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POSITION ON REVISION OF PROSPECTUS DIRECTIVE

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INTRODUCTION

EuropeanIssuers welcomes the "growth agenda" of the Commission, and the emphasis in the CMU Action Plan on providing more funding choices for companies, which should enable them to choose the funding option that best suits their current and future growth needs[1]. We also support the aim to provide competitive and strong capital markets to contribute to growth and jobs.

Our understanding of what companies want by way of funding choices is that they should be free to choose the funding options that best suit them at their particular stage of development. This means for example:

- The choice of crowdfunding or funding on a public market;
- The choice of alternative (growth) or main (EU regulated) market;
- The choice of targeting the issue to retail and / or wholesale investors;
- The choice of jurisdiction across the single market as to where to approve the prospectus;
- The ability to take advantage of a single passport, which means the approval of one single authority and notification only to ESMA, not to all the individual authorities;
- The choice of issuing documentation in the local language or in English in order to attract international investors; and
- The choice of raising capital in Europe at costs and in time which are comparable to and competitive with other major international jurisdictions.

Companies face different challenges at different stages of their development. Some companies are growing, while others are stagnant or in financial difficulties. Some are dealing with major change, while others face continuous but steady improvements. Companies come in many different shapes and forms, such as:

- Global businesses raising capital all over the world to support their international operations;
- Frequent issuers, which raise capital on a regular basis;
- Infrequent issuers, which may only raise capital 3 times over a 40 year period for specific projects;
- Mid-cap companies coming to the market to ensure succession planning;

[1] Although we would have liked to have seen more of a distinction between SMEs and Emerging Growth Companies in the Action Plan, as suggested by the EU IPO Task Force Report. The Task Force, set up and supported by EuropeanIssuers, the European Private Equity & Venture Capital Association and the Federation of European Securities Exchanges, brings together experts from across the EU with direct knowledge and experience of Initial Public Offerings (IPOs) who together agreed on key recommendations on how to improve this key component of Europe's capital markets.

- Small-cap growth companies which need to tap the capital markets several times as they scale up; and
- Companies of all sizes that may come to the capital markets, but be unsuccessful and ultimately want to leave.

Their needs for capital and for different types of investor to match will therefore vary. Some may have controlling shareholders; others may be widely held. Some may have international investors; others may have more local investors. Some may be widely traded, while others are less liquid.

Producing a prospectus is one of the major costs and deterrents of listing and raising finance on capital markets. Therefore, we welcome the revision of the EU Prospectus rules which aims at making it easier and less costly to raise funds on capital markets in Europe. Nevertheless, we think that the Commission could be more ambitious in its proposals. In order to help inform the debate and help the success of the Prospectus Regulation, this position paper highlights our main concerns with regard to the proposal.

SUMMARY

- **Home Member State Definition**

  In line with the Capital Markets Union initiative, companies should have the choice where to approve prospectus (between a MS where they have a registered office and where the securities are offered to the public or were/are admitted to trading). This freedom should apply for issuers of all securities (equity and non-equity securities).

- **SME minimum disclosure regime**

  - ✓ The SME minimum disclosure regime should be extended to include all companies on SME Growth Markets and also smaller companies on Regulated Markets.
  - ✓ Companies transitioning from a SME Growth Market to a regulated market should not face additional unnecessary burdens.
  - ✓ Minimum disclosure prospectus should be much more succinct, simpler, shorter in length and less costly for SMEs to produce. Therefore, there would be little merit in producing a summary of such a prospectus.
  - ✓ No pre-approval by NCA should be required, but rather by certified advisers.

- **Secondary Issuances**

  - ✓ For secondary offers only a securities note should be required given that companies admitted to trading on Regulated Markets or SME growth markets already produce a great deal of information, publicly available.

  - ✓ It would be beneficial to provide more detail or at least some principles in this Regulation that would ensure that the proportional disclosure regime for secondary issuances is truly proportional.

- **Scrutiny & Approval by NCA**

  - ✓ It is important to increase efficiency of the approval of the prospectus by a National Competent Authority.
  - ✓ Amendment of the definition of the Home Member State needed to provide more flexibility to issuers of all securities.
  - ✓ Exemption from pre-approval for secondary offerings is needed.

- **Risk Factors**

  - ✓ A classification of risk factors according to their materiality and probability of occurrence, which has never been required before, could result in unintended consequences, will be misleading for investors and will raise major issues in terms of liability.
  - ✓ We would rather suggest that risk factors could be allocated by distinct categories according to their type (industry-related; company-related; business-related; market-related; etc.).

- **Incorporation by Reference**

  - ✓ Incorporation by reference should be allowed on regulated markets (equity and debt, therefore including base prospectus), on MTFs and SME Growth Markets.

- **Thresholds**

  While we welcome the intention to raise the thresholds triggering requirements to produce a prospectus, we believe that the Commission is not ambitious enough. In order to increase the flexibility for SMEs to raise capital and accommodate to different sizes of companies in different EU economies, we suggest to:

  - ✓ raise the "upper" fundraising threshold (art. 3 para 2 (b) of PR COM(2015) 583) from 10 to 50 million euro (given it is a Member State option, the level could be selected at a lower level)
  - ✓ raise the fundraising threshold (art. 1 para 3 (d) of PR COM(2015) 583) from 500 000 to 2,5 million euro
  - ✓ raise the "investor" threshold (art. 1 para 3 (b)) from 150 to 500 natural or legal persons per Member State, other than qualified investors

- **Wholesale debt markets**

  In order to ensure competitive wholesale debt markets, it is important to:

  - ✓ Maintain the exemption currently in force from producing a prospectus for offers of non-equity securities with a denomination of at least 100 K (art. 3 para 2d PD 2003/71/EC).
  - ✓ Maintain the lighter disclosure regime under the Prospectus Regulation Annexes (see Annex IX and XIII) and the exemption from the summary requirements (see PD Article 5(2)).

- **Prospectus Summary**
    - ✓ The Regulation should be clear that the summary should be considered as an introduction to the prospectus and that no liability attaches to the summary alone, but only when the summary is read together with the entire prospectus
    - ✓ Incorporation by reference and cross-references in the prospectus summary should be allowed to ensure that investors are properly informed
    - ✓ To prescribe a maximum number of risks to be included in the Regulation could open issuers up to additional liability and would be both unhelpful and unclear for investors

FULL POSITION

1. HOME MEMBER STATE DEFINITION

We understand there have been discussions on changing the Home Member State (MS) definition[2] by removing the existing flexibility for issuers of certain non-equity securities[3] to approve prospectus in another Member State than the one where the company has its headquarter. We also understand that the aim was to prevent an un-level playing field and forum shopping within the EU. [4]

We fear this is not the right approach as it is against the principle **of freedom of movement**, **which is a key objective of a Capital Markets Union** (as would increase market fragmentation). Changing the home member state definition in a way that companies could approve prospectus only in a Member State where their registered office is would result in more burdens and costs for companies instead of alleviating them.[5] Not only this would not facilitate access for companies to capital markets, but it would actually be a retrograde step (currently there is at least freedom of movement for some non-equity securities[6]).

This would result in additional costs for companies as they would need to familiarise themselves (or their advisers) with procedures, forms, etc. of a new National Competent Authority (NCA). Also, some NCAs have developed the knowledge and expertise and improved their approval processes. Companies should be allowed to benefit from that expertise and knowledge instead of being forced to go through Member State where NCAs do not offer services of such quality.

Taking this opportunity, we would like to stress that **companies should have the choice of their home Member State** (between a MS where they have a registered office and where the securities are offered to the public or were/are admitted to trading) **for all securities** (equity and non-equity securities).

This way a level playing field would be ensured, freedom of movement within EU would be respected, and this would be a step forward in achieving a Capital Markets Union and ensuring healthy competition and/or co-operation between NCAs to improve their procedures.

We note that companies in Member States with more than one exchange may be able to benefit from choice based on specialised services e.g. expertise in property / shipping / derivatives etc. We believe that specialisation could improve the quality of services offered and enable Europe to better compete with other parts of the world. **Companies should have the choice of approval in any country in Europe, given that the purpose of EU regulation is to create a single market.** If there is no single market for companies, then we should go back to national legislation instead.

[2] art. 2 para 1 k of draft Regulation

[3] This applies to issues of non-equity securities whose denomination per unit amounts to at least 1000 euro - art. 2 para 1m ii PD 2003/71/EC

[4] art. 2 para 1 k of draft Regulation

[5] In case of a "very European" companies, issuers or their agents/advisers would need to become familiar with detailed procedures, forms and approval processes of even 28 NCAs.

[6] This applies to issues of non-equity securities whose denomination per unit amounts to at least 1000 euro - art. 2 para 1m ii PD 2003/71/EC

Suggested amendment of art.2 para 1 (m): "'home Member State' means:

(i) for all issuers of securities established in the Union ~~**which are not mentioned in point (ii)**~~, the Member State where the issuer has its registered office ***or where the securities were or are to be admitted to trading on a regulated market or where the securities are offered to the public, at the choice of the issuer, the offeror or the person asking for admission, as the case may be*****.**

2. EXEMPTIONS & THRESHOLDS

Currently, an admission to trading a venue on other than an EU regulated market does not require a prospectus. A requirement to produce a prospectus only kicks in if a company undertakes an offer to the public, although currently certain carve outs are in place:

- exemption for offers addressed solely to qualified investors (large financial and institutional investors) – generally used by smaller companies raising capital on a MTF;
- small offers of less than €5 MIO – most commonly used by SMEs seeking to raise small amounts either on a MTF or an alternative funding platform;
- offers made to less than 150 persons in each Member State – again, this is used by SMEs for small offers on a MTF or alternative listing platform;
- offers where the securities being offered are denominated in amounts of at least €100,000 – this exemption is commonly used by bond issuers in the debt markets.

These exemptions are of paramount importance for SMEs seeking to raise capital and are the principal considerations that determine the type of capital raising they are able to undertake. In order to facilitate capital raising for financing of the real economy, we believe it is crucial that those carve outs not only remain but also that are significantly widened. It is important to limit the circumstances when smaller companies are required to go through the additional cost and time of producing a prospectus when seeking to raise public equity finance. One of the issues for Europe is that many start-ups choose when they grow and scale up, to move and raise capital outside Europe. It is therefore important that the EU looks at its competitiveness against other parts of the world.

Therefore, we welcome the intention to raise the **fundraising thresholds**, although we believe that the Commission is **not ambitious enough** about it.

- In our view the **"upper" fundraising threshold** could be further **increased from the proposed EUR 10 million** (art. 3 para 2 (b) of PR COM(2015) 583), without undermining investor protection. As companies throughout the European Union are very diverse and have different growth levels and needs, we believe that it is important to ensure that enough flexibility is retained so that more companies in different Member States can take advantage of this option. This would reinforce the key message of 'one size does not fit all' and ensure that more companies could access growth opportunities.

It is useful to compare with other jurisdictions. For instance, Reg A+, recently introduced in the US, allows **fundraisings of up to US$50 million without the requirement to produce a full prospectus**, subject to the fulfilment of certain conditions and the publication of a simplified offering document.

Given that companies seeking admission to trading on MTFs are subject to various conditions, disclosure requirements and publication of documents, which could be seen as a simplified offering document (see examples in the Commission impact assessment on p 68), **we believe that the proposed €10 million threshold should be raised to a more meaningful level, which is comparable to the level established in Reg A+**, in order to increase the flexibility for SMEs to raise capital and accommodate to different sizes of companies in different EU economies.

In terms of evidence, please see the data available on the platform on minibonds[7] in Italy, where we can see that: i) the biggest amounts of issuances are between 0-50 M euro and; ii) many issuances are above the 10 M euro threshold[8]. This shows that smaller companies would benefit from raising the "upper" fundraising threshold, while contributing to growth and jobs in the EU.

We are therefore advocating for raising the **"upper" fundraising threshold** (art. 3 para 2 (b) of PR COM(2015) 583) **from € 10 MIO to € 50 MIO.**

We would also like to point out that **the restriction in the art 3 para 2 (b) to offers made only in that Member State, seems to be running counter the objectives of the Capital Markets Union, creation of a single market and promoting cross-border investment**. We believe that investors from other jurisdictions should be allowed to participate in such offers.

We propose the following amendment:

Art. 3 para 2. A Member State may exempt offers of securities to the public from the prospectus requirement of paragraph 1 provided that: ~~**(a) the offer is made only in that Member State, and**~~ ~~**(b)**~~ the total consideration of the offer is less than a monetary amount calculated over a period of 12 months, which shall not exceed EUR ~~**10 000 000**~~ 50 000 000.

- Regarding the "lower/minimum" fundraising threshold, below which Member State cannot impose any prospectus at the national level (art. 1 para 3 (d) of PR COM(2015) 583), we believe that €500K is much too low given the size of offers in many countries, as well as the costs connected to an offer or even the costs of the prospectus itself (easily €300K – 1 MIO for many smaller offers[9]). Basically there is no point doing an offer raising €500K to pay all or the majority of the fundraising for the prospectus and other offer related costs. From what we hear from the exchange operators, there are no offers below €500K anyway. Therefore, we believe that **proposed €500K should be raised to €2,5MIO.**

- We would like to strongly emphasise that a prospectus should not be required if an offer of securities is addressed to fewer than **500 natural or legal persons per Member State**, **other than qualified investors** (from 150 in the proposal).

  We are disappointed that our requests to raise this threshold have not been so far taken into account. This is a very important point which was also endorsed by the **EU IPO Task Force**, which does include retail investors' representative[10]. Please also note that **US Jobs**

[7] Minibonds are destined to smaller companies

[8] see EPIC, Minibond scoreboard market trends, main indicators as of July 31st 2015

[9] See our response to the EC consultation of May 2015 for further details on costs (p. 5)

[10] Niels Lemmers, VEB. For details on composition see p. 65 of the EU IPO Task Force Report: http://www.europeanissuers.eu/_mdb/position/290_Final_report_IPO_Task_Force_20150323.pdf

Act allows up to **2000 people** before SEC registration (equivalent of an offer to public); below 2000, this is considered as crowdfunding in USA. Increasing the threshold would also be in line with the Capital Markets Union Action Plan aiming to diversify funding options and taking into account recent developments like crowdfunding.

- To ensure a greater funding choice for companies, it is **important to keep competitive wholesale debt markets.**

The obligation to publish a prospectus does not currently apply to offers of securities whose denomination per unit amounts to at least EUR 100,000. A prospectus is still required for the admission to trading on a regulated market of these securities, although the issuer is then exempted from the obligation to establish a summary of the prospectus. Once the securities are listed on a regulated market, the issuer is also exempted from the obligation to publish financial reports pursuant to the provisions of the Transparency Directive (TD).

Creation of a well working and EU harmonised and competitive wholesale debt market has been one of the major achievements of the previous revision, giving more flexibility to companies to finance their investments and development. Considering the objectives of the Capital Markets Union these provisions should be maintained and companies should have the freedom to decide which type of investors they want to target. Repealing this exemption would add unjustified constraints on financing for companies and would risk driving capital outside Europe, as companies may find it easier to raise these funds elsewhere.

Therefore, we **express our disappointment** with the removal of **the exemption from producing a prospectus for denominations of at least 100 K** (art. 3 para 2d PD 2003/71/EC), and we request that it is restored. Many smaller companies on MTFs are using it without impairing investor protection.

We also advocate for maintaining the **lighter disclosure regime under the Prospectus Regulation** Annexes (see Annex IX and XIII) and **for an exemption from the summary requirements** (see PD Article 5(2)).

We suggest the amendment of article 1 para 3 (see the section below) as well as of art 7 para 11:

Art 7 para 11. **Where the prospectus relates to the admission to trading on a regulated market of securities having a denomination of at least EUR 100 000, there shall be no requirement to provide a summary, save where a Member State so requires in accordance with Article 25(4).**

~~**ESMA shall develop draft regulatory technical standards to specify the content and format of presentation of the historical key financial information referred to under point (b) of paragraph 6, taking into account the various types of securities and issuers. ESMA shall submit those draft regulatory technical standards to the Commission by [enter date 9 months after entry into force].**~~

~~**Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.**~~

- **Exemptions for admission to trading on a RM**

While we welcome an increase of the threshold for capital increases to 20% (art. 1 para 4 (b) PR COM(2015) 583), we do not understand the need for adding the threshold in art. 1 para 4 (b) PR COM(2015) 583).

The PD also exempts issuers asking for admission of shares resulting from the conversion or exchange of other securities, or from the exercise of rights, from the obligation to establish a prospectus. Since the issuer is already listed on a regulated market, it must comply with theTD and market abuse requirements and therefore publishes a great amount of information regarding its financial situation, prospects, corporate governance, risk factors, etc. Introducing a threshold which would trigger the publication of a prospectus for shares of the same class as shares already admitted to trading represents an unjustified burden.

We therefore would suggest that the **threshold in art. 1 para 4 (b) PR COM(2015) 583)is deleted** (see amendments in the annex).

In terms of a technical detail, we suggest replacing the term "fungible" with "securities of the same class" in art. 1 para 4 (a) to avoid confusion and make it consistent throughout the Regulation.

We therefore suggest the following amendments:

Art. 1 para 3: This Regulation shall not apply to any of the following types of offers of securities to the public:
(a) an offer of securities addressed solely to qualified investors;
(b) an offer of securities addressed to fewer than ~~**150**~~ **500** natural or legal persons per Member State, other than qualified investors;
(c) an offer of securities whose denomination per unit amounts to at least EUR 100 000;
(d) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 100 000 per investor, for each separate offer;
(e) an offer of securities with a total consideration in the Union of less than **EUR ~~500 000~~ 2 500 000**, which shall be calculated over a period of 12 months;
(f) shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;
(g) securities offered in connection with a takeover by means of an exchange offer, provided that a document is available containing information describing the transaction and its impact on the issuer;
(h) securities offered, allotted or to be allotted in connection with a merger or division, provided that a document is available containing information describing the transaction and its impact on the issuer;
(i) dividends paid out to existing shareholders in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
(j) securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer or allotment.
4. This Regulation shall not apply to the admission to trading on a regulated market of any of the following:

(a) securities ~~**fungible**~~ **of the same class as** ~~**with**~~ securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20 per cent of the number of securities already admitted to trading on the same regulated market;
(b) shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, where the resulting shares are of the same class already admitted to trading on the same regulated market, ~~**provided that the resulting shares represent, over a period of 12 months, less than 20 per cent of the number of shares of the same class already admitted to trading on the same regulated market. Where a prospectus was drawn up in accordance with either this Regulation or Directive 2003/71/EC upon the offer to the public or admission to trading of the securities giving access to the shares, or where the securities giving access to the shares were issued before the entry into force of this Regulation, this Regulation shall not apply to the admission to trading on a regulated market of the resulting shares irrespective of their proportion in relation to the number of shares of the same class already admitted to trading on the same regulated market.**~~

3. SME Growth Markets/ "Pro-SME" regime

- **A "Pro-SME" regime should apply to all companies on SME Growth Markets and also smaller companies on RM**

The EC proposes to replace proportionate disclosure regime for SMEs and companies with reduced market capitalisation (PDR) with a "minimum disclosure regime for SME". While the PDR has been applying also to companies meeting the criteria on Regulated Markets, we understand that a "minimum disclosure regime for SMEs" would only apply to companies on MTFs and not listed companies. We believe that this should be **extended to smaller companies on regulated markets as well.**

Moreover, the Commission intends to align the "Pro-SME" regime with MiFID II and therefore allow it for companies with a market cap of up to €200M. We believe that **the scope of a "Pro-SME" regime should also be extended to all issuers on SME Growth Markets**, regardless of their classification as an SME.

Otherwise, the proposal would **not be in line with the spirit of the Capital Markets Union** and Lord Hill's promise to ensure that companies get funding at different stages of growth. As a result, a lot of companies which are relatively small comparing to large blue-chip companies that have a market cap of tens of billions or even a hundred billion, risk being subject to a "Valley of Death" in raising capital. We would highlight the fact that the definitions actually used by investors on the capital markets are very different to those of EU policymakers[11].

Therefore, we urge you to follow an approach that would allow for a more "smooth transition" for such companies, instead of creating a huge financing gap that they would have difficulties to cross.

In addition, we would like to highlight the following points:

- It is important to **allow incorporation by reference** on "Pro-SME" markets;

[11] See pp 13-15 of the EuropeanIssuers / EVCA / FESE Staff Working Document which accompanied the IPO Task Force Report entitled Rebuilding IPOs in Europe: Creating Growth and Jobs in European Capital Markets.

- The possibility of drawing up the prospectus under a **format structured in the form of a questionnaire** (Article 15, (2)) should be **entirely optional**;
- **On MTFs & SME Growth Markets no pre-approval by NCA should** be required, but rather certified advisers should be appointed, as is already the case for many national markets for admission to trading (e.g. AIM in UK or Italy, First North in Scandinavia, NewConnect in Poland[12]).
- It should be ensured that **companies transitioning from a SME Growth Market to a regulated market do not face additional unnecessary burdens**. We believe that these issuers should be exempt from producing a full prospectus when joining a regulated market from a SME Growth Market, as they would be already compliant with disclosure requirements imposed by EU Directives and the need to produce a full prospectus would only translate into an unnecessary increase of costs.

- We believe that Article 15 should be amended expressly to recognise and to underline the "Pro-SME" regime principle. The Article should provide a clean and concrete framework for this approach by specifying the overarching principles that should be included in the prospectus drawn under the minimum disclosure regime for SMEs. Starting from the basis that all information that is already in the public domain through legal or regulatory disclosure should not have to be repeated (unless there is a material change in circumstances), there should continue to be an overriding principle that all information about the issuer and the offer that is necessary to make an investment decision is included in the document.

Such prospectus would focus on the **key details of the offer, using simple language and making use of incorporation by reference**. Please see annex 2 regarding what information, we believe, should be included in such a prospectus. This list is not exhaustive, but rather one that suggests the minimum disclosures required.

The core information points would focus on: Name of the issuer and persons responsible; Business overview and Current Trading; Number and nature of the securities forming part of the offer; Terms and Conditions of the offer (including Issue Price); Information on Underwriting / Placing; Information on issued share capital (before and after the offer) – including aggregate information on rights giving the option to subscribe for, or convert into, shares; Proceeds of the offer and expenses; Reasons for the offer and Intended use of net proceeds; Risks Factors; Working Capital; Profit Forecast (if relevant); Financial Information (incorporated by reference); Pro Forma financial Information (if relevant); No significant change statement (from date of latest published financial information); Statement on Material Litigation; and Dividend Policy.

We expect a **Prospectus drawn up in this form to be much more succinct, simpler, shorter in length and less costly for SMEs to produce**. In these circumstances, we see very little merit in requiring issuers, who are SMEs to produce a summary of such a prospectus, particularly if the prospectus is drawn up as a single document. This will avoid unnecessary repetition of relevant information and would reduce costs. Dispensing with a summary, in these cases, is highly unlikely to detract from the principle of investor protection.

[12] See references to authorised or certified advisers, NOMADs and sponsors in the Glossary to IPO Report.

Therefore, we believe that Article 15 should be amended as follows:

1. SMEs may choose to draw up a prospectus under the minimum disclosure regime for SMEs in the case of an offer of securities to the public ~~provided that they have no securities admitted to trading on a regulated market.~~ ***on a regulated market or MTF or SME Growth Market.***

The minimum disclosure regime shall consist of a specific registration document and a specific securities note. ***These documents shall include the information required in the prospectus schedules in simple language and using incorporation by reference where appropriate.***
A summary is not required if the prospectus is drawn up as a single document.
The prospectus schedules shall determine the disclosures required as a minimum, which shall cover:
a) Name of the issuer and persons responsible
b) Business overview and Current Trading
c) Number and nature of the securities forming part of the offer
d) Terms and Conditions of the Offer (including Issue Price)
e) Information on Underwriting / Placing
f) Information on issued share capital (before and after the offer) – including aggregate information on rights giving the option to subscribe for, or convert into, shares
g) Proceeds of the offer and expenses
h) Reasons for the offer and Intended use of net proceeds
i) Risks Factors
j) Working Capital
k) Profit Forecast (if relevant)
l) Financial Information (incorporated by reference)
m) Pro Forma financial Information (if relevant)
n) No significant change statement (from date of latest published financial information)
o) Statement on Material Litigation
p) Dividend Policy

When establishing the corresponding prospectuses schedules, the information shall be adapted to the size and to the length of the track record of such companies.

2. Companies making use of the minimum disclosure regime referred to in paragraph 1 and offering shares or non-equity securities which are not subordinated, convertible or exchangeable, do not give a right to subscribe to or acquire other types of securities and are not linked to a derivative instrument, ~~shall be entitled to~~ may, ***at their option***, draw up a prospectus under a format structured in the form of a questionnaire with standardised text, to be filled in by the issuer. For this purpose, both the specific registration document and the specific securities note shall be structured in that form. ***This format is optional and does not exclude issuers from drawing up the prospectus in the minimum disclosure regime format referred to in paragraph 1.***

3. The Commission shall adopt delegated acts in accordance with Article 42 to specify the reduced information to be included in the schedules applicable under the minimum disclosure regime ***under paragraph 1*** and the optional format allowed under paragraph 2.

Those delegated acts shall be adopted by [enter date of application].

4. ESMA shall develop guidelines addressed to SMEs on how to draw up a prospectus under the ***optional*** format referred to in paragraph 2. The procedures set out in subparagraphs 2 to 4 of Article 16(3) of Regulation (EU) No 1095/2010 shall not apply.

4. SCRUTINY & APPROVAL BY NCA

We understand that the Commission's intention is to simplify secondary issuances, but we do **not think that the proposals are ambitious enough:**

- See our point on **definition of the Home Member State** which is competent to approve the prospectus. If companies do not have the choice of the Home Member State, there will be no incentive for the National Competent Authorities to improve their practices of approving prospectuses. We believe that the quality of the current approval process should be improved to allow companies to raise funds in a faster and less costly manner in Europe and thus give European markets a competitive edge over other markets in the world. By contrast to some other jurisdictions, the approval process is inefficient and expensive from the corporate or advisory perspective, and the levels of market expertise within the NCAs are variable.

Companies which choose to raise capital in New York do not then have to approach Delaware, Texas and North Carolina in order to sell to investors in those states. Nor are they obliged to pay several of the other 49 states €3000 each to approve marketing documents. Once marketing materials for retail investors have been approved in one Member State, they should be able to be used in others without further approvals.

- **Exemption from pre-approval for secondary offerings is needed**

In order to ensure a truly proportionate regime for the secondary issuances and to make sure that this revision is truly ambitious, it is important to **abolish the pre-approval by a NCA for secondary offerings**, especially for frequent issuers. Pre-approval is one of main impediments to issuance as the process is often very slow and the opportunities faced by companies may be missed if they have to wait too long. Post approval (risk-based spot checks) should be sufficient for the authorities in such cases, as we understand may be the case in Australia.

Possible amendment:

Art. 19 para 1: No prospectus shall be published until it has been approved by the competent authority of the home Member State, **with the exception of either of the following cases where:**
(a) issuers have the status of frequent issuer;
(b) issuers draw up a prospectus under the minimum disclosure regime for SMEs in line with art.15;
(c) offers of securities which are of the same class as securities already admitted to trading on the same regulated market or growth markets (secondary issuances).

As we already pointed out in our response to the Commission consultation, it is also important to explicitly distinguish between IPOs and Secondary Offers by introducing the concept of an IPO and Secondary Public Offer in the draft regulation (amendment to art.1). Otherwise the creation of a truly proportionate regime may fail.

- **Delay, time limits & supplementary information**

We fear that the change of the wording as to the reasons for the NCA to delay approval may even deteriorate current practices in some MS.

Change of text in para 4: **change of grounds/reasons to delay the approval** from *"incompleteness"* to *"not meeting standards of completeness, comprehensibility and consistency necessary for its approval"* in the proposal for regulation. The Competent Authority performs a completeness check before the time limit for approval starts running. While, the new wording allows for more subjectivity and therefore could result in even more delays than nowadays. The NCA's binding comments should be limited to formal compliance with the Regulation; additional comments could be provided but should not be binding.

Additionally, the already existing reference in the same paragraph to "**supplementary information**" may result in a significant prolongation of the approval process (it happens that NCA does not ask for the supplementary information up front but one at a time – as a result the delay may be equal to X times 10 days as each time the 10 day period starts running from the beginning). Given the importance of timing to meet the right market windows in the IPO process, this could damage the company's and investors' chances of a successful IPO. Again this could make raising capital in other jurisdictions outside Europe more attractive.

In order to make this process more efficient we suggest the following amendments:

Art. 19 para 2: The competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market, of its decision regarding the approval of the prospectus within 10 working days of the submission of the draft prospectus.

~~**Where the competent authority fails to take a decision on the prospectus within the time limits laid down in this paragraph and paragraphs 3 and 5, this shall not be deemed to constitute approval of the application.**~~ (…)

Art. 19 para 4: Where the competent authority finds, **on reasonable grounds**, that the draft prospectus **is incomplete**: ~~**does not meet the standards of completeness, comprehensibility and consistency necessary for its approval and/or that amendments or supplementary information are needed**~~:
- it shall inform the issuer, the offeror or the person asking for admission to trading on a regulated market within 10 working days of the submission of the draft prospectus and/or supplementary information; and
- the time limit referred to in paragraphs 2 **and 3** shall apply from the date on which an amended draft prospectus and/or supplementary information are submitted to the competent authority.

Art. 19 para 5 should be repealed as we believe there is no need for pre-approval for secondary issuances, including frequent issuers.

Given the Commission's intention of creating a Digital Single Europe, we believe that NCAs should be obliged to accept electronic filings and should communicate with companies **fully electronically**. Companies should be able to communicate with the regulator in English where the Prospectus itself is being filed in English or where there is a strong cross-border aspect to the offering (this should not be limited to dual listings).

- **Ensure appropriate stakeholder consultation**

Paragraph 12 requires ESMA to organise and conduct at least one peer review of the scrutiny and approval procedures of competent authorities. We think this is a very good approach, but would like to suggest that in line with Better Regulation practices, ESMA must take into account the opinions from the Securities and Markets Stakeholder Group.

Therefore, we propose the following amendment:

Art. 19 para 12 should then read as follows: Without prejudice to Article 30 of Regulation (EU) No 1095/2010, ESMA shall organise and conduct at least one peer review of the scrutiny and approval procedures of competent authorities, including notifications of approval between competent authorities. The peer review shall also assess the impact of different approaches with regard to scrutiny and approval by competent authorities on issuers' ability to raise capital in the European Union. The report on this peer review shall be published no later than three years after the date of application of this Regulation. In the context of this peer review, ESMA shall ~~where appropriate, request opinions or~~ **take into account** advice from the Securities and Markets Stakeholder Group referred to in Article 37 of Regulation (EU) No 1095/2010.

5. THE PROSPECTUS SUMMARY

We appreciate the Commission's drafting mentioning that a summary prospectus should be read as an introduction to the prospectus (art. 7 para 5 (a)) and that civil liability attaches only where the summary is misleading, inaccurate or inconsistent when read together with other parts of the prospectus (…) (art. 7 para 5 (d). Nevertheless, given diverging liability regimes in Europe, we would like to propose some further amendments it order to ensure that in all EU jurisdictions it is clear that the summary should be considered as an introduction to the prospectus and that no liability attaches to the summary alone, but only when the summary is read together with the entire prospectus.

Art. 7 para 1. The prospectus shall include a summary providing ***an introduction to*** the key information that investors need in order to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered or admitted to trading on a regulated market, and that ***should be*** ~~when~~ read together with the other parts of the prospectus ***to*** aid~~s~~ investors when considering whether to invest in such securities. 2. The content of the summary shall be accurate, fair, clear and not misleading. It shall be consistent with the other parts of the prospectus.

2a. The summary should be read as an introduction to the prospectus. It should include the warnings listed in points (a) to (d) of paragraph 5.
2b. Liability is not attached to the summary itself, but only when read together with the other parts of the prospectus.
2c. The summary should include reference to the most material risks specific to the issuer and the securities; reference should be made in the summary that these risks cannot be read in isolation and must be read together with the risks section contained in the prospectus.

Page limit

A great majority of our members believe that it is not adequate to impose a page limit to the summary of the prospectus. This could potentially originate liability concerns as well as an increase in legal fees for the additional time required for drafting. Therefore, we propose the following amendment:

Art. 7 para 3. The summary shall be drawn up as a short document written in a concise manner ~~**and of a maximum of six sides of A4-sized paper when printed**~~. It shall:
(a) be presented and laid out in a way that is easy to read, using characters of readable size;
(b) be written in a language and a style that facilitate the understanding of the information, in particular, in language that is clear, ~~**non-technical**~~, succinct and comprehensible.
(…)

If, however, a page limit is considered an essential requirement, we would argue that there should be the possibility for the summary to be longer than the defined number of pages as a discretionary derogation from the NCA, attributed to particular cases where the summary needs to be longer. **In such a case**, the following amendment should be included in Article 7:

Art 7para 3 (c). The NCA may grant a derogation to allow the issuer to provide a summary longer than required in paragraph 3, in cases where the complexity of the issuer's business, the nature of the issue, or the nature of the securities themselves makes this essential.

This would ensure that a page limit imposed on the length of the summary does not disproportionally affect issuers when choosing which information to include in the summary and which to leave out and is clear regarding the purpose of the summary.

Risk factors in a summary

We further believe that to prescribe a maximum number of risks to be included in the Regulation could open issuers up to additional liability and would be both unhelpful and unclear for investors. If the issuer starts arbitrarily cutting down risk factors when preparing the summary of the prospectus, then the company might not be providing all the key information derived from the prospectus in an accurate, fair, clear and not misleading way and therefore the company will be liable – especially in a case where a risk factor, that was not included in the summary because not considered at that time as one of the most significant, materialises for a company. Moreover, the proposal regarding limitation of risks is not in line with international practice or standards (e.g. any limitation on risk

factors is not foreseen by the IOSCO standards). We therefore believe that Article 7, (6) point (c) and (7) point (d) should be amended in the following way:

Art. 7 para 6 (c) under a sub-section titled 'What are the key risks that are specific to the issuer?' a brief description of ~~no more than five of~~ the most material risk factors specific to the issuer ~~contained in the category of highest materiality~~ according to ***the conditions set in*** Article 16~~.~~***, and containing the warning that the risk factors must be read in the context of the whole prospectus before making an investment decision.***

[...]

Art. 7 para 7 (d) under a sub-section titled 'What are the key risks that are specific to the securities?' a brief description of ~~no more than five of~~ the most material risk factors specific to the securities, ~~contained in the category of highest materiality~~ according to ***the conditions set in*** Article 16~~.~~***, and containing the warning that the risk factors must be read in the context of the whole prospectus before making an investment decision.***

It is also important to allow both **incorporation by reference and cross-references in the prospectus summary** to other sections in the full prospectus in order to ensure that investors are properly informed, while enabling limiting the length of the prospectus summary.

Art. 7 para 10: The summary **may ~~shall not~~** contain cross-references to other parts of the prospectus **~~but shall not contain~~ and ~~or~~** incorporate information by reference.

6. RISK FACTORS

In Article 16 the Commission proposes that risk factors shall be allocated across a maximum of three distinct categories which shall differentiate them by their relative materiality based on the issuer's assessment of the probability of their occurrence and the expected magnitude of their negative impact. In Article 7 the Commission proposes to restrict to the 5 most material risks specific to the issuer in a summary prospectus.

Our members are very concerned with:

- **risk factors categorisation** proposed by the Commission (see above). We are **against any hierarchy of risks**, for various reasons:
    - Europe needs to create more of an equity culture in order to create better functioning and competitive capital markets, which means greater acceptance of risk;
    - the requirement would be formalistic and could result in unintended consequences;
    - it could expose issuers to an unacceptable level of increased liability, given the potential for misclassification;
    - materiality is very difficult to assess, given the differing characteristics of risks (probability and timing of occurrence, as well as uncertain effects).

- risks are rapidly changing and evolving, while lawsuits are brought with the benefit of hindsight;
- the materiality of risks may be subjective: what are the most material risks to certain investors may not be for others. E.g. if certain investors have a specific focus on green investments, then corporate social responsibility risks will be more material than for other investors, etc.
- the proposed materiality test re risk factors categorisation would be unprecedented and not in line with well-established practices internationally, which could be difficult and costly both to companies issuing on different continents as well as for international investors who would end up with less comparable documents

- We are also concerned with **a limitation of key risks in the summary** to a specific number as it would pose significant challenges for issuers and would be very risky in terms of liability. Moreover, the proposal is not in line with international practice or standards (e.g. any limitation on risk factors is not foreseen by the IOSCO standards). See the section on prospectus summary for more detail on this.

We propose the following amendments[13]:

Art. 16 para 1: The risk factors featured in a prospectus shall be limited to risks which are specific to the issuer and/or the securities and are material for taking an informed investment decision, as corroborated by the content of the registration document and the securities note. ~~They shall be allocated across a maximum of three distinct categories which shall differentiate them by their relative materiality based on the issuer's assessment of the probability of their occurrence and the expected magnitude of their negative impact.~~ **Risk factors can be allocated by distinct categories according to their type.**

2. ESMA shall develop guidelines on the ~~**assessment by competent authorities of the specificity and materiality of risk factors and on the allocation of risk factors across categories**~~ **allocation of risk factors across categories depending on their nature and characteristics**.

7. INCORPORATION BY REFERENCE

Companies would like to use incorporation by reference more widely in order to avoid the unnecessary repetition of information. We also would like to emphasise that incorporation by reference should be **allowed both on regulated markets** (equity and debt, therefore including **base prospectus**) and on the **SME Growth Markets.**

We suggest the following amendments:

Art. 18 para 1 Information may be incorporated by reference in a prospectus **or a base prospectus** where it has been previously or simultaneously published electronically, drawn up in a language fulfilling the requirements of Article 25 and ~~**where it is contained in one of the following documents**~~ **filed in the context of disclosure requirements of European Union legislation or filed under the rules of the trading venue or SME Growth Market, for example:**

[13] Please also see an example of how risk factors could be presented as an alternative to the Commission proposal: information document of L'Oréal (pp. 25-35). Of course this is just an example to visualise what we propose.

(a) documents which have been approved by ~~the~~ **a** competent authority ~~of the home Member State~~, or filed with it, in accordance with this Regulation;
(b) documents referred to in points (f) and (g) of Article 1(3) and points (d) and (e) of Article 1(4);
(c) regulated information as defined in point (l) of Article 2(1);
(d) annual and interim financial information;
(e) audit reports and financial statements;
(f) management reports as defined in Article 19 of Directive 2013/34/EU of the European Parliament and of the Council[24];
(g) corporate governance statements as defined in Article 20 of Directive 2013/34/EU;
(h) [remuneration reports as defined in Article [X] of [*revised Shareholders Rights Directive25*]
(i) memorandum and articles of association.

The above mentioned list shall be non-exhaustive.
(…)

~~**Para 4. In order to ensure consistent harmonisation in relation to this Article, ESMA may develop draft regulatory technical standards to update the list mentioned in paragraph 1 by including additional types of documents required under Union law to be filed with or approved by a public authority.**~~

8. SECONDARY ISSUANCES

We welcome the Commission's intention to introduce a minimum disclosure regime for secondary issuances. Nevertheless, we believe that certain adjustments are needed.

Given that companies admitted to trading on the Regulated Market or SME growth markets already produce a great deal of information that is available publicly (prospectus to get admission to trading on a Regulated Market, admission documents for SME Growth Markets in case of exemptions, and on-going disclosure requirements under Market Abuse Regulation and Transparency Directive), we believe that for **secondary offers simply a securities note should be required**.

We believe that it would be beneficial to provide more detail in level I or at least some principles that would ensure that the proportional disclosure regime for secondary issuances is truly proportional.

We therefore suggest the following amendment:

Art. 14 para 2: By derogation to article 6(1), and without prejudice to Article 17(2), **the ~~prospectus~~ securities note** drawn up under the minimum disclosure regime for secondary issuances shall contain ~~the relevant~~ **information** ~~which is necessary to enable investors to understand the prospects of the issuer and of any guarantor, based on minimum financial information included or incorporated by reference into the prospectus covering the last financial year only,~~ **regarding the characteristics, risks** and rights attached to the securities, the reasons for the issuance and its impact on the issuer, **the characteristics and timetable of the offer and/or admission and updated key information regarding the financial situation of the issuer, its risks, its activities, markets and prospects.** The information contained in **the ~~prospectus~~ securities note** shall be presented in an

easily analysable and comprehensible form in order to enable investors to make an informed investment decision. (…)

As a general point, we would like to have a principle in the Article added that all information already disclosed to the market should not have to be included in the secondary offer prospectus. Please also see in the annex a proposal on what information could be required in such alleviated regime.

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