

EUROPEANISSUERS' RESPONSE TO ESMA CONSULTATION ON DRAFT GUIDELINES ON DISCLOSURE REQUIREMENTS UNDER THE PROSPECTUS REGULATION

4 October 2019

SUMMARY

On 12 July 2019, ESMA issued a consultation on the draft guidelines on disclosure requirements under the Prospectus Regulation. In 2005, ESMA's predecessor CESR adopted recommendations in order to provide guidance to financial market participants about how to comply with various disclosure requirements in the Prospectus Directive. In order to make the CESR guidelines more consistent with the Prospectus Regulation, ESMA has drafted new guidelines which it expects to receive feedback on from financial market participants.

EuropeanIssuers responded to the draft guidelines' consultation insisting on the following key points:

- The possibilities to reference the financial reports in the prospectus should be made clearer. Also, the guidelines should avoid making the prospectus longer by including separate reports in them.
- EuropeanIssuers is against systematically expanding the pro form scope of application to situations where the issuer is involved in multiple transaction which collectively constitute a 25% variation to the size of the issuer's business. EuropeanIssuers supports the CESR's previous position that the situation should be assessed on a case by case basis.
- The rules for the calculation of present requirements in the working capital statements must only consider an acquisition when there is a firm commitment to acquire an entity, and the price of the acquisition should be included when calculating the present requirements.
- Recommending additional disclosure in statement of capitalisation and indebtedness is not relevant especially when these disclosures relate to information that is found elsewhere in the document thus leading to a duplication of information.
- EuropeanIssuers is against the inclusion of all trade and other receivables and payables in the indebtedness statement as it would create extra burdens through an unnecessary duplication of information. The information would also be inconsistent with the key financial information required in the summary of the prospectus in accordance with the delegated regulation (EU) 2019/979 (annex 1) which would leave investors confronted with different information. EuropeanIssuers therefore supports carrying forward this CESR recommendation without any changes.
- EuropeanIssuers does not support requiring the use of the IFRS definition of related parties for the related party transactions disclosure where the prospectus was permitted to include non-IFRS financial statements. This would create a substantial burden for issuers while providing little benefit to issuers.
- EuropeanIssuers does not agree with the introduction of a new specific disclosure on the potential dilution effects connected to the exercise of option agreements as there is no

requirement in the delegated acts for this disclosure, thus there is no basis to add it to the draft guidelines.

These are the main points that EuropeanIssuers is concerned about, but there are more issues and more detailed reasoning in our full response listed below.

RESPONSE TO THE SPECIFIC QUESTIONS

Operating and financial review

Q1 Do you agree with the choice to largely carry over the CESR recommendations on OFR? If not, could you please indicate what further guidance should be provided and the legal basis for such?

<ESMA_QUESTION_CPG_1>

The possibilities of reference to financial reports should be made clearer. As a matter of fact ESMA's proposed guidance addresses many issues already covered by the annual financial statements and management reports. Additional disclosures should be very few, as all significant issues relating to the financial position, results of operations and development of the company must be reported in the annual financial statements and management report. Furthermore, articulation between ESMA Guidelines on Alternative Performance Measures (paragraph 25) and Guideline 3 (iii) could also be clarified as regards recurring and non-recurring APMs. Finally, the wording of guideline 2 regarding comparability should be amended to clearly refer to “similar information provided elsewhere in the prospectus”.

<ESMA_QUESTION_CPG_1>

Q2 Do you agree with the introduction of draft guideline 4 in order to provide further guidance on the use of the management report? Do you believe the inclusion of any separate non-financial report (when applicable) could materially increase the length of equity prospectuses? If so, please provide your reasoning and an alternative proposal.

<ESMA_QUESTION_CPG_2>

Regarding the non-financial report, inclusion of a separate report would result in significantly increasing the length of prospectuses. So far, the non-financial KPIs were not necessary in most prospectuses.<ESMA_QUESTION_CPG_2>

Q3 Do you believe the application of draft guidelines 1, 2, 3 and 4 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_3>

Guidelines 1 and 2 will probably not cause any major change in costs, but Guidelines 3 and 4 could increase costs. In particular, according to one of our members, consulting and auditing costs are estimated to increase by 10%.

<ESMA_QUESTION_CPG_3>

Capital resources

Q4 Do you agree with the choice to largely carry over the CESR recommendations on capital resources? If not, could you please indicate what further guidance should be provided and the legal basis for such?

<ESMA_QUESTION_CPG_4>

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<ESMA_QUESTION_CPG_4>

Q5 Do you consider that the clarifications in these draft guidelines on how text provided elsewhere should be cross-referred to are useful?

<ESMA_QUESTION_CPG_5>

Yes, it should be clear that it makes sense to refer to the cash flow statement, as its presentation is subject to accounting standards and thus provides a common reporting basis for investors.

<ESMA_QUESTION_CPG_5>

Q6 Do you believe the application of draft guidelines 5, 6, 7 and 8 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_6>

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<ESMA_QUESTION_CPG_6>

Profit forecasts and estimates

Q7 Do you agree with the choice to largely carry over the CESR recommendation on profit forecasts and estimates? If not, could you please indicate what further guidance should be provided and the legal basis for such?

<ESMA_QUESTION_CPG_7>

We consider that Guideline 11 is not useful and should be removed since the clean statement required by the delegated act is clear and straightforward. As regards other guidelines on pro forma and estimates, it should be differentiated more clearly what kind of prospectus it is. For an IPO, the forecast is certainly more important than for smaller debt transactions, especially under long-term issuance programs of large public companies.

<ESMA_QUESTION_CPG_7>

Q8 Do you believe the application of draft guidelines 9, 10, 11 and 12 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_8>

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<ESMA_QUESTION_CPG_8>

Historical financial information

Q9 In relation to draft guideline 14, do you consider that it is beneficial to clarify the application of the bridge approach for prospectuses that include less than three years of financial information? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_9>

No, we don't consider it necessary to clarify the application of the bridge approach.

<ESMA_QUESTION_CPG_9>

Q10 Do you agree with the guidance set out in draft guidelines 13, 14, 15, 16 and 17? If not, please explain your reasons and provide alternative suggestions.

<ESMA_QUESTION_CPG_10>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CPG_10>

Q11 Do you consider that additional guidance is necessary as regards the restatement of historical financial information in the case of prospectuses that include less than three years of financial information? If so, please explain your view.

<ESMA_QUESTION_CPG_11>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CPG_11>

Q12 Do you believe the application of any of the draft guidelines 13, 14, 15, 16 and 17 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_12>

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<ESMA_QUESTION_CPG_12>

Pro forma information

Q13 Should draft guideline 18 include any other standard indicators of size? Have you ever used other indicators because the three indicators included in draft guideline 18 would produce anomalous results?

<ESMA_QUESTION_CPG_13>

The CESR recommendations §92 and 93 clearly state that the list of indicators is non-exhaustive and that other indicators can be applied. We consider that this statement should be carried forward in ESMA guidelines.

<ESMA_QUESTION_CPG_13>

Q14 In draft guideline 18, do you agree that when an issuer is involved in several transactions which individually do not, but which collectively do, constitute a 25% variation to the issuer's size, pro forma information should be required unless it is disproportionately burdensome to produce it?

<ESMA_QUESTION_CPG_14>

We are not in favour of systematically expanding the pro forma scope of application to situations where the issuer is involved in multiple transactions, which collectively constitute a 25% variation to the size of the issuer's business, and consider in accordance with CESR's previous position that the situation should be assessed on a case by case basis.<ESMA_QUESTION_CPG_14>

Q15 In draft guideline 18, do you agree that when an issuer is involved in several transactions of which only one constitutes a 25% variation to the issuer's size, pro forma information should be required for all the transactions unless it is disproportionately burdensome to produce it?

<ESMA_QUESTION_CPG_15>

We are not in favour of systematically expanding the pro forma scope of application and consider in accordance with CESR's previous position that the situation should be assessed on a case by case basis.

<ESMA_QUESTION_CPG_15>

Q16 In draft guideline 25, do you agree that the accountant / auditor report should not be permitted to include an emphasis of matter?

<ESMA_QUESTION_CPG_16>

Preventing "qualifications or emphases of matter" in the independent auditor's report is not the task of issuers. In practice, implementation of this guideline would hardly be possible. Therefore this guideline should be redrafted : "When the independent accountants or auditors prepare their report under Annex 20, Section 3 of the Commission Delegated Regulation, ~~the persons responsible for the prospectus~~ **they** should ensure that they follow the exact wording set out in that Section."

<ESMA_QUESTION_CPG_16>

Q17 In relation to draft guidelines 19, 20, 21, 22, 23, 24 and 26 which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

<ESMA_QUESTION_CPG_17>

We question whether the pro forma requirement should cover the situation described in paragraph 111 of Guideline 24 (**acquisition conditional on the capital increase being successful**). While there is a range of events or transactions for which the pro forma information might typically be presented, falling into the general categories of business combinations, divestments, issues/reduction of equity or debt, doubts might be expressed concerning the advisability of extending the regime to an intermediate step in a business transaction.

<ESMA_QUESTION_CPG_17>

Q18 Do you believe the application of any of the draft guidelines 18, 19, 20, 21, 22, 23, 24, 25 and 26 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_18>

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<ESMA_QUESTION_CPG_18>

Interim financial information

Q19 Do you agree with the proposal to carry over only part of the CESR recommendations on interim financial information since some of the contents appear to be obsolete under the current legislative framework? If not, could you please indicate which CESR recommendations should have been retained and the legal basis for including them in these draft guidelines?

<ESMA_QUESTION_CPG_19>

Yes, we agree with the updates to the CESR recommendations mandated inter alia by the revision of the Transparency directive.

<ESMA_QUESTION_CPG_19>

Q20 Do you believe the application of draft guidelines 27 and 28 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_20>

No.

<ESMA_QUESTION_CPG_20>

Working capital statements

Q21 Do you agree with the rules for calculation of working capital in draft guideline 31? If you do not agree, please explain why and propose an alternative approach.

<ESMA_QUESTION_CPG_21>

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<ESMA_QUESTION_CPG_21>

Q22 Do you agree with the rules for calculation of present requirements in draft guideline 32? If you do not agree, please explain why and propose an alternative approach.

<ESMA_QUESTION_CPG_22>

No. An acquisition should only be taken into consideration when there is a firm commitment to acquire an entity. Guideline 32 should therefore be amended to refer to a firm commitment. It is also not clear what should be included in the calculation. Since the guideline is about the working capital statement we assume that it's the price of the acquisition. Therefore we suggest clarifying the guideline as follows : "If it has made a **firm** commitment to acquire another entity within the 12 months following the date of approval of the prospectus, **it the price of the acquisition** should **be** included ~~d the acquisition~~ when calculating its present requirements."

<ESMA_QUESTION_CPG_22>

Q23 Do you agree that it is useful to require credit institutions to take their liquidity risk into account when they determine their working capital? Do you agree with the requirements of draft guideline 34?

<ESMA_QUESTION_CPG_23>

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<ESMA_QUESTION_CPG_23>

Q24 Do you agree that it is useful to require (re)insurance undertakings to take their liquidity metrics and their regulatory capital requirements into account when they determine their working capital? Do you agree with the requirements of draft guideline 35?

<ESMA_QUESTION_CPG_24>

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<ESMA_QUESTION_CPG_24>

Q25 In relation to draft guidelines 29, 30, 33, 36 and 37, which largely carry over existing material, do you agree that this material should be carried over? If you do not, please specify which material is no longer relevant and explain why.

<ESMA_QUESTION_CPG_25>

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<ESMA_QUESTION_CPG_25>

Q26 Do you believe the application of any of the draft guidelines 29, 30, 31, 32, 33, 34, 35, 36, and 37 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_26>

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<ESMA_QUESTION_CPG_26>

Capitalisation and indebtedness statements

Q27 Would you like more specific guidance on what to disclose concerning the type of guarantee according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

<ESMA_QUESTION_CPG_27>

The statement of capitalisation and indebtedness aims at providing investors with an overview of the issuer's financial condition and financing structure. Recommending additional disclosures is therefore not relevant especially when these disclosures relate to information that can be found in the financial statements and their notes. Therefore we consider that the CESR recommendations should be carried forward without any changes.

<ESMA_QUESTION_CPG_27>

Q28 Would you like more specific guidance on how credit institutions and (re)insurance undertakings should adapt the capitalisation statement according to draft guideline 38? If so, please explain which type of further guidance would be helpful.

<ESMA_QUESTION_CPG_28>

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<ESMA_QUESTION_CPG_28>

Q29 Do you agree that trade receivables and trade payables should be included in the indebtedness statement, as proposed in draft guideline 39?

<ESMA_QUESTION_CPG_29>

We disagree with the inclusion of all trade and other receivables and payables in the indebtedness statement. This would be redundant with the information provided by the working capital statement and inconsistent with the key financial information required in the summary of the prospectus in accordance with delegated regulation (EU) 2019/979 (annex 1 of the delegated regulation requires for equity securities the disclosure of net financial debt defined as long and short term debts minus cash). Investors would be confronted with different information. Including trade receivables and payables would also raise practical issues : issuers would have to cope with additional consolidation work compared with other disclosures (cash management is often centralized which is not the case for clients and suppliers). Therefore we consider that the CESR recommendations should be carried forward without any changes. <ESMA_QUESTION_CPG_29>

Q30 In the indebtedness statement, do you agree that financial liabilities from leases should be included under financial debt and described further in a paragraph after the statement of indebtedness?

<ESMA_QUESTION_CPG_30>

The statement of capitalisation and indebtedness aims at providing investors with an overview of the issuer's financial condition and financing structure. Recommending additional disclosures is therefore not relevant especially when these disclosures relate to information that can be found in the financial statements and their notes. Therefore we consider that the CESR recommendations should be carried forward without any changes.

<ESMA_QUESTION_CPG_30>

Q31 Do you consider that any line items in either the capitalisation or the indebtedness statement are not useful to investors? Please explain your answer.

<ESMA_QUESTION_CPG_31>

TYPE YOUR TEXT HERE

<ESMA_QUESTION_CPG_31>

Q32 Do you have any other comments on draft guidelines 38 and 39?

<ESMA_QUESTION_CPG_32>

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<ESMA_QUESTION_CPG_32>

Q33 Do you believe the application of draft guidelines 38 and 39 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_33>

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<ESMA_QUESTION_CPG_33>

Remuneration

Q34 Do you agree with the approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_34>

Yes.

<ESMA_QUESTION_CPG_34>

Q35 Do you believe the application of draft guideline 40 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_35>

No.

<ESMA_QUESTION_CPG_35>

Related party transactions

Q36 Do you agree with the content of this draft guideline? Do you think it provides further clarity to the market? If not, please explain.

<ESMA_QUESTION_CPG_36>

Requiring the use of the IFRS definition of related parties for related party transaction disclosure where the prospectus was permitted to include non-IFRS financial statements, which themselves use a particular definition of related parties, would be a substantial burden on issuers that is not outweighed by any significant benefit to investors. <ESMA_QUESTION_CPG_36>

Q37 Do you believe that the application of draft guideline 41 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_37>

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<ESMA_QUESTION_CPG_37>

Acquisition rights and undertakings to increase capital

Q38 Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_38>

Yes.

<ESMA_QUESTION_CPG_38>

Q39 Do you believe the application of draft guideline 42 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_39>

No.<ESMA_QUESTION_CPG_39>

Options agreements

Q40 Do you agree with the general approach taken for this draft guideline, i.e. to almost entirely replicate the existing CESR recommendations? If not, please provide your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_40>

Yes.

<ESMA_QUESTION_CPG_40>

Q41 Do you agree with the introduction of a specific disclosure point on the potential dilution effects connected to the exercise of option agreements?

<ESMA_QUESTION_CPG_41>

No we do not agree with this new point which is not required by the delegated act. Item 19.1.6 of Annex I, for instance, only requires information about the capital under option (or agreed to be put under option) and details of the options. There is no requirement to disclose information on the potential dilution.<ESMA_QUESTION_CPG_41>

Q42 Do you believe the application of draft guideline 43 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_42>

Yes since it requires additional information.

<ESMA_QUESTION_CPG_42>

History of share capital

Q43 Do you agree with the guidance set out in draft guideline 44 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_43>

Yes.

<ESMA_QUESTION_CPG_43>

Q44 Do you believe the application of draft guideline 44 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_44>

No.

<ESMA_QUESTION_CPG_44>

Description of the rights attaching to shares of the issuer

Q45 Do you agree with the guidance set out in draft guideline 45 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_45>

Yes.

<ESMA_QUESTION_CPG_45>

Q46 Do you believe the application of draft guideline 45 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_46>

No.

<ESMA_QUESTION_CPG_46>

Statements by experts

Q47 Do you agree with the guidance set out in draft guideline 46 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_47>

Yes.

<ESMA_QUESTION_CPG_47>

Q48 Do you believe the application of draft guideline 46 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_48>

No.

<ESMA_QUESTION_CPG_48>

Information on holdings

Q49 Do you agree with the proposal to carry over only part of the CESR recommendations on information on holdings? If not, please indicate what further CESR recommendations should be retained and the legal basis for their inclusion in these draft guidelines.

<ESMA_QUESTION_CPG_49>

Yes.

<ESMA_QUESTION_CPG_49>

Q50 Do you consider the clarification on the general principle whereby this draft guideline does not apply when the required information is provided in the issuer's consolidated / separate financial statements prepared in accordance with IFRS to be useful?

<ESMA_QUESTION_CPG_50>

Yes, we consider that the clarification is very useful and important.

<ESMA_QUESTION_CPG_50>

Q51 Do you believe the application of draft guideline 47 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_51>

No.<ESMA_QUESTION_CPG_51>

Interests of natural and legal persons involved in the issue / offer

Q52 Do you agree with the guidance set out in draft guideline 48 which has been subject only to minor revision? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_52>

Yes.

<ESMA_QUESTION_CPG_52>

Q53 Do you believe the application of draft guideline 48 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_53>

No.

<ESMA_QUESTION_CPG_53>

Collective investment undertakings

Q54 Do you agree with the guidance set out in the draft guidelines which have been subject only to minor revision, i.e. draft guidelines 49, 50, 52, 53, 54, 55 and 57? If not, please elaborate on your reasoning and suggest an alternative approach.

<ESMA_QUESTION_CPG_54>

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<ESMA_QUESTION_CPG_54>

Q55 Do you agree with the inclusion of new draft guideline 51? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.

<ESMA_QUESTION_CPG_55>

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<ESMA_QUESTION_CPG_55>

Q56 Do you agree with the inclusion of new draft guideline 56? If not, please explain and indicate an alternative approach that would provide sufficient investor protection.

<ESMA_QUESTION_CPG_56>

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<ESMA_QUESTION_CPG_56>

Q57 Do you believe the application of any of the draft guidelines 49, 50, 51, 52, 53, 54, 55, 56 and 57 will impose additional costs on the persons responsible for the prospectus? If so, please provide evidence of the costs and – on a best-effort basis – quantify them.

<ESMA_QUESTION_CPG_57>

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<ESMA_QUESTION_CPG_57>

EuropeanIssuers is a pan-European organisation representing the interests of publicly quoted companies across Europe to the EU Institutions. Our members include both national associations and companies from all sectors in 15 European countries, covering markets worth € 7.6 trillion market capitalisation with approximately 8000 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.

For more information, please visit www.europeanissuers.eu