, internal controls requirements have proven too costly for smaller public companies. In particular, the costs of designing, documenting, and auditing financial controls, as required by SOX, have caused many corporations to voluntarily deregister themselves from major exchanges in the US.

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Annex I: Proposals for general alleviations to regulatory requirements

1. **Alleviations to MAR (for all companies)**

- **Notion of inside information:** The legislator should seek ways to clarify (and narrow) the definition of inside information to make compliance more affordable for issuers and to better protect the possibility of delaying disclosure of issuers against abusive market practices. All the associations of EuropeanIssuers realized that the broad definition of inside information raised many problems for i) the identification of when the information becomes an "inside information" and ii) the risk to publish information not enough mature, therefore, companies must rely on the possibility to delay which is the natural counterweight of that broad definition.
- **Interaction between MAR and Transparency Directive:** There is an interaction between the Transparency Directive, where investors need to be informed at predictable points of time and MAR, where information needs to be disclosed immediately at the moment it may be deemed inside. This interaction is especially relevant for periodic financial information (annual and half-yearly financial statements), where it is challenging to identify the exact moment when the information becomes "inside" and should therefore be disclosed. Companies should be given more flexibility to avoid making premature disclosures of inside information.
- **Insider lists:** The management of the insider list is very burdensome due to all the information the issuer must gather to fill in the list. Article 18 paragraph 9 should be amended to ensure that only the most essential information for the identification purposes is included. Issuers should be given flexibility to determine which elements of personal data in the insider list are sufficient for that purpose.
- **Manager Transactions:** The threshold for managers' transactions (above which issuers should report transactions) is currently too low, leading to too much administrative burden for listed companies. The threshold should therefore be raised from the current €5 000-€20 000 to €50 000. Furthermore, to alleviate the burden for listed companies, it should always be for the national competent authorities to disclose managers' transactions to the public. Clear guidance should be provided on what types of managers' transactions need to be disclosed, as well as the scope of the relevant provisions in the context of different types of transaction. Transactions that do not send market signals (e.g. inheritances, gifts) should be out of scope. Finally, transactions should be aggregated to make the disclosure as simple as possible.
- **Sanctions:** Sanctions for market abuse must be proportionate regarding the nature of the breach of law but also sufficiently dissuasive to prevent market abuse. In some cases they may be higher than the market capitalisation of companies (e.g. Poland and Bulgaria). The risk of inadvertent breach of MAR and associated administrative sanctions are seen as an important factor that dissuades companies from listing. Member States shall amend their respective national sanctions regimes to ensure that the amount of administrative sanctions reflects the specifics of the supervised market and is proportionate to the nature of abuse.

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2. Alleviations to Prospectus (for all companies)

- **Thresholds:** In a first instance, the Commission should assess whether it would be appropriate to increase the threshold below which a prospectus for offers of securities to the public is not necessary from €1 000 000 to €2 000 000. The Commission should also consider whether the upper threshold for national discretion not to require a prospectus for offers of securities to the public, which are not passported, could be raised from €8 000 000 to €10 000 000.
- **Length of prospectus:** In a second instance, the Commission should evaluate how to reduce the content of a prospectus only to key aspects with a view to significantly reducing its length but not to the detriment to investors and issuers. To that end, it should consider how to further encourage incorporation by reference of information that has already been made public. As stated above, we consider, subject to an assessment of this measure, that the Recovery Prospectus should be established as a permanent measure and should apply to all issuers and all type of securities (equity and debt alike).
- **Deadlines**: The Commission should also examine whether it would be appropriate to reduce the handling times by national competent authorities for IPOs from 20 working days to 15 working days. Building on the latest technological developments and more widely available means of faster communication, it should then assess whether a prospectus can be made available to the public closer to the offer (3 working days instead of 6 working days).
- **Other proposed alleviations:**

  a. raising the number of qualified investors up to 500 in order to be exempted from the publication of the prospectus.
  b. including in the definition of qualified investors also high net worth individuals who have the experience, knowledge and expertise to make their own investment decisions and properly assess the risks that those funds carry (these individuals (a) commit to investing a minimum of EUR 100 000; and (b) state in writing, in a separate document from the contract to be concluded for the commitment to invest, that they are aware of the risks associated with the envisaged commitment (see Reg. EUVECA).
  c. We propose, as an alternative to short prospectus for issuers already listed, the idea of not having any prospectus for a capital increase being the issuer already subject to TOD and MAR.
  d. Elimination of the requirement of the translation of the prospectus in case of art. 25 of the Prospectus Regulation (passporting).

3. Alleviations to IFRS and ESEF

- Streamline and simplify IFRS for SMCs in order to reduce the costs for smaller market players and improve investor reach. The SME Stakeholder expert group should be tasked with assessing IFRS requirements with a view to proposing solutions to the IASB to alleviate burdens for SMCs.
- Clarify at the EU level for all companies that ESEF is the appropriate filing format. The implementation of this requirement should, however, be delayed until the format becomes available to companies at a reasonable cost.

4. Exempt research in SMEs from unbundling rule in MiFID II

- In order to support brokers' produced research on SMEs, brokers should be allowed to bundle execution commissions and research fees when it concerns SME stock listed on any trading venue.

5. Remove the tick size limitation for SME stocks

- In order for the tick sizes to not be a hindering factor for liquidity in SME shares, the local market operators should be able to decide on a minimum tick size with respect to trading in SME shares.

6. Review the framework for an efficient stock loan market for SMEs

- Conduct a review of the implications of the settlement discipline provisions in CSDR on the development of an efficient SME securities lending market.
- Consider in any review the impact of other relevant regulatory obstacles to the development of a dynamic SME stock loan markets, such as (i) difficulty for smaller lenders to comply with best execution requirements and (ii) local constraints on the ways to get client's consent for stock loan.

7. Create an SME Market Marker status subject to alleviated prudential requirements

- Contribute to the emergence of dedicated SME market makers that would support market making activity in SME stock via creating a separate legal category of such operators in EU legislation and subjecting them to alleviated regulatory treatment. The use of automated market making techniques with respect to SMEs should be promoted. It could also be explored how stock lending/borrowing could be facilitated through adapted regulatory treatment.

8. Encourage interconnection of smaller cap markets and supporting unimpeded set-up of branches

- This provision of MiFID II should be enforced and clarified at EU level. Where breaches of Union law are identified, the Commission should open infringement proceedings against Member States in order to ensure that exchange operators can indeed set up branches freely for the provision of cross-border services. In addition, ESMA should work, where appropriate, on targeted guidance to National Competent Authorities related to the provision of investment services/activities through a branch, to ensure in particular that market operators can set up and operate an exchange branch unimpededly in another Member State.

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EuropeanIssuers is a pan-European organisation representing the interests of publicly quoted companies across Europe to the EU Institutions. There are approximately 13,225 such companies on both the main regulated markets and the alternative exchange-regulated markets. Our members include both national associations and companies from all sectors in 14 European countries, covering markets worth €7.6 trillion market capitalisation with approximately 8,000 companies.

We aim to ensure that EU policy creates an environment in which companies can raise capital through the public markets and can deliver growth over the longer term. We seek capital markets that serve the interests of their end users, including issuers.

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