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RESPONSE TO THE CALL FOR EVIDENCE ON THE EU REGULATORY FRAMEWORK FOR FINANCIAL SERVICES

29 JANUARY 2016

Final

Financial Regulation: Call for evidence

Dear Madam/Sir,

EuropeanIssuers, representing the interests of quoted companies across Europe, very much welcomes **the call for evidence on the EU regulatory framework for financial services**, launched by the European Commission end of last year. With membership including both national associations and companies from all sectors in 14 European countries, 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.

Over the years, EU financial regulation has become extremely complex. As a result, the costs to companies are increasingly higher. This has a negative impact on all quoted companies, although often smaller ones are affected disproportionately due to a lack of available resources. Regulation is thus not designed for the needs of all the approximately 13,000 quoted companies across Europe.

We therefore believe that the **call for evidence on the EU regulatory framework for financial services measuring the possible impact and interaction of financial legislation** is an important step forward in order to fully understand burdens on companies.

To go one step further and to avoid inconsistencies as well as incoherencies in the future, EuropeanIssuers recommends for future initiatives of the EU Commission to consider new proposal only when absolutely necessary and following conducting well-grounded and well-designed impact assessment studies (following the "Better regulation" approach).

Consequently, we think that EU institutions should spend more time on deep and thorough impact assessments, including scrutiny of consequences and interactions of new proposals with the existing legislation. Impact assessments should be especially carried out by the Commission but – pursuant to the Better Regulation Guidelines - also by European Parliament and Council, in advance of substantial amendments.

Moreover, the consultation of various stakeholders should be enhanced. For instance, we would appreciate to see a higher representation of issuers within various stakeholder and expert groups, maybe even by establishing a dedicated 'issuers experts group'.

As appendix to this letter you will find examples of existing and proposed financial regulation that have negative effects on the financing of the economy or are inconsistent. We remain at your disposal should you wish to discuss these examples further.

Yours sincerely,

Florence Bindelle

Secretary General of EuropeanIssuers

I. GENERAL REMARKS

We appreciate the initiative of the EU Commission to conduct an impact assessment of the regulatory framework for financial services. We are supporting this approach not only by giving evidence on regulatory drawbacks (please see Section II below) but also recommendations on how to avoid such drawbacks in future:

A. To avoid drawbacks (as possible) in general

First of all, financial and non-financial companies have had changed their internal accounting, compliance and reporting systems a lot in the past and have reached more than a sufficient level of transparency and efficiency. There is enough existing regulation in that respect which is why we recommend EU Commission to consider new proposal only when absolute necessary and following well-grounded and well-designed impact assessment studies (following the "Better regulation" approach).

Consequently, we think that EU institutions should spent more time on deep and thorough impact assessments, including scrutiny of consequences and interactions of new proposals with the existing legislation. Impact assessments should be especially carried out by the Commission but – pursuant to the Better Regulation Guidelines - also by European Parliament and Council, in advance of substantial amendments. Where the European Parliament and the Council find an agreement significantly different from the initial Commission proposal, they should assess the likely economic, social and environmental impact and regulatory burden before any final decision is taken.

Moreover, the consultation of various stakeholders should be enhanced. For instance, we would like to see a higher representation of issuers within various stakeholder and expert groups, maybe even to create a dedicated 'issuers experts group'.

B. To avoid inconsistencies between level I and other level-texts

Under "Issue 12" we give much evidence on the inconsistencies between level I and other level texts, which are primarily caused by delegation of crucial political issues or by extension of ESAs mandate above the set conditions by level I. To prevent this, we firstly recommend to ensure that all crucial political issues of the respective dossier are tackled within the level 1 legislative procedure and to avoid the temptation of overcoming possible deadlocks in negotiations by deferring discussions on some key contentious matters to the ESAs. In addition, to ensure that the ESAs do not exceed their mandates, the Rapporteur of the file within the EU Parliament and a person in charge within the Presidency of the Council of the EU should be informed about the drafts developments within the ESAs. This approach does not require to change existing European rules but would increase confidence in sublevel-rules and are therefore a good alternative to the proposed mandatory involvement of the entire EU Parliament.

II. GIVING EVIDENCE OF REGULATORY DRAWBACKS

Although the call for evidence is primarily dedicated to financial services, we will take the chance to give evidence on the entire regulatory framework concerning capital market issues. Since the call is seeking for evidence on how to increase capital market finance of companies, especially SMEs, and among others how markets become more liquid, we believe the EU Commission should consider any legislation which constraints companies' access to capital market finance (e.g. initiatives like the Market Abuse Regulation, the Accounting Directive, the Transparency Directive, the proposed Prospectus Regulation). In order to get a comprehensive view, we suggest to look at aspects like what causes the lack of liquidity, where investors are over or not sufficiently protected and where additional burdens are disproportionate comparing with the outcome.

We strongly recommend to **initiate a new call for evidence with a special focus on the impact of non-financial companies**.

To support the Commission's initiative, we provide evidence on legislation which does not meet its initial objectives, which is inconsistent with other legislation or cannot work because of incoherencies between different legislative acts We also propose two ways on how to lower the risk of inefficient legislation.

Our considerations are based on three general assumptions:

- The requirement to disclose information is only justified if a (typical) market, investor or oversight would make this information conditional on his/her decision.
- Contradictory information will confuse markets and investors and is therefore not only redundant but also detrimental to any legislative objective.
- Burdens on financial and non-financial companies can only be justified if they reduce risks and are of benefit for investors.

With regard to these general assumptions, we analysed the EU regulatory framework and provided with as much evidence as we found regarding deficits in EU legislation.

In our view this consultation is not only dedicated to questions of level I rules such as directives and regulations, but also to level II rules like delegated acts, level III rules like guidelines, recommendations, Q&As, national rules transposing EU law (e.g. gold-plating) and any further official rule, decision or opinion (e.g. enforcement) which influences issuers, intermediaries and/or stakeholders within the EU regulatory framework.[1] Furthermore, we have included future or proposed rules if they are likely to miss the objectives of this consultation.

Finally, please note that because of the structure of the consultation, some evidences are falling under more than one category/sub-category. As a result, some evidences are just repeated.

[1] As the EU Commission intends to do, see p. 5 of the consultation document.

Issue 1: Unnecessary regulatory constraints on financing

Example 1: Negative effects of an EU Financial Transaction Tax

The Commission's proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax (EU FTT) would undermine the attractiveness of the taxation area. It would deeply affect non-financial companies and be contrary to the objectives pursued at the European level. This taxation would have considerably negative direct and indirect effects on non-financial companies' financing, especially long-term, hedging and intragroup management activities, even though they are already in great difficulty in the current economic and financial context. An EU FTT would also affect the liquidity and prices of non-financial companies' equity, as well as of other financial instruments used to hedge corporate risks, to manage the pensions of their employees and former employees and to manage their treasury/liquidity. Moreover, the return from treasury/liquidity management could be affected to the point of stifling the money market and the repo market. The absence of exemption from intragroup transactions would further increase the tax burden and greatly reduce the necessary flow of liquidity within groups.

The consulting firm Oliver Wyman studied the impact of the proposed EU FTT on end users and highlighted two effects that have been underestimated (« Impact of the EU 11 FTT on end-users », 2013):

- Cascading taxes paid in the financial system are too large to be absorbed by the financial system and so would in large part be passed on to end users;
- Reduced liquidity in the system would increase transaction costs for end-users.

More particularly, companies would face annual costs of EUR 8 - 10 billion, equivalent to 4 - 5% of post-tax profits in the impacted economies; investors would face a one-off decline in the value of their investments of 4 - 5% (equivalent to a EUR 260 - 340 billion decline in asset values). In addition, they will face annual costs of EUR 5 - 15 billion in increased risk management costs.

Matheson analysed existing literature on financial transactions taxes and came to the conclusion that such taxes create many distortions that militate against using taxes to raise revenue (« Taxing Financial Transactions: Issues and Evidence », IMF Working Paper, 2011): increased cost of capital for issuers, reduction in trading volume and market liquidity and inefficiency in regulating financial markets and preventing bubbles.

As a result, we strongly advocate for a withdrawal of the proposal.

Example 2: Use of derivatives for buy-back programs (Regulation (EC) n°2273/2003 of 22 December 2003 implementing Directive 2003/6/EC; Regulation (EU) n°596/2014 of 16 April 2014 on market abuse (MAR); ESMA's Final report on draft technical standards on the Market Abuse Regulation (ESMA/2015/1455))

Regulation (EC) n°2273/2003 offers a safe harbour for buy-back programs carried out by issuers whose securities are admitted to trading on a regulated market, provided that these programs comply with conditions laid down in the regulation in terms of objectives, disclosure and reporting requirements, trading conditions, etc. In particular, article 5 of Regulation (EC) n°2273/2003 stipulates that « *Where the issuer carries out the purchase of own shares **through derivative financial instruments**, the exercise price of those derivative financial instruments shall not be above the higher of the price of the last independent trade and the highest current independent bid*. »

These provisions will be replaced as of July 2016 by the provisions of MAR (article 5) which do not make any reference to the use of derivative instruments. Moreover, in its Final report on draft technical standards on MAR, the ESMA makes a judgment call and excludes the use of derivative instruments: « *ESMA also believes derivatives are not suitable for granting a safe harbour as it would be very difficult to monitor price and volume limits. ESMA also thinks that by using derivatives it could be relatively easy to circumvent the prohibition of market manipulation. Although derivatives can be used for buying back shares, ESMA is of the opinion that their complexity and particular features make them not appropriate for the purposes of buy-back programs in accordance with Article 5 of MAR, considering the dependence on too many factors like strike, time, and other elements that cannot be calculated in advance with certaint*y. »

Derivative instruments are useful tools issuers can use when implementing buy-back programs in order to pursue, more specifically, the objective to meet obligations arising from exchangeable debt securities or allocation of shares to employees. Excluding derivatives instruments from the safe harbor for buy-back programs will force issuers to hold the shares and impose constraints on the sound management of their treasury.

We strongly advocate for an amendment of MAR in order to explicitly allow the use of derivative instruments in the implementation of buy-back programs.

Issue 2: Market Liquidity

No EuropeanIssuers example

Issue 3: Investor and consumer protection

In general, we recognize an overwhelming amount of bureaucratic rules without a proportionate effect for the degree of investor protection. These rules need to be reduces in order to give companies, intermediaries and stakeholders a comprehensible regulatory framework they are able to act within without undue obstacles, costs and efforts.

Issue 4: Proportionality/preserving diversity in the EU financial sector

No EuropeanIssuers example

Issue 5: Excessive compliance costs and complexity

Example 1: Documentation of market soundings (Market Abuse Regulation (EU) No. 596/2014 (MAR) /level 2-text)

Art. 11 of the Market Abuse Regulation (EU) No. 596/2014 (MAR) provides detailed requirements on how to record a market sounding. Pursuant to paragraph 3 the "disclosing market participant" (DMP) has even to record its conclusion about the disclosure of information which is not assessed as inside information. Furthermore, paragraph 5 requires a detailed documentation of the communication with any possible investor. Among others the DMP has to inform the person receiving the market sounding that he is prohibited from using that information. Usually this person receiving the market sounding is an institutional investor and knows how to deal with inside information. The documentation is therefore only burdensome.

Hence, we recommend only to oblige people to bear insider rules in mind. In this case, detailed descriptions included in ESMA's Final Report of draft technical standards on the Market Abuse Regulation ESMA/2015/1455 are not necessary.

Example 2: Envisaged obligation to file annual financial statements in the structured electronic format XBRL/iXBRL under the Transparency Directive 2004/109/EU (TD)

According to Art. 4 para. 7 of the TD, issuers have to file their annual reports in an electronic format by 2020. ESMA is currently developing Regulatory Technical Standards to specify this format. In the respective consultation paper ESMA reaches the conclusion that issuers will have to file their consolidated financial IFRS statements in the so-called XBRL format despite massive criticism by issuers across Europe and even though there is no indication for a clear market demand. If ESMA's proposal were accepted issuers would face massive additional compliance costs as well as legal uncertainty though the potential benefits for investors are small, if there are any.

We suggest ESMA to choose the easiest and most efficient solution by proposing the electronic publication of PDF-report, which is also proved to be preferred by investors (FRC Reporting Lab did some testing). **Final RTS thus have to be redrafted accordingly. Otherwise the XBRL-reporting duty should be excluded in the TD text on level 1.**

Example 3: The audit reform runs counter its objectives and will cause unjustified high compliance costs (Article 17 of Regulation no. 537/2014)

Article 17 of Regulation no. 537/2014 requires Europe-wide to rotate audit firms after a 10 years' period. However, the Regulation also allows Member States to either extend or reduce the mentioned rotation period within certain limits. This leads to a situation where a patchwork of different rotation cycles in EU Member States is to be expected. One of the first Member States having implemented the Regulation has taken a ten-year approach. Other Member States might opt for an extension. Some Member States even plan to differentiate between different industries (e.g. Sweden is granting extension periods only for non-financial services industries).

For EU-wide operating groups of companies, the patchwork of different rotation periods throughout Europe results in a situation, where the audit of the group's consolidated financial statements, exclusively conducted and steered by the parent group auditor will nearly be impossible. Groups of companies usually engage a network of auditors to ensure timely and reliable provision of audit services. However, under the new EU audit legislation, audit committees at group level will need to take into account all different rotation periods in the various member states. This may create situations where it will simply not be possible to have a single audit firm network auditing all relevant entities of a group.

The above mentioned scenario will not only unnecessarily increase the complexity on group level, leading to recurring higher costs for groups of companies in Europe, but also runs counter the objectives of the EU-Audit reform: In de facto not being able to only engage one audit firm for the whole group, the necessary overview for providing high quality audit will be missing. A decrease of audit quality and consistency is to be feared. Furthermore, the efficiency of having only one network of auditors both from a timing and reliability perspective would be gone.

While the supreme parent company and all but one of its PIE subsidiaries reside in Member States A with a rotation period of 10 years, one subsidiary is located in Member State B which exercised its option to reduce the maximum rotation period to up to 7 years. There are two possibilities to handle this situation:

- Each group company has its own rotation period, resulting in different audit firms being engaged with different companies. This would significantly complicate the audit for the group auditor and increase the risk for uniform group accounting policies not being applied consistently. The communication between several different auditors in various Member States, who have been providing audit services for a company for a different amount of time and have different level of knowledge about the company, would inevitably be less efficient and end up in complex coordination processes. This, in turn, would lead to higher costs, inefficiencies and a higher risk of audit errors. Besides, if a PIE subsidiary has to appoint a new auditor after 7 years, this may effectively predetermine the parent's auditor selection 3 years later (and thus limiting its freedom of choice), bearing in mind the objective of a cohesive group-wide audit process.

- Both the parent and all other group companies also reduce the period to seven years in order to ensure a consistent audit process, meaning that one audit firm will be responsible for the whole group. This means that the parent and all group companies will need to follow the PIE with the most restrictive exercise of the Member State options or, to put it bluntly, the tail is wagging the dog. This would effectively undermine a parent company's right to rotate auditors based on the 10-year period legislation in its home country which, in addition, coincides with the period envisioned by the EU Audit Regulation. Moreover, a more frequent rotation would prevent auditors from gaining deep insight into a company, which, as a result, would cause a loss of knowledge and a higher risk of audit errors.

EuropeanIssuers recommends an amendment of Article 17 of Regulation no. 537/2014 in the sense that it should be the supreme parent company's regime which determines the rotation period for all entities of the group being affected by the Regulation. By doing so, the above mentioned inefficiencies would be remedied.

For instance, such an approach is also taken regarding the requirement of having an audit committee only at group level (See Article 39 of the revised EU Audit Directive). Another example of a pan-European group perspective is the requirement to prepare group accounts. Only the supreme parent company is required to prepare consolidated financial statements.

Example 4: The audit of the group`s consolidated financial statements will lead in specific situations to unacceptable compliance costs (Art. 5(1) Regulation (EU) No. 537/2014)

Art. 5 (1) of Regulation no. 537/2014 establishes a blacklist of prohibited non-audit services which cannot be provided by the statutory auditor and its network. Member States are allowed to add services to the blacklist or to remove certain services from the list. At the end, it might be possible that every Member State will have adopted a different blacklist. The blacklist is not only applicable to the parent company and its public interest entities but also to controlled subsidiaries. As a consequence, also group entities that are not public interest entities subject or not even subject to statutory audit, will fall under the scope of the Regulation. According to an interpretation of the European Commission in September 2014 (Q&A document), these group entities have to follow the black list as implemented in their country of residence.

For EU groups of companies, this heavily complicates current practices where the compliance with auditor independence requirements is usually centrally monitored at the level of the supreme parent company. In the future, it will become extremely difficult for the parent company to ensure compliance with 28 variations of the black list. Thereby, the audit of the group's consolidated financial statements, exclusively conducted and steered by the parent group auditor will become nearly impossible. The situation will lead to unnecessary inefficiencies and excessive, recurring compliance costs while at the same time not meeting the objectives set out in the Regulation efficiently and effectively.

As with the example of rotation periods mentioned above, the complexity of the additional requirements unnecessarily hampers EU groups ability to focus on their prime activities to generate growth and to remain competitive.

The parent company's Member State A permits auditors to provide tax services whereas a PIE subsidiary's Member State B has put tax services on its "black list". As a result, in order to ensure a comprehensive and efficient tax consultancy service by one firm for the whole group, the parent company will be practically forced to assign all these (group-wide) services to a third party. Apart from the huge administrative effort of replacing the statutory auditor, cost savings will be lost as well as in-depth knowledge arising from the combination of auditing and tax consultancy activities.

Again, we believe that it is detrimental that this situation will effectively encroach upon a parent company's right, in accordance with its home country's law, to obtain the best and widest possible consultancy services for its group.

We suggest the change of Art. 5 (1) in the way that in a group structure the applicable black list should be the one adopted by the Member State where the supreme parent company of the EU group is residing.

Example 5: Effective monitoring of the proposed cap at various levels of a group is difficult to achieve and will entail excessive compliance costs (Art. 4 (2) of Regulation no. 537/2014)

Art. 4 (2) of Regulation no. 537/2014 introduces a cap on the volume of non-audit services to be provided by the statutory auditor of the public interest entity. The cap amounts to 70 percent of the average audit fees of the last three years. It is common practice, that in a group structure, each public interest entity needs to ensure compliance with the cap calculated for the respective entity. Each member state may adopt varying detailed calculation requirements concerning the cap.

From an EU group perspective, the administration of such a requirement is usually performed at the level of the parent company. Effective monitoring of such a cap at various levels of a group is ineffective and inefficient and results into unnecessary bureaucratic burdens. It will entail excessive compliance costs, which will not meet the objectives set out by the Regulation efficiently and effectively.

An EU engineering group with the listed supreme parent company in Member State F has hundreds of subsidiaries across the EU. Part of the group are twenty subsidiaries in other member states which are themselves listed companies or finance vehicles which qualify as public interest entities. At each public interest entity of the group the cap needs to be calculated taking into account the relationship of the particular entity to other entities within the engineering group and following the variations of the local calculation methods. The processes for the calculation of caps with the engineering group are very complicated and compared to the goal of a restriction on the volume of services very complex and costly.

In our view, Art. 4 (2) should be modified in a way that the cap is only calculated at group level, more specifically at the supreme parent company of the group.

Issue 6: Reporting and disclosure obligations

Example 1 Unnecessary bureaucracy through obligations by Market Abuse regime on level

ESMA's interpretation of the Level I text of the Market Abuse Regulation in its Final Report of ESMA's technical advice on possible delegated acts concerning the Market Abuse Regulation ESMA/2015/224 is extremely wide. The high degree of additional bureaucracy is thwart the political will of the level I text, whose intention was to avoid exactly this effect and which result in high compliance costs.

Examples are the very detailed requirements for insider lists (up to the private cell phone number of the CEO) and manager transactions reports and, in addition, the obligation to record the concrete time of every insertion in the inside list and for every directors' dealings.

Another example of a superfluous obligation under the MAR is the duty of issuers to file a list of related persons that may also fall under the duty to notify managers' transactions. This list only creates bureaucracy without any obvious benefit in terms of investor protection.

Also the obligation to disclose "passive" transactions as directors' dealings is misleading to the market and therefore misses its objective. The wide interpretation of securities transactions in ESMAs Final Report of ESMA's technical advice on possible delegated acts concerning the Market Abuse Regulation ESMA/2015/224, which shall be covered by directors` dealings, contradicts the purpose of the level 1-text. The purpose of the level 1-text is to cover transactions of directors, which have a signalling effect for the market, because they show how the expectations of the relevant director in the future development of the company are. Securities transactions however, where directors are not active, for instance in the case of inheritances or gifts, don't give such a signal to the market. Another example of the counterintuitive interpretation of the level-1-text is ESMA's conclusion that the donation of shares or financial instruments relating to shares under a pre-determined remuneration package has to be notified as a manager's transaction.

The high degree of additional bureaucracy makes listings on an EU regulated market less attractive and works as an entry barrier for companies interested in capital market finance. This is exactly the opposite of the political objective of the Capital Markets Union.

We therefore recommend to adjust the mentioned requirements to an appropriate degree. For example, one consequence is to exclude passive transactions from the obligation to be notified under the managers' transaction regime.

Example 2: Delay of disclosure of inside information in Market Abuse (Directive 2003/6/EC and Regulation n. 596/2014/EU)

As in the former market Abuse Directive also in the new Market Abuse Regulation the same notion of inside information is applicable for the duty of disclosure and for market abuse; this coincidence of notions generates legal uncertainty, especially because market abuse is the basis in many Member States for criminal offences. The possibility for listed companies to delay disclosure has been severely limited by the condition that such delay should not be misleading. In order to solve that uncertainty, many Member States simply did not apply the Directive or circumvented it with guidelines of their competent authorities, which proved to be valuable before them but worthless when dealing with criminal charges. The problem is the same in the Regulation n. 596/2014.which has given ESMA a mandate to issue guidelines to establish a non-exhaustive indicate list of situations in which delay of disclosure is likely to mislead the public.

Thus, we suggest a flexible approach, which would be the best solution in order to give issuers the possibility to delay the communication of information which is not sufficiently developed yet.

Example 3: Accounting directives, directive 2003/51/EC, Article 10 of the Takeover Bids

According to the Accounting directives, the statutory auditors shall express an opinion concerning the consistency of the annual (management) report with the annual accounts for the same financial year, see art. 28 Directive 2013/34/EU. Subsequent directives have modified the content of the annual management report requiring additional non-financial information.

The following directives can be listed as examples:

- Article 10 of the Takeover Bids directive provides that information shall be published in the annual report (e.g. about the structure of the capital, restrictions on the transfer of securities, etc);
- Article 46 (a) of the directive 2006/46/EC provides that a statement on corporate governance shall be published every year and that it may be included in the annual report
- Article 1 of directive 2014/95/EC requires certain large companies to disclose relevant non-financial and diversity information in the management report

What should be explicitly provided is that **any extension of the content of the management report does not entail an automatic extension of the scope of statutory audit**, unless this is explicitly indicated. For example, in the case of the consistency report required by directive 2013/34/EU ((a) the description of the main features of the company's internal control and risk management and (b) some of the information required by the Takeover Bids directive), the consistency opinion should not be required.

We believe that the consistency opinion should only affect **information that are comparable with financial data in their nature and characteristics**. Consequently, in case of an extension of the contents of the annual report, there should be no automatic consequence on the perimeter of the consistency opinion.

Example 4: EMIR (Regulation n. 648/2102)

A great number of non-banking firms are potentially subject to the Regulation. This is also due to the fact that the notion of undertaking in EMIR is wide[2] and according to its interpretation it includes "any entity engaged in an economic activity, regardless of the legal status of the entity or the way in which it is financed". A supply of goods and services, e.g. an insurance, on a market is considered an economic activity[3]. The consequence is that also an entrepreneur could be subject to the Regulation and, in particular, to the actual reporting obligations (in Italy the number of entrepreneurs, physical persons are 3.245.250). This extensive approach (which is burdensome and involves big efforts and costs in order to set up procedures to comply with the Regulation) together with the obligation to report any transaction in derivative contracts may determine, on one side, a huge number of data to be reported without any significant value that Trade Repositories have to process and, on the other side, difficulties for the Competent Authority to undertake effective supervision. This effect is

[2] See art. 2, n. 8.
[3] According to the interpretation of the Court of Justice quoted in the EC's FAQ on 10 July 2014.

detrimental for the purpose of the Regulation itself which is to ensure maximum transparency to the use of derivative contracts. There is the risk that critical positions in derivative contracts are "hidden" by the bulk of data reported.

In light of the above mentioned we are convinced that a reshape of the Regulation is necessary; the reshape could be made through the restriction of the perimeter of the subjects under the reporting obligations ; for instance by excluding all derivatives which are used by non-banking enterprises in the ordinary course of their business as a means to mitigate or hedge an economic primary risk arising out of their core entrepreneurial activities like selling goods or services (the "service" itself not being a derivative).

Alternatively, there should be foreseen a waiver to the reporting obligations (e.g. imposing some significant thresholds also for the notifications of the trades to be reported) in order to exclude the reporting for non-material transactions which do not affect financial stability.

Example 5: National implementation and gold-plating

There are also cases where national implementation and gold-plating leads to excessive reporting and disclosure obligations. In Italy, for instance, the implementation process of the Directive 2013/50/UE on transparency obligation for listed companies is imposing more stringent requirements than the European legislator. This refers eg to the interim report: the directive abolished the obligation to publish interim reports while providing that Member States may request the disclosure of additional information only if specific requirements are met; Italian legislation has granted however a general power to the supervisory authority to request such information from all issuers on a general basis. Another example relates to the disclosure of major shareholdings: Italian legislation provides for a lower initial threshold: 3% instead of 5%.

Some more examples of gold-plating can be seen in the requirement of the Italian legislator to publish on the newspapers the announcement to publish the financial reports and the convocation of the general meeting. According to an assessment of Consob on the costs deriving from the status of listed company it emerged that the annually costs for the publication in the newspapers of the convocation of the general meeting are about 90.000 euro and the ones for the publication on the newspapers of the announcement of the publication of the financial information are about 25.000 euro;

Even if it is consented by the Directive, the lack of maximum harmonization may determine different forms of implementations at the Member State level and lead to additional costs for investors. We believe that it is necessary to recommend to Member states to avoid any form of gold-plating which can determine regulatory arbitrage and undermine a level-playing field.

Issue 7: Contractual documentation

No EuropeanIssuers Example

Issue 8: Rules outdated due to technological change

No EuropeanIssuers Example

Issue 9: Barriers to entry

Example 1: Extension of the Market Abuse regime to companies listed on a MTF

As pointed out above the number and details of regulation that listed companies in Europe have to comply with when they wish to attract (equity) capital market finance works as barrier of entry for the demand side of the market. The CMU project should therefore be used to reduce the general level of bureaucracy for listed companies.

Contrary to that are acts by the European legislator to widen the scope of issuers duties under the Market Abuse (MAR) regime to companies listed on a MTF. In Germany, this will most likely have the impact that companies of the so-called “Freiverkehr” (which is the privately regulated segment at the German stock exchanges) will have to notify managers’ transactions, provide insider lists and publish inside information as soon as possible. As a consequence, differences in regulatory intensity between the regulated market and growth segments like the Alternext, the Entry Standard and the AIM will be reduced. This in turn reduces the attractiveness for SMEs to make the first step into the organised capital market.

It is thus of utmost importance to refrain from extending the MAR regime to companies listed on a MTF.

Example 2: Prospectus Directive (Directive 2003/71/EC)

The current Prospectus Directive only allows some non-equity issuers to choose the Member State where the securities are admitted to trading. The same possibility is not provided for equity issuers. No change in this regard has been made in the recent Commission’ s proposal for a regulation on prospectus.

According to the internal survey issued by our member association Assonime, there were 136 Italian issuers between 2011 and 2015 choosing to ask for approval of the prospectus for bonds before a different Competent Authority (Luxembourg); this shows that the amount of Italian issuers who have chosen a different Competent Authority is relevant.

We recommend to allow companies to choose 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 the EU would be respected. This would be a step forward in achieving a Capital Markets Union and ensuring healthy competition and/or co-operation between National Competent Authorities to improve their procedures which can be sometimes barriers to entry. Also, some NCAs have developed the knowledge and expertise and improved their approval processes. Companies should be allowed to benefit from it instead of being forced to be under the regime of Member States where NCAs do not offer services of such quality.

Example 3: Commission' s proposal for a regulation on prospectus (COM/2015/0583)

Art. 19 para 2 of the recently published Commission's proposal states that where the competent authority fails to take a decision on the prospectus and any supplements within the foreseen deadline, this shall not be deemed to constitute approval; the lack of a provision on the status in case the approval is not granted within the time limits creates uncertainty during a very delicate phase where many subjects are involved (e.g. issuers, offerors, global coordinators, arrangers, etc.)

Art. 19, para 4 states that where the Competent Authority finds that the draft prospectus does not meet standards of "completeness, comprehensibility and consistency necessary for its approval", the Authority shall inform the issuer and require supplementary information. The new wording allows for more subjectivity and therefore could result in even more delays than it is currently the case. The NCA's binding comments should be limited to formal compliance with the Regulation; additional comments could be provided but should not be binding.

Moreover, the possibility for the NCA to require supplementary information may result in a significant prolongation of the approval process[4]. 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. This could make raising capital in other jurisdictions outside Europe more attractive.

We think that a reshape of the approval process is necessary; three modifications should be implemented:

• The deletion of par. 2 or a modification which states that where the competent fails to take a decision on the prospectus within the time limits, this shall be deemed to constitute approval;

• The check of the Competent Authority should be limited to the completeness of the prospectus;

• The request of supplementary information should be limited (once).

[4] Art. 13, para 4.

Issue 10: Links between individual rules and overall cumulative impact

Example 1: Regulation n. 596/2014/EU and Directive 2014/65/EU (Mifid II)

In its Action plan on establishing a Capital Markets Union, EU-Commission among others expresses its intention to promote capital market-finance for SMEs. This objective is countered by generally extending the scope of application of MAR (Art. 2 Nr. 1, Art. 12, Art. 13, MAR), MiFIR/MiFID II (Art. 1 MiFIR) to Multilateral Trading Facilities (MTF) and Organised Trading Facilities (OTF). Stock Exchanges all over Europe have created privately regulated SME markets which typically will qualify as a MTF. In Italy for instance, the number of companies which raised capital on MTFs is higher than that on regulated markets; from 2009 to 2014 the number of listed companies on regulated markets decreased from 280 to 244 while on AIM Italia (the MTF managed by Borsa Italiana for the listing of shares) in the same period the number raised from 11 to 57[5].With regard to bonds, the most part of issuances in Italy on Extramot – Pro (the Italian MTF managed by Borsa Italiana for bonds) are under the 50 mil. euro thresholds; this shows that the MTF is the right tool to help SMEs to access the capital market[6] Extending the scope of regulatory requirements designed for regulated markets and large public interest entities also to SMEs and their market segments will create additional bureaucratic burdens for these companies and act as a severe disincentive for IPOs of smaller issuers.

In order to reduce the burden for SMEs it would be necessary to amend the Regulation n. 596/2014/EU and Directive 2014/65/EU (Mifid II) removing the extensions of applicable rules to SMEs.

Issue 11: Definitions.

Example 1: Definitions of SMEs are not similar in MiFID II (2014/65/EU), current Prospectus Directive (2003/71/EC) and among others the Accounting Directive (2013/34/EU)

Under MiFiD II, a SME is defined as "a company that had an average market capitalisation of less than EUR 200.000.000". In the Prospectus Directive (directive 2003/71/EC) the definition of a SME is a "company with reduced market capitalisation". It makes reference to a company listed on a regulated market which had an average market capitalisation of less than EUR 100.000.000 on the basis of end-year quotes for the previous three calendar years". The current EU definition of SME used in the Auditing and Accounting directives categorizes micro, small and medium size entities (SME) as those enterprises which do not exceed at least 2 of the following criteria: The company has 250 employees, a net turnover not exceeding EUR 40.000.000, an annual balance sheet not exceeding EUR 20000.000.

[5] See Consob Annual Report to the market for 2014.
[6] See Barometro Minibond Market trends, Epic&MiniBondItaly.it

In our opinion, there is a need for a definition that allows a company to know in advance its SME status. This is important for its reporting obligations, based on procedures which must be set more than one year in advance by a company. In addition, it has the advantage of not being questionable, because it is based on objective and measurable criteria. We think that it would bring certainty to link SME definition to size (and other indicators like that) rather that to a pretty volatile index.

Example 2: Article 10 (a) of the Transparency directive (2004/109/EC) and in Articles 2.1(d) and 5 of the Takeover Bids directive (2004/25/EC)

The definitions of "acting in concert": In Article 10 (a) of the Transparency directive (2004/109/EC) and in Articles 2.1(d) and 5 of the Takeover Bids directive (2004/25/EC) are not identical. The goals pursued by the two directives, although complementary, are different:

- Article 10 of the Transparency directive aims, inter alia, at providing transparency as to who has the power to exercise voting rights when voting-rights holders agree on pooling their votes;
- Articles 2.1. (d) and 5 of the Takeover Bids directive aims at protecting minority shareholders by requesting the launch of a mandatory bid at an equitable price when shareholders act in concert to acquire control.

The European Securities and Markets Authority (ESMA) published (in 2012, firs update in 2014) a public statement on practices governed by the Takeover Bid Directive (TBD), focused on shareholder cooperation issues relating to acting in concert and the appointment of board members. The statement is in response to a request by the European Commission for clarity on these issues, following its 2012 report on the application of the TBD. It is based on information collected about the TBD's application and common practices across the European Economic Area (EEA). The statement was prepared by the Takeover Bids Network, a permanent working group, under ESMA's auspices, that promotes the exchange of information on practices and application of the TBD across EEA. The statement contains a White List of activities that shareholders can cooperate on without the presumption of acting in concert. It also contains information on how shareholders may cooperate in order to secure board member appointments by setting out factors that national authorities may take into account when considering whether shareholders are acting in concert.

EuropeanIssuers recommends to revise the definition in order to provide at level 1 for "negative presumptions" and "positive presumptions" of acting in concert.

Example 3: Definition of the term "Shareholder" (Directive 2007/36/EC)

Both in the directive 2007/36/EC and in the proposed directive of the European Commission from 2011 there is not an effective definition of shareholder[7]; due to the definition still in force, in some Member States the legal owner can be recognized as the shareholder and issuers are hampered identifying their shareholders in the general meeting who vote by proxy in a cross-border context.

[7] "Natural and legal person that is recognized as shareholder under the applicable law"

Shareholder identification is functional to companies to improve loyalty of their shareholders in the long run and to address their issues also through some initiatives of investor relations. Shareholder identification is also functional to shareholders who wish to coordinate themselves in order to exercise their rights (i.e. the right to add items to the agenda, to demand the convocation of an AGM[8]); therefore, the lack of a harmonised EU framework creates some obstacles to the cross-border exercise of rights, discourages cross-border investments and is detrimental for shareholder activism. Even if the shareholder identification mechanism has been recognized by some Member States, this does not work in cross-border situations as its effects are confined in domestic boundaries[9]. Moreover the costs for the shareholder identification at the general meeting that issuers bear are composed by the costs for the internal human resources involved in the process of matching the communications received to participate at the general meeting and the costs for the advisors in charge of a supplementary investigation about the shareholder base (about 10.000 euro for an Italian issuer having about 230.000 shareholders); all the costs which issuers have to bear for **every general meeting** (potentially more than one in a year) should therefore allow issuers to identify the ultimate account holders.

EuropeanIssuers believes that an approach of maximum harmonization should be followed, without leaving the possibility to Member States to hamper the recognition of the **"ultimate account holder"** to whom the recognition of the exercise of rights should be granted. Therefore, the directive should be amended in this direction. The approach of maximum harmonization could grant issuers the possibility to compare data in a cross-border scenario.

Example 4: Ambiguous definition of financial instruments (MiFID 2)

Article 4 of Directive 2014/65/EU (MiFID 2) defines as "financial instruments" instruments specified in Annex I, Section C, which includes 11 categories of financial instruments.

For example, the notion of "derivative contracts" as outlined under points 4 and 10 of Section C ("*Options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities*") has led to differences in interpretation among Member States. The UK for instance considers that certain forward exchange transactions do not constitute derivative contracts while other Member States, including France, argue the opposite.

In addition, a certain number of definitions specified in Annex 1, Section C, are circular and use the term being *defined* as part of their own *definition*. Derivative contracts relating to commodities and mentioned in Section C, point 6, qualify as financial instrument if they are traded on a RM, a MTF or an OTF. An organized platform is granted MTF status only if securities are traded on it.

We recommend that the mentioned contradictions are to be eliminated and a definition ensuring more legal certainty through clarity for market participants is to be found.

[8] See D. Zetzsche, *Shareholder interaction preceding shareholder meetings of public corporations – A six country comparison*, February, 6th, 2005. See at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1034176

[9] About the reasons for the harmonisation of shareholder identification see L. Enriques, M. Gargantini, V. Novembre, *Mandated and contract-based shareholding disclosure*, "Uniform law review", vol. XV, 201. The Authors stress the importance of the harmonisation of the technical details of shareholder identification.
It is therefore of paramount importance to have an EU principle of shareholder identification, which has also been supported by the ECB, in the context of T2S, and its task force on shareholder transparency, and by the Reflection Group.

Example 5: Ambiguous definition of market making in Directive 2014/65/EU (MiFID II)

Directive 2014/65 (MiFiD II) defines a 'market maker' as a "a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against that person's proprietary capital at prices defined by that person".

By contrast, the Short selling regulation has a different definition of "market making activities" that refers to the activity of:

- Posting firm, simultaneous two-way quotes of comparable size and at competitive prices, with the result of providing liquidity on a regular and ongoing basis to the market;
- As part of its usual business, fulfilling orders initiated by clients or in response to clients' requests to trade;
- Hedging positions arising from the fulfilment of tasks under the two previous points.

While MiFiD's objective is to subject certain intermediaries to its obligations, that of the Short selling regulation is to exempt some from certain of these obligations, especially the transparency obligations in the case of net short positions.

Even though the objectives of the mentioned legislative acts are different, we deem it as being important that a more harmonized and streamlined definition of the term "market maker" is developed with respect to the two legislative acts.

Issue 12: Overlaps, duplications and inconsistencies

Example 1: The rules for prospectus supplements (Art. 16 Prospectus Directive 2003/71/EC) are inconsistent to the rules of the disclosure of inside information (Art. 17 Market Abuse Regulation (EU) No. 596/2014)

According to Art. 16 Prospectus Directive, supplements have to be published between the date the prospectus is approved and the final closing of the offer to the public or, as it may be, during the time when trading on a regulated market begins, whichever occurs later.

Because of the expression "whichever occurs later", the exact date when a public offer ends can be uncertain. Does the public offer continue or even arise when the intermediary banks offer the new bonds to their investors? At this time, the bonds are already issued and traded. Market Abuse Regulation and Transparency Directive both typical laws of secondary markets meet the provisions of the Prospectus Directive, a primary market legislation. In this case, the above mentioned conflict of supplements and inside information disclosure occurs.

When new information is deemed to be capable to affect the assessment of securities, in almost every case, it fulfils the criteria of an inside information and therefore the requirements of Art. 17 Market Abuse Regulation. Hence, the issuer has to publish a supplement and to disclose an inside information.

However, these two disclosures are inconsistent. A supplement has to be approved within seven days by the national competent authority. In principle the inside information has to be disclosed as soon as possible. However, the disclosure of an inside information might be delayed if several conditions are met. Supplements cannot be delayed. This could result in a situation where the issuer wants to delay the disclosure of an inside information but cannot do it because of the obligation to publish a supplement, especially in case the company is a frequent issuer.

Therefore, the issuer usually will do both publish the supplement and disclose the inside information. However, while the inside information got disclosed immediately, the supplement has to be approved with the consequence of the right to withdraw for the investors.

As a result, the investor may notice the disclosure of inside information and can subscribe for securities of the issuer. After approval (usually a working day or two later) the supplement will be published. In the next two following days, the investor has the right to withdraw, independently of whether the new information was material for him and independently of whether he has already noticed the disclosed inside information before he took the decision to invest.

Hence, with the disclosure of inside information, the investor can speculate on the development of the securities‘ price. Therefore, when the conditions of an inside information are fulfilled, the right to withdraw should not be applicable.

Example 2: EMIR (Regulation n. 648/2102)

The European Commission has launched a public consultation on the review of EMIR regulation in spring 2015; in this consultation document the European Commission seems to be aware of the fact that non-financial counterparties are overburdened by the obligations set forth by the current Regulation and wants to assess the impact of the above mentioned regulation. It asks, for example, if the clearing thresholds for non-hedging transactions are adequately defined to capture those non-financial counterparties that should be deemed as systematically important. On the other side ESMA has published a review of the use of OTC derivatives by non-financial counterparties (ESMA's recommendations in EMIR report no. 1 "Review on the use of OTC derivatives by non-financial counterparties" released on 13 August (ESMA 2015/1251). ESMA's proposal is to assess the systemic importance of non-financial companies (NFC) irrespective of the hedging/non-hedging nature of their trades, removing the current exemption from the obligation to clearing arrangements for hedging transactions.

We strongly encourage the European Commission to uphold the existing hedging exemption as the ESMA's proposal would increase the costs of hedging transactions and impact NFC ability to manage their risks.

This would have a possibly significant effect on their operational activities and result in more restricted investment capacity of those companies due to collateral obligations.

Example 3: ESA regulatory technical standards, guidelines and recommendations (Regulation (EU) No 1093/2010 establishing the European Banking Authority; Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority; Regulation (EU) No 1094/2010 establishing the European Insurance and Occupational Pensions Authority)

One of the objectives of the European Supervisory Authorities (ESAs) is to establish a single rulebook by the elaboration of technical standards which do not involve policy choices (see for instance Recital (22) of Regulation (EU) n°1095/2010). **The regulatory power of the ESAs is strictly defined, limited and controlled by articles 290 and 291 of the Treaty on the Functioning of the European Union (TFEU) and by the adoption of all draft technical standards (either regulatory (RTS) or implementing standards) by the Commission.**

Notwithstanding the importance as well as the necessity of the ESAs and their ability to foster confidence in the financial system, the past has shown that ESAs have on several occasions overstepped powers conferred to them. As a consequence, democratic legitimacy had been missing with regard to the respective acts and the political will of the legislator not been respected.

This also relates to guidelines and recommendations: Article 16 of the regulations establishing the ESAs allows the Authorities to issue guidelines and recommendations in order to establish « *consistent, efficient and effective supervisory practices* » and ensure « *the common, uniform and consistent application of Union law* ».

These guidelines and recommendations cannot be legally, binding being outside the scope of the technical standards. It would be otherwise contrary to the intention of the European legislator to limit the regulatory power of the ESAs.

Moreover, the various guidelines and recommendations issued by the ESAs form a new set of rules with no scrutiny by the European legislator nor remedies. In various cases described below, the ESAs diverge materially, when developing guidelines, from explicit political decisions made at the level of the Commission, Parliament and Council.

ESMA regulatory standards on EMIR are contrary to the intention of the level 1-text regarding the hedging exemption

In the context of derivatives regulation EMIR non-financial counterparties are only obliged to clearing, if their derivatives stock, which is not held for hedging operational risk, exceeds certain thresholds. For calculating the clearing thresholds, it is according to recital 31 EMIR crucial to refer to the "sum of all net positions and exposures".

In ESMA's regulatory draft for clearing thresholds, the gross reference was subsequently established, which ran clearly counter level I text. As a result, we believe this point should be amended.

ESMA RTS on MiFID II are contrary to the level I text regarding investment research qualified as inducement

ESMA also qualifies investment research provided to portfolio managers as inducements under MiFID, even though such treatment will probably have major implications for the research market in Europe. Such push from the ESMA's side disregards the intention of the EU institutions which have not touched upon the question of research in the course of the MiFID II legislative proceedings.

Given the relevance of the issue for the research coverage of European undertakings, especially in the SME sector, and for the quality of services by European portfolio managers, it should be clear that the decision upon the regulatory approach to research requires the involvement of the EU legislative bodies.

ESMA Guidelines on the exemption for market making activities and primary market operations under Regulation (EU) 236/2012 of the European Parliament and the Council on short selling and certain aspects of Credit Default Swaps – 1 February 2013, ESMA/2013/158

The Short Selling Regulation (EU) 236/2012 allows in Article 17 for an Exemption for market making activities and primary market operations from certain provisions of the regulation. In its Guidelines, ESMA takes a narrower interpretation of the market making definition in the Short Selling Regulation (EU) 236/2012, Art 2.1(k): « *'market making activities' means the activities of an investment firm, a credit institution, a third-country entity, or a firm as referred to in point (l) of Article 2(1) of Directive 2004/39/EC, which is a member of a trading venue* […] »

The trading venue requirement is interpreted as meaning that the exemption can only be used by market makers when carrying on market making activity in relation to an instrument that is traded on or admitted to trading on a trading venue (i.e. the exemption cannot be used in relation to genuine market making in OTC derivatives). As a consequence, several of Member States refused adherence to the ESMA guidelines, on the basis of the membership requirement. (Reference text: Guidelines compliance table – 19 June 2013, ESMA/2013/765)

ESMA Guidelines on Alternative Performance Measures – 5 October 2015, ESMA/2015/1415

In October 2015, the ESMA published guidelines on alternative performance measures (APM) disclosed by issuers or persons responsible for the prospectus when publishing regulated information and prospectuses. An APM is a « financial measure of historical or future performance, financial position, or cash flows, other than a financial measure defined or specified in the applicable financial reporting framework". In a nutshell, APM are non-GAAP measures. Before the publication of these guidelines, the French Authority published its own guidelines on the same matter which were similar in substance and not mandatory. **After publication by the ESMA of its guidelines, the French Authority decided to implement the said guidelines as a mandatory position.**

EuropeanIssuers recommends to ensure that all crucial political issues of the respective dossier are tackled within the level I legislative procedure and to avoid the temptation of overcoming possible deadlocks in negotiations by deferring discussions on some key contentious matters to the ESAs.

In addition, to ensure that the ESAs do not exceed their mandates, the Rapporteur of the file within the EU Parliament and a person in charge within the Presidency of the Council of the EU should be informed about the drafts developments within the ESAs. This approach does not require to change existing European rules but would increase confidence in sublevel-rules and are therefore a good alternative to the proposed mandatory involvement of the entire EU Parliament

Example 4: Multiple reporting of the same derivatives transactions

The obligation to report derivative transactions is laid down both by Art. 26 MiFiR and by Art. 9(1) EMIR. In addition, regulation 1227/2011 (REMIT) sets out specific reporting requirements for energy derivatives. Art. 9 EMIR creates an obligation for Member states to report all derivatives transactions to a trade repository. MiFiR requires all derivatives contracts subject to the central clearing obligation under EMIR and deemed sufficiently liquid to be executed on an organised trading venue. The reporting requirements are those prescribed in Art. 26 for non-equity instruments. Both texts impose similar disclosure requirements for listed derivatives. While the scope of the information to be provided varies form one text to the other, reflecting differences in objectives (EMIR aims at limiting counterparty risks; MiFIR seeks to ensure the stability and integrity of European financial markets), the fact remains that "listed" derivatives transactions are subject to a double reporting, albeit with differing arrangements.

There are also reporting duplications under MiFIR and EMIR in regard of hedging the operational risks of nonfinancial companies. It is not obvious why position checks and position reporting requirements under MiFIR (Art. 59 and 60) shall apply to commodity-derivatives used for hedging the operational risks of nonfinancial companies. The same applies for real-time-reporting as under EMIR these derivatives already have to be reported to transaction registers. Additional reporting requirements do not make sense and are redundant from our point of view.

EuropeanIssuers asks to remedy the just mentioned reporting duplications for the same derivatives transactions within EMIR and MiFIR.

Example 5: Art. 13 sec.2 of the Transparency Directive (2004/109/EC)

Under Art. 13 sec.2 of the Transparency Directive "the Commission shall be empowered to adopt […] the measures to specify the contents of the notification to be made, the notification period and to whom the notification is to be made as referred to in paragraph 1". The Commission has used this authority to implement a procedure under which the person notifying a major shareholding has to make the notification to the issuer and the competent authority of the issuer (Art. 11 (5) of COMMISSION DIRECTIVE 2007/14/EC of 8 March 2007). The issuer has then to publish this notification.

This creates unnecessary double work. First, the notifying person has to collect all information regarding the securities concerned and held by the notifying person, its group companies, other related parties and/or UCITS administered by the notifying person, mostly institutional investors and asset managers. Most institutional investors do this using electronic tools ("threshold management systems"). When the information is collected this information is converted into a telefax and sent to the issuer and the competent authority. The issuer then has to take the information from the telefax and reconvert it into an electronic tool which is used to disclose the information to the markets across Europe. This creates the risk that transferring errors occur since the information is handled manually several times and it delays the process to inform the market participants about major shareholdings. This also creates unnecessary double work.

Rules should be changed in order that notifying persons should directly publish the information regarding major shareholdings via the electronic systems used in Europe and at the same time inform the competent authorities and the issuer.

This could be done using STP in electronic formats thus improving efficiency at all parties concerned and would also inform the market participants earlier thus helping to improve market efficiency.

<u>Issue 13: Gaps</u>

Example 1: ESA Governance (Regulation (EU) No 1093/2010 establishing the European Banking Authority; Regulation (EU) No 1095/2010 establishing the European Securities and Markets Authority; Regulation (EU) No 1094/2010 establishing the European Insurance and Occupational Pensions Authority)

The financial crisis has pointed out that there are two important issues which have not been addressed in the right direction: **governance** of the ESAs and the **structure** of the financial supervision. Both are crucial to face the financial crisis but did not prove to work in the most efficient way and the gaps should be filled up.

- **Governance**

A critical issue of ESAs' efficiency relates to their governance. Today, the Board of supervisors and the Management Board are composed of national competent authorities (plus the Chairman and some non-voting observers). This kind of composition does not necessarily guarantee the efficiency of ESAs decisions, or ensure the requisite degree of independence, as it embeds the interests of national authorities. This governance may be a factor which makes it more difficult to take action in sensitive areas, particularly with respect to Article 17 enforcement action. When the ECB was created, the choice was made to add six 'other' members to the Governors of Central Banks of the Euro Countries in the Governing Board and of the Governor of the EU Countries in the General Council: the six independent members, appointed by the European Council, constitute the executive board of the ECB. A similar choice should be made for the ESAs.

The Board of Supervisors should be composed of the head of the national competent authorities plus the 6 members of the Management Board: the chairman of the Management Board should obviously coincide with the Chairman of the Board of Supervisors (BoS). This new framework would lead to more effective ESA governance, and may overcome the natural resistance of some national competent authorities to promote, through a central body, convergence in regulation and supervision; particularly given the radically different powers which the ESA can exercise as compared to the precursor Level 3 Committees. Furthermore, members of the Supervisory Board should be appointed in the first instance with different mandates (50% for three years; and 50% members, including the chairman, for six years) in order to have de facto a staggered and more independent board.

Moreover, the current asymmetry of the chairman, who is not voting in the BoS (where his vote would have been irrelevant, given the other 27 votes in the Board) and he is voting in the management board (where there are only six votes) should be corrected.

Finally, the ESA Chairman should also have a casting vote both in the Management Board and in the BoS.

- **Structure of the financial market supervision**

The structure of financial market supervision in the EU countries has been affected by the structure and the evolution of the domestic financial system as well as by the legal system in place. The different objectives of regulation, the different markets, and intermediaries have been assigned to one or more authorities. Financial regulation aims to correct market imperfections and unfair distribution of the resources, while pursuing four general objectives: macro-stability of the system, micro-stability of the intermediaries, market transparency and investor protection, and, last but not least, efficiency/competition. In order to pursue these four objectives, there is neither a unique theoretical model nor just one practical approach to the regulation and supervision of financial markets. Pros and cons have been extensively discussed by many studies and significant differences are found in the literature in terms of both definition and classification of regulatory models and techniques. And it is difficult to observe in reality the adoption of regulatory schemes that are fully consistent with one theoretical model.

We think that a more appropriate solution for the ESAs is to propose a "3-peaks model" designed by objective. Our proposal assigns macro-stability to the ESRB with the support of ECB, and the other two objectives of prudential regulation and investor/consumer protection to two new ESAs: the European Prudential Authority in charge for the regulation of the micro stability for all entities (banks, UCITS, investment firms, insurance firms), working in close cooperation with the SSM; the European Investor Protection Authority in charge for all transparency issues and business conduct rules and supervision on all entities and markets.

Our proposal is also in line with the De Laroisiere Report, according to which the regulatory framework should evolve 'towards a system which would rely on only two Authorities. The first one would be responsible for banking and insurance issues, as well as any other issue which is relevant for financial stability (e.g. systemically important hedge funds, systemically important financial infrastructures). The second Authority would be responsible for conduct of business and market issues, across the three main financial sectors. Combining banking and insurance supervisory issues in the same Authority could result in more effective supervision of financial conglomerates and contribute to a simplification of the current extremely complex institutional landscape' (point 216, p. 58 De Larosiere Report).

Issue 14: Risk

No EuropeanIssuers Example

Issue 15: Procyclicality

No EuropeanIssuers Example

EuropeanIssuers *represents the interests of quoted companies across Europe. Our members include both national associations and companies from all sectors in 14 European countries.*

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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