AFME's feedback

European Commission's legislative proposals for a new Listing Act

28 March 2023

AFME represents a broad array of European and global participants in the wholesale financial markets. Its members comprise pan-EU and global banks as well as key regional banks, brokers, law firms, investors and other financial market participants. We advocate stable, competitive, sustainable European financial markets that support economic growth and benefit society.

(I) Introduction

AFME welcomes the objective of the Commission to reduce administrative burdens for companies raising capital, so that they can access European public markets more efficiently.

We note that there have been welcome developments in creating a more attractive market environment over recent years, and welcome a number of the Commission's current proposals. However, whilst AFME members are supportive of some proportionate flexibility being provided to certain issuers such as SMEs and companies with non-complex businesses structures, we believe the EC's blanket proposals to cap prospectus length and to remove any requirement for prospectuses for secondary capital raises under 40% in size create material risks for investors, issuers and their directors, the bookrunning and underwriting syndicate banks and market stability. We firmly believe such measures will introduce additional and unnecessary complexity, rigidity and risk into the regime and are likely to undermine the policy objectives.

The Commission's stated intention to take steps to improve research coverage is noted and generally supported. AFME recognises the importance of the objective to improve access to capital markets funding for SMEs. However, it is our assessment that the European Commission's proposals to increase SME research in the Listings Act are not optimal to achieve the stated policy objectives.

AFME supports certain proposed clarifications and simplifications made to MAR, but note that certain areas require clarification or further consideration, as outlined below.

(II) Areas of support

Subject to our comments on the relevant sections of this response, AFME supports the following aspects of the Commission's proposals:

- Deletion of statement of capitalisation and indebtedness
- Shortened minimum availability of IPO prospectuses (3 instead of 6 working days)
- Deletion of ranking requirement within risk factor categories
- Lowering free float requirement to a 10% threshold

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- Updating annual or interim financials incorporated by reference in a base prospectus, subject to a drafting clarification that such future financials will be incorporated by reference automatically as and when they are published
- Relaxation of investor communication required from intermediaries in case of a supplement (re-establishment of the temporary regime that expired by 31 December 2023)
- Amendment to MAR Article 11, combined with Recital 56 of the draft Listing Act, clarifying that the market sounding regime is only an option for disclosing market participants (DMPs) to benefit from the protection against the allegation of unlawful disclosure of inside information ('safe-harbour')
- Proposal to carve-out intermediate steps of protracted processes from the requirement to disclose inside information according to Article 17(1)
- Simplification of the insider list process.

(III) Prospectus and listing requirements

Length limits: While we understand and agree with efforts to make disclosure and the offering process simpler and more efficient, the manner in which this is achieved should take into consideration the need for issuers to be able to provide the information that it believes is necessary for investors to make an informed decision. This will vary depending on the particular issuer, market or other factors. Therefore, AFME members (with one exception) strongly oppose the imposition of limits on the length of a prospectus, in any situation and particularly in the case of IPOs and transformational rights issues, for the reasons set out below.

(A) The appropriate size of a prospectus will vary based on the complexity of the issuer's business and the particular transaction.

There is no finite, one-size-fits-all maximum disclosure size appropriate for all companies, and any such disclosure limits should not be legislated for. The appropriate size for a prospectus must ultimately be for an issuer and its advisers to determine, on a case-by-case basis, ensuring that all content required for regulatory and compliance purposes is covered to the best of their knowledge, judgement and risk tolerance in the face of differing levels of disclosure liability in courts in the jurisdictions in which their investors reside around Europe but also the rest of the world. The appropriate length of a prospectus should remain that which allows all relevant facts, circumstances, risks and selling messages, unique to each issuer and its capital raise at the time, to be addressed to the satisfaction and comfort of such issuer, its directors, its controlling shareholders, its syndicate banks, their respective legal and accounting advisers (taken together, the transaction team), and the relevant stock exchange. Only that transaction team should and will be able to determine the proper and appropriate prospectus length on the occasion of each individual capital raise, so that they are able to defend against litigation and reputational risk if any of them are accused in hindsight of inaccurate or incomplete disclosure. We want to make it clear that we are not advocating for longer or more complicated prospectuses, but for flexibility so that the length of a prospectus can be guided by the particular facts and circumstances and ultimately by the issuer acting reasonably. Members

support the streamlining of disclosure documents and content requirements but believe that a pan-European length limit is the incorrect way to do so.

(B) **<u>Restricting the length of a prospectus may result in investors not being given all necessary information to make an investment decision.</u>**

It is imperative to ensure that all new investors are provided with the necessary information which is material for making an informed investment decision. Limits on prospectus size will unduly constrain issuers attempting to provide such information, particularly where detailed and lengthy disclosure is required, for example for those companies with complex structures, strategies or businesses, those affected by material, complicated or broad-ranging risks, or those affected by major transformational internal or external events. While a seasoned issuer with good periodic disclosure and no out of the ordinary changes in conditions or its business can and should produce a concise prospectus, an IPO for a first-of-its-kind research company, for example, or a major refinancing for two ailing companies in the midst of a merger, will require more text to articulate their aspirations, operations and risks.

Disclosure, reporting, and transparency regulations should be designed first and foremost to protect investors and ensure the integrity of the market during and after the capital raise, but also to allow a company to present itself and the investment opportunity as fulsomely as it determines it needs to, based on its assessment of all the facts and circumstances, to allow it the best chance to succeed in its capital raise. Any arbitrary one-size-fits-all restriction on length or unduly restrictive provisions on sequencing or content of the prospectus will reduce the requisite flexibility of a company and its directors to construct disclosure to deal appropriately with all the specific facts, circumstances and risks at the time of the capital raise. Any such limits or restrictions raise major concerns with respect to investor protection and the relevant directors', controlling shareholders' and underwriters' confidence to come to the equity markets with their own adequate protection from reputational and litigation risks in hindsight, as well as with respect to an informed and properly functioning market. We also note that prospectus lengths tend to vary by country. Some European languages differ significantly in their length due to differing word formation and grammatical rules. Imposing a universal length limit would discriminate against member states with a lengthier native language, impacting domestic issuers.

(C) **<u>Prospectus length is not a major factor in attracting capital market issuances.</u>**

AFME members recognise that in recent months there have been a considerable number of EU press articles and studies which express frustration that the listings of many promising EU companies commencing in or moving to the United States. However, the US is still attracting this inward IPO investment despite having no restrictions on the length of prospectuses. It is worth noting that there are many prominent examples of a trend in the US toward longer equity offering prospectuses, as well as a high absolute number of pages. AFME also notes the success of the recent Porsche equity offering in September 2022, which is generally regarded as a flagship EU IPO, the prospectus for which (minus financials) is over 350 pages (the total prospectus is 820 pages). We also note that there are no restrictions on the length of EU bond

prospectuses, a large number of which are very long yet still very successful and well received by investors.

AFME believes that there are a number of other, more important factors than the length of prospectuses that have a far greater impact on the motivations of EU SME and high-growth companies to list and grow. The reports on Raising Finance for Europe's Small and Medium Sizes Business, The Shortage of Risk Capital for Europe's High Growth Businesses, and others provide specific supporting data and recommendations. These include the need to increase the size of available risk capital, pension fund reform, tax incentives, entrepreneur education and networking, and other factors.

The Commission's proposals on prospectus size restrictions, we believe, will have the unfortunate effect of making capital raising in Europe less attractive for issuers, directors, controlling shareholders and syndicate banks, and increasing costs of capital for European companies, which would be detrimental to the aim of encouraging European companies to increase access to, and use of, public equity markets.

(D) **The existing prospectus summary length limit illustrates the risks and issues associated with arbitrary length restrictions.**

The same analysis applies to the prospectus summary. Length limits create unnecessary constraints, in particular with respect to issuers with complex group structures, strategies or businesses or complicated and nuanced risks requiring detailed analysis and disclosure in the summary section. Members report situations where it is almost impossible to meet both the content requirements of the summary (including that the summary shall be accurate, fair and not misleading) as well as the format requirements (including that the summary shall be presented and laid out in a way that is easy to read using characters of a readable size). The risk is that the text may need to be set out in a very small font with no margins, to the point of being almost unreadable, or so abbreviated as to be almost incomprehensible, in order to meet restrictive disclosure requirements. This is deeply problematic and counter-productive to the aims of improving capital formation in Europe and ensuring full and clear disclosure for detailed and prudent investor analysis and decision-making.

(E) **Prospectus length restrictions will increase litigation risks for issuers, controlling shareholders, directors and underwriters.**

An unintended consequence of the restrictions, which would surely be viewed as unfair, is that, in the context of the litigation and liability regimes in Europe and the rest of the world, complying with the proposed arbitrary prospectus and summary size restrictions will increase the liability risks for issuers, controlling shareholders, directors and underwriters since it would potentially reduce the levels of accuracy and completeness of issuer information available at the times of greatest uncertainty for investors that are looking to invest in issuer capital raises accompanying transformative and disruptive corporate events.

Furthermore, the proposed changes may unwittingly create a catch-22 situation for issuers and the market as they face competing demands to restrict the page lengths of offering documents while at the same time having to address additional burdensome information disclosure requirements (see e.g., the "Sustainability information" section below).

These increased litigation risks will in turn increase the effective cost of raising capital in the EU. It would seem more prudent and effective in achieving the objective to streamline prospectus formulation, for European regulation to substantially set out appropriate disclosure content requirements whilst leaving issuers to determine the length and detail of their prospectus disclosure required to (a) cover the minimum content requirements imposed by EU regulation, (b) best tell their story and market the business to maximise their chances of a successful capital raise, and (c) protect themselves against liability in the event of litigation in courts inside and outside of Europe for mis-disclosure.

(F) **<u>An alternative way to ensure more streamlined and understandable prospectuses is to put a greater focus on plain language and comprehensibility</u>**

An alternative way to help ensure streamlined and more understandable prospectuses would be to encourage supervisory convergence of NCAs' approaches to the current "plain language" rules in the EU. The EU Prospectus Regulation requires that "[T]he information in a prospectus shall be written and presented in an easily analysable, concise and comprehensible form", taking into account certain information that is deemed necessary for investors to make an investment decision. As practitioners, AFME members note that these requirements are not uniformly monitored and enforced by all European NCAs.

In the U.S., SEC Rules 421(b) and 421(d) set out how to write in plain language and provide examples for acceptable disclosure in this regard. The U.S. also appears to have a more robust framework for monitoring compliance and addressing any shortcomings. Similarly, the Hong Kong Stock Exchange (the regulator of listed offerings in Hong Kong) has published guidance on producing prospectuses that are clear, concise and in plain language. ESMA highlighted the plain language and comprehensibility requirement as an area for further improvement in its recent Peer Review Report on scrutiny and approval procedures of prospectuses. We agree that further progress towards a consistent approach to supervising, monitoring and addressing derogations from the existing plain language and comprehensibility requirements would make EU prospectuses more accessible to, and useful for, investors.

<u>Content requirements:</u> On a separate note, we believe that aligning the level of disclosure of the standard prospectus to that currently required under the EU Growth prospectus regime will lower disclosure standards in relation to larger and more complex companies to the extent of causing negative consequences for both investor protection and increased liability risks for issuers, controlling shareholders, directors and underwriters.

<u>Sustainability information</u>: Imposing the disclosure of greatly increased sustainability-related information which, given this is a new and developing area, may not have faced satisfactory scrutiny and/or be of satisfactory quality, will also create liability concerns for issuers, controlling shareholders, directors and underwriters and therefore could also drive up the cost of capital, investor

risk and litigation liability risks.. This is exacerbated by fragmented liability regimes across Europe (see below), and litigation risky non-EU jurisdictions such as the US (which are critical to access in the larger capital raisings). Risks and issues would be exacerbated if sustainability disclosure would need to be made by incorporation by reference of older and potentially stale prior company announcements. We would not think it proper for syndicate banks to have potential liability for incorporation by reference by an issuer into a prospectus of documents that were drafted and published by a company before any involvement of the syndicate banks, and for documents that will not have been drafted to the same standards as a prospectus. (This point is relevant in the wider context of any information that will have to be mandatorily incorporated by reference – see below).

Prescriptive format: We also believe that a prescriptive fixing of the order of disclosure is unhelpful, as it would restrict the flexibility of issuers to present the relevant information in the order (of importance among other things) that is most beneficial for the offering, the issuer and potential investors.

OFR: It appears from the annexes to the Listing Act that the section "Operating and Financial Review" will no longer be required for equity prospectuses. It appears to have been deleted from the list of categories of prospectus information in Annexes I and II. Although this deletion is not specifically mentioned in the explanatory memorandum, in the recitals or in the impact assessment, the impact assessment mentions the OFR as "rather / very burdensome" on page 167. This may be correct from an issuer's perspective, but does not consider the importance of this section for investors. Also, having no OFR would make a prospectus incompatible with requirements for a placement that is to be extended to US investors (as is customary market practice for larger issues or issuers with meaningful US shareholding levels) and to UK investors. This could lead to capital raises for EU issuers, which are offered into the US, UK and other jurisdictions outside the EEA, potentially having two offering documents, with a material divergence in level of disclosure. No OFR in the EU prospectus, and OFR section in an ex-EU offer document.

Exemptions from the obligation to publish a full prospectus:

AFME members welcome appropriate flexibility with respect to the obligation to prepare a prospectus, acknowledging that different circumstances might require different types and levels of disclosure. We agree that in some cases there may be sufficient existing disclosure, market familiarity or other factors that obviate the need for a marketing process and investor meetings, and might render having a prospectus unnecessary, and that in these cases there should be clear alternatives for issuers and investors.

However, for the reasons set out below, members are very concerned by the proposals to:

(a) increase the current capital raise threshold of 20% below which no prospectus is required to 40% - i.e. in the exemption for admission to trading of fungible securities (Article 1(5)(a) and in the introduction of a corresponding exemption for public offers (Article 1(4)(da); and

(b) introduce new exemptions for fungible issues of new securities above 40% subject to certain conditions (Articles 1(4)(db) and 1(5)(ba), but with no disclosure requirement other than the preparation of a 10-page updating document.

Whilst we understand the policy intention behind making such issuances simpler and acknowledging the differences between these issuances and new issuances of securities, we have concerns for investor protection and greatly increased liability risks for issuers, controlling shareholders, directors and syndicate banks. For example, increasing the threshold from 20% to 40% mentioned above would mean that issuers would be able to raise large amounts of capital without being required to update and refresh significant areas of their disclosure such as risk factors and rationale and effect of such a large and transformative capital raise and related corporate or external event on the existing businesses, and without investors having access to a single document setting out in one place all the necessary information that they need to make a fully informed investment decision. The same issuer could also raise an unlimited further amount of capital over 40% from EU citizens at any time with only a 10-page update offer document (which, as described below, is a particularly concerning proposal).

We believe that this waters down the current disclosure rules and practices too much and may pose significant risks to investor protection in the EU. This could in turn undermine confidence in the EU's public markets. Given the heightened threat to investor protection, syndicate banks will have increased liability concerns (see below). The significantly heightened risks for syndicate banks will ultimately drive up the cost of capital for companies seeking to access public markets, drive issuers and syndicate banks to adopt unpredictable and inconsistent disclosure and execution practices, which will increase ineffective capital raising and litigation risks, and ultimately unstable European capital markets, all of which runs counter to the EU's public policy aim for the Listing Act. This outcome will be particularly acute in the case of companies raising larger amounts of capital in distressed circumstances and/or in transformative circumstances such as the acquisition and integration of material M&A targets or in the case of riskier companies, such as high growth companies or SMEs, which are one of the main focuses of the proposals.

This exposes the directors, controlling shareholders and underwriters to the riskiest of scenarios – a short offer document in relation to which each of them may be found liable by courts throughout the EU and the rest of the world for omissions of material information, misleading information and inaccurate information by reason of brevity, with the claim brought with the benefit of hindsight. From an issuer and syndicate bank liability risk mitigation perspective and from an investor protection point of view it is a basic principle of capital markets transactions that securities be issued either via a fulsome international standard prospectus, or else on an "undocumented basis" with no marketing or offering document, where investors are required to review all publicly available information on an issuer on a non-transformative transaction. Without a robust ongoing disclosure regime (see below) a short 10 page update offer document we do not believe is a good option as it exposes the issuer and banks to unmitigable litigation risks for what will inevitably be omitted from the short document, and leaving the buyside exposed if they rely on the 10 page update document alone. The inevitable result will be an increase in securities litigation between underinformed investors and exposed issuers and banks.

Members agree a more streamlined secondary raising regime might increase the attractiveness of European markets but an exemption from drawing up a full prospectus relating to secondary offerings is seen as only viable and reasonable if replaced with a system of regulatorily imposed detailed disclosure by shelf registration documents and regular, ongoing, ordinary course, fulsome updating disclosure.

In addition, liability regimes would need to be changed across the EU to make clear that syndicate banks are not responsible for issuer documents and existing issuer disclosure: and an Australian-style cleansing statement regime (with accompanying due diligence procedures put in place ahead of issuance) would need to be used. However, even with the aforementioned steps being in place, any such short document would still not work in a situation where the issuer wished to offer its shares outside of the EU, as the changes outlined in this paragraph would not protect the issuer, controlling shareholders and the syndicate banks with regulators and in courts in non-EU jurisdictions.

We believe an issuance over 20% is of sufficient size either of itself to be or to be being undertaken to fund, a materially transformative change to the issuer's capital structure, strategy, business, prospects, risk profile and/or balance sheet and requires an appropriately considered fulsome and tailored disclosure document. Larger increases over 40% similarly require an appropriate disclosure document, and we do not believe that 10 pages will be sufficient to represent the issuer and its business fairly and accurately when there will be such a transformative change inherent in raising so large an amount of capital.

In addition, as discussed earlier, for liability reasons, issuers, directors and syndicate banks will not want to use a 10 page offering document for offerings to investors in the EU where there are no safe harbours from liability for such short disclosure documents, or outside the EU, especially those in the US, where there would be clear liability risk resulting from such short disclosure documents.

In summary, a prospectus acts as a protectionary tool for investors, issuers, directors, controlling shareholders and syndicate banks alike, and subsequent capital raises without a full prospectus would expose the issuer, its directors, its controlling shareholders and the syndicate banks to greater litigation risks both in the EU, considering unchanged liability regimes and in jurisdictions outside the EU where market practice and liability regimes dictate a fulsome international standard prospectus on all capital raises over 20%, with all relevant information about the issuer and its business and its capital raise in one full disclosure document.

All of which leads to the conclusion that a market practice would develop for EU issuers who offer to prospective investors outside of, or who are owned to any appreciable extent outside of, their home market in the EU of two differing offering documents being prepared (one short form one for compliance with EU regulation, unused with investors, and one long form one used to market the transaction). This would result in additional expenses and time to market for issuers; inconsistency and confusion in the market as to which is the relevant disclosure document along with risk to any investors who obtain and rely on the short form document rather than the longer fulsome disclosure document; and litigation risks to issuers, directors, controlling shareholders and syndicate banks still existing, with banks resisting allowing their name and logo on the regulatorily required short document.

We note that while similar proposals for shortening disclosure documents have also been made in the UK, similar concerns to those raised by AFME members above have also been raised in the UK. It has been pointed out that any shortening of prospectus lengths may only proceed after (a) the tightening up of and improvement in quality and details of ongoing public disclosures and (b) changes being made to issuer and syndicate bank liability in relation to the content of shortened disclosure documents.

Whilst we understand the premise behind streamlining the secondary issuance process, the success of any such changes is, we believe, conditional on there being a well-established, much more detailed and carefully regulated ongoing disclosure regime where the quality, standards and precision of ongoing disclosure is improved to that of current prospectus drafting; for example, in the US, ongoing updated regular company disclosure documentation is produced alongside 10K or 20 F and 6K filings or 8K submissions. These are high quality and easily adaptable/incorporated documents that are produced with the detailed assistance and oversight of counsel and are subject to robust due diligence and verification processes.

Members also point out that to-date short-form disclosure documents have not satisfied marketing and investor needs. They are rarely used for this reason, and due to the aforementioned issues/risks and the fact that they hamstring issuers from successfully setting out their business marketing and investment proposition in a way that will give their capital raise the greatest chance of success. We are not certain of the extent of the analysis conducted by the Commission in this area, and question the inferences drawn from the data that was compiled and assessed, and the relevance and aptness of the conclusions drawn.

Finally, if a short disclosure document is permitted, we believe that it would be prudent for NCAs to encourage issuers to produce, and to be willing to approve, prospectuses that are submitted on a voluntary basis under appropriate circumstances.

Mandatory incorporation by reference: Making incorporation by reference a legal requirement, rather than an option, will lead to risks of disclosure being inaccurate and misleading, as prior disclosure published by a company which was not in contemplation of its transformative capital raising, will likely no longer be accurate, complete or sufficiently clearly and carefully drafted taking account of all the new facts and circumstances, and will not have been drafted to the standards required for a prospectus to ensure clarity for investors and litigation protection for the transaction team.

This said, our understanding of the proposal regarding incorporation by reference is that:

(a) mandatory incorporation would only be applicable to the extent information is required to be disclosed under the PR (i.e., it is specifically required in the PR disclosure annexes and/or is otherwise material under PR Article 6(1)); and

(b) incorporation by reference only relates to specific information and so not necessarily to whole documents (and also only to the extent such information/documents would otherwise be reproduced verbatim in the prospectus),

therefore, the material listed in paragraphs (a) to (k) of PR Article 19(1) would not necessarily be required to be incorporated by reference.

It would be even more problematic if the proposal were to be extended or interpreted in a manner that required all the information listed in paragraphs (a) to (k) of PR Article 19(1) to be incorporated by reference into all prospectuses. It would also lead to unnecessarily lengthy disclosure overall, given not all the information in the documents listed in paragraphs (a) to (k) of PR Article 19(1) will be relevant in all circumstances.

EU Follow-on Prospectus: Members are similarly concerned by the 50-page EU Follow-on prospectus and that taking advantage of this will not be sufficient to meet investors' needs (please see all the issues, risks and arguments set out earlier in relation to the length of the prospectus). The proposed requirement that information contained in the EU Follow-on prospectus enable investors, "especially retail investors", to make an informed investment decision is unnecessary as the EU Prospectus Regulation already requires prospectuses to be in "easily analysable, concise and comprehensible form". It is also illogical as retail investors may be offered equity securities by any equity prospectus, not only an EU Follow-on prospectus. Furthermore, the proposed requirement could be interpreted as introducing a stricter liability regime than for a standard prospectus without providing any guidance on how the presentation of information is supposed to differ from the existing requirement noted above. This will give rise to significant legal concerns and uncertainty for companies wishing to access EU public markets.

Prospectus Supplements: Prospectus Regulation Article 23 defines the cases where a supplement must be published: a "significant new factor, material mistake or material inaccuracy". We note that the proposals provide that no supplement will be required where the final offer price differs by no more than 20% from the maximum price disclosed in the prospectus, which would in practice limit the wideness of a price range. In our view, publication of a supplement should only be required with respect to a very significant change, as provided for in Article 23 and issuers and offerors should remain free to fix the terms of the IPO. AFME considers that a 2 day-withdrawal right for investors and no supplementary constraint on the publication of a supplement to the prospectus is the better solution to offer flexibility to issuers and offerors while preserving investor protection.

Civil liability regime: AFME members as a general point believe that the prospectus regulation civil liability regime is mostly adequate, while current prospectus regulations and practices apply. However, the lack of a uniform liability regime across Europe and individual member states creates significant risks, inefficiencies and differences that act as a barrier to the market. A more consistent and clarified overall EU liability regime would help to mitigate this, although we are cognisant of the fact that harmonisation of EU civil law liability regimes relevant to disclosure is currently outside the remit of the Commission and its proposals.

As mentioned, we believe that there should be a more consistent prospectus regulation civil liability regime throughout Europe. Lack of such harmonisation places European at a disadvantage compared to other competitor jurisdictions. A good example is the framework for shortened disclosure in Australia where it is clear that banks are not responsible for issuer documents, and there is the possibility of a cleansing statement if necessary (with accompanying due diligence procedures put in place ahead of issuance). Under this framework issuer's counsel and counsel for prospective underwriters would have been involved in preparing bespoke periodic and ad hoc disclosure which would be ready for incorporation by reference. This helps to make such issuances more certain, more efficient and simpler than a similar offering in Europe.

Most pertinently and perhaps more achievable in the shorter term, members strongly advocate for a new liability regime under the Prospectus Regulation for forward-looking information in prospectuses. We believe that the liability regime for forward looking statements ought to be modified

so that the issuer will be held liable for such statements only if the issuer was aware of the falsity of such statements or has intentionally made the statement to mislead investors. This standard of "recklessness" is the standard adopted by the SEC in the United States and is expected to be adopted in the UK. It would create a reasonable defence to prospectus liability for forward looking information in prospectuses across EU member states. This effective safe harbour would be an appropriate measure in assisting capital raising by certain desirable types of issuers (e.g., high-growth). This would also allow investors to make more meaningful assessments based on management's view of the future financial performance of the issuer. In addition, however, in order to be effective, it would need to be further clarified that if a syndicate bank were ever found to be responsible or liable for any such forward looking statements by an issuer in its prospectus then a similar liability standard of "recklessness" would be applicable.

Third-country prospectuses: As a general point, AFME members agree that the Commission should adopt a flexible approach with respect to third country (non-EU) prospectuses and we welcome the Commission's attempts to reform the equivalence regime. A strict equivalence regime would likely deter foreign issuers by subjecting their prospectuses (i.e., those prepared a third country whose legislation has already been deemed equivalent) to additional requirements would be detrimental to the attractiveness of European markets. Members point to the IOSCO guidelines and believe that it is important that regulators do not take too granular an approach to determining equivalence if this is to be a meaningful and helpful change.

Multiple voting right shares structures / Dual Class Share Structures: AFME members agree with the principle that multiple voting right share structures are particularly valuable in attracting high-growth, innovative, founder-led companies looking to list, and support the Commission's efforts to address this matter in a positive way. Multiple voting right share structures can be helpful in shielding a founder's vision for the company from short term commercial / market pressures. We acknowledge that the Commission is stepping into a new area away from one share one vote structures which may be met by some political friction.

Nevertheless, AFME members strongly stand by the analysis that these structures are often a key driver in the attractiveness of the market for a range of innovative, high growth, founder-led companies in general, and is not an issue solely limited to SME's. Whilst we understand that these structures are undesirable to some of the investor community that view maintaining and exercising their voting rights as their prerogative, we would argue that the consensus amongst the investor community would side with the view that in many cases a company will prove more successful in the long term under devoted and protected leadership. We point to the numerous markets in the US, the UK, and Hong Kong, as well as some European Member States, that have permitted such structures, successfully attracting issuers as a result. The UK has recently attracted high profile listings featuring such structures (Oxford Nanopore, Wise and Deliveroo etc.) whilst also retaining high standards of governance and investor protection.[1]

[1] In the UK, multiple voting right share structure have been introduced on the LSE's premium listing segment, subject to the following conditions:

We note that there is an ongoing debate on Premium Listing rules in the UK and convergence to the current UK requirements would not necessarily be the right direction for Europe. Nevertheless, we encourage the Commission and other policy makers to bear in mind the numerous large, high-profile companies globally that have utilised these structures, successfully listing and remaining an attractive investment opportunity. What's more, limiting these structures to the SME growth market would likely make Europe a less attractive venue to list for companies with long term growth plans and the intention to progress to the main market. In order to do so, there would be a necessity for said company to undergo a fundamental change to its capital and operational business structures. We believe that when facilitating these structures, an appropriate balance between preserving key governance protections and allowing a continuity of control in the hands of founders to be maintained for a transitional period after IPO, should be maintained. Any flexibility around multiple class share structures should be approached in a way that safeguards governance standards, including mandatory sunset clauses, non-transferability, automatic cancellation /conversion on exit, elective conversion into ordinary shares (and automatically on a purported transfer or exit, unless structured to be cancelled instead) and reservation of certain matters for holders of ordinary shares only.

Ultimately, we point to the numerous markets in the US, the UK, and Hong Kong, as well as some European Member States, that illustrate the utility of these structures and how they may be governed – should these structures feature, they will no doubt drive the competitiveness of Europe.

Importantly, because the factors above would apply to companies that are not SMEs, we would strongly support extension of the permission for these structures (with appropriate safeguards if the Commission sees fit) to other types of companies, including founder companies or other companies where dual class shares make sense for the company and its owners/investors. In fact, Member States that actively or de facto limit these structures to the SME growth markets will very strongly deter companies with long term growth plans and the intention to progress to the main market. In order to do so, there would be a necessity for said company to undergo a fundamental change to its capital and operational business structures in order to meet the requirements of the main market.

Free Float: AFME members support review of free float requirements and a potential lowering of the threshold from 25% to 10%. In our experience, greater free float requirements across Europe have acted as a significant barrier to entry for issuers in two respects (1) dilution and value leakage at IPO, and (2) pre-IPO shareholders being unwilling to sell such a large proportion of their shareholdings. As a result, such issuers have instead utilised competitor markets whereby liquidity is ensured by criteria relating to size, shares in issue and number of shareholders, facilitating a flexible listing with a free

• a time limit or "sunset" on the structure of five years from the date of admission (with the structure needing to fall away after such time);
• weighted voting rights only being available on: (a) a vote on the removal of the holder of those weighted voting shares as a director; and (b) any matter following a change of control to operate as a takeover deterrent;
• a maximum weighted voting right ration of 20:1 as compared to ordinary shares;
• such weighted voting shares can only be held by directors of the issuer; and
• restricted transfer of weighted voting shares, other than to a beneficiary of a director's estate.

float suitable for the issuer's stage of growth. We note that some NCAs have been more willing to exercise discretion in waiving the 25% requirement. Any issues related to such inconsistency would be solved with the application of a uniform 10% threshold.

Flexibility on free float at the time of IPO would, our members believe, be helpful in allowing companies to IPO more easily by reducing the importance of the IPO valuation and any IPO discount, thereby also improving the likelihood that IPOs are successfully priced, and allowing shareholders to view an IPO as a first stage in what might then be a subsequent series of sell downs.

(IV) Market Abuse Regulation

Simplification of reporting for buy-back programmes (Article 5): Overall, AFME supports the proposed changes to the reporting obligations relating to buy-back programmes, as set out in Article 5 (1)(b) and (3). However, we believe that the existing safe harbour for share buy-backs should be widened in scope to include:

(a) all reasons for share buy-backs permitted under applicable corporate law (see Article 21 and following from Directive 2012/30/EU); and

(b) buy backs of debt instruments.

The limitation of the safe harbour to only some of the purposes of share buy-back programmes that are permitted under corporate law is not justified. The market impact of a buy-back is unrelated to the underlying (economic) purpose. A clarification to that effect would be useful and promote regulatory convergence.

In addition, buying back outstanding debt securities that trade significantly below nominal value has proven to be a useful tool to reduce an issuer's debt burden and to adapt an issuer's debt exposure to more favourable market conditions when interest levels decline. Therefore, there is an economic need to execute these bond repurchases. It does not appear justified, from a market integrity perspective, not to also have a safe harbour for debt buy-backs.

Furthermore, we also suggest that the same changes on reporting and disclosure of share buy-back activities are implemented for stabilisation activities. AFME suggests that the Delegated Regulations relating to share buybacks and stabilisation activities are amended to align the provisions on the simplified provisions of MAR.

Market Soundings Regime (MAR Article 11): AFME members welcome the proposed amendment to MAR Article 11, combined with Recital 56 of the draft Listing Act, which clarifies that the market sounding regime is only an option for disclosing market participants (DMPs) to benefit from the protection against the allegation of unlawful disclosure of inside information ('safe-harbour'). It follows that DMPs opting to carry out market soundings in accordance with certain information and record-keeping requirements are granted full protection against the allegation of unlawfully disclosing of inside information, while DMPs opting to carry out market soundings without complying with the

requirements are not able to take advantage of such protection (but there is no presumption that DMPs have unlawfully disclosed inside information).

However, we would welcome clarification, perhaps in a recital, that Member States should not seek to 'gold plate' the requirements by imposing fines for not following the formalities of the market sounding regime irrespective of any breach of the prohibition of unlawfully disclosing inside information.

It should also be considered, in the forthcoming review of the delegated acts on Level II, whether the use of a prescribed script and the level of detail of the required documentation – such as the recording and minuting of all communications between the disclosing market participant and all persons that received the market sounding (Article 6(19)(d) Commission Delegated Regulation (EU) 2016/960) – could be reduced to capture only meaningful communications. The DMP, the issuer and the person receiving the market sounding may all be in different jurisdictions and therefore under different regulations. Some regulatory harmonisation and simplification will be helpful to assist issuers preparing for a new issue in difficult market conditions.

Finally, we welcome the proposed relaxation of the requirement to inform recipients if disclosed information no longer constitutes inside information (cleansing). Indeed where the respective information has meanwhile been announced publicly that should automatically be considered a cleansing event and there should not be a need for any additional cleansing event or process.

Issuer obligation to publicly disclose inside information (MAR Article 17): Generally, AFME members welcome the Commission's proposal to carve-out from the requirement to disclose inside information according to Article 17(1) intermediate steps of protracted processes. The concept to require issuers to "disclose only the information relating to the event that is intended to complete a protracted process" (p. 23 of the explanatory memorandum, hereinafter the "final event") appears to constitute a useful streamlining. Also, adopting a delegated act setting out a non-exhaustive list of relevant information and, for each information, the moment when the issuer can be reasonably expected to disclose, should be suitable to provide more clarity. However, description of that moment in Recital 58 as " when such information is sufficiently precise" should be reconsidered as, according to Article 7 (1) MAR, *any* inside information has to be of a "precise nature" – so that "preciseness" does not appear a suitable criterion. Rather, we believe the trigger event for disclosure should be defined as described in the explanatory memorandum as aforesaid.

Where the draft obliges the issuer to disclose the intermediate step before the final event occurs, it could create uncertainty in several respects. Firstly, the benefit of avoiding pre-mature disclosure that could potentially jeopardise the successful completion of the protracted process could be frustrated by requiring such pre-matured disclosure in the case of a leakage. Secondly, and even worse, it is uncertain whether there will be a separate regime than otherwise in the case of a delay in Article 17(7). To avoid these probably unwanted effects, it would appear useful to allow issuers to take a "no comment" approach rather than being forced to make pre-mature disclosures before the final event has occurred. If the Commission upheld the "early disclosure when confidentiality is no longer ensured" approach, the treatment of rumours and the requirements should be aligned to Article 17(7).

The new requirement for issuers to inform the competent authority immediately after the decision to delay is taken (and not just after disclosure has been effected) should be reconsidered. The trigger event for such disclosure is ambiguously phrased as the draft speaks of the issuer's "*intention* to delay"

and then refers to the moment "immediately *after* the decision to delay". Even requiring disclosure at the latter point in time puts issuers under enormous pressure as a written explanation of how the conditions set out in Article 17(4) were met seems to be required simultaneously. AFME members are of the view that informing the competent authority as to how the requirements for a delay were met after public disclosure has been effected, as currently, is sufficient.

On Article 17(4) we also suggest that the new conditions set out under the new proposed (b) will be challenging for an issuer to meet. If the inside information of which the issuer intends to delay disclosure must not be materially different from the previous public announcements, or must not be in contrast with market's expectations, then it cannot be inside information by definition (as inside information is the type of information which would be likely to have significant effect on prices). Delay of disclosure should be permitted under (a) where immediate disclosure is likely to prejudice the legitimate interests of the issuer and consideration should be given to remove the new proposed (b) as a condition.

Additionally, the consideration to be added to Article 17(7) that a rumour must be "reliable" to trigger disclosure is problematic as the reliability of a rumour is often difficult to establish due to rumours being, by definition, difficult to trace, verify or, in many cases, confirm in the way that material and factual outcomes are. It would appear more appropriate to require that a relevant rumour has to comprise the most significant details of the inside information and must not contain wrong or misleading elements.

Insider Lists (Article 18)*:** In general, AFME supports efforts to simplify the insider lists process. However, we believe that, as currently drafted, the amendments to Article 18 introduce ambiguity as to the obligations on persons acting on the issuer's behalf or on the issuer's account. We therefore suggest that the insertion of paragraph 1a is drafted as follows: *"Any person acting on the issuer's behalf or on the issuer's account shall draw up its own* ***permanent insider *list of all persons having access to inside information that directly concerns that issuer. Paragraph 1, points (b) and (c), shall apply."* This should clarify the difference between the obligation to draw up a "permanent" insider list and a "full" insider list.

AFME appreciates that insider lists are an essential tool for regulatory authorities when an investigation is launched. However, the current requirements for insider lists are onerous, not only for SME issuers but also for other firms and non-SME issuers, and a data privacy risk is also present. Where information in the insider list is sensitive, requirements to keep all the information at all the time seems disproportionate. This appears to have been recognised in the exemption that has been granted for SMEs, which are a less transparent market segment. If market confidence can be sustained with SME issuers' exemption, we suggest that it would be possible to remove some requirements for non-SME issuers and market participants (without going so far as the SME exemption). For example, it could be that more sensitive personal information can be collected when an investigation is launched rather than kept in the insider list all the time.

PDMR and PCA Notifications (Article 19): The obligations for persons discharging managerial responsibilities at an issuer (PDMRs) and related persons to disclose to transactions in the issuer's financial instruments, and to prohibit PDMRs' transactions in the 30 days ahead of the announcement of new financials by the issuer (Closed Periods), are generally understood, but can be cumbersome in practice. This is particularly due to the low disclosure threshold and the wide scope that also includes transactions without an active investment decision.

The proposed changes are generally a step into the right direction, but we would request consideration of modifications in two areas:

First, on the disclosure threshold:

- Raising the disclosure threshold from EUR 5,000 to EUR 20,000 follows the approach taken already by a number of Member States (including Germany) using an option that exists under current MAR regime already and is generally welcome as it reduces the administrative burden for PDMRs, their related persons and issuers across the EU.
- The draft provides for a Member State option to further raise the threshold to EUR 50,000. This would reduce the administrative burden for PDMRs, their related persons and issuers further. However, the proposed optionality would maintain the existing lack of harmonisation that does not appear justified. Rather, a general introduction of the higher threshold of EUR 50,000 would be preferable.

Second, on the Issuers' right to permit certain transactions in a closed period, we note that this is expanded to:

(a) to instruments other than shares and related entitlements,

(b) transactions not implying any active investment decision, resulting from third parties or exercise of derivatives on predetermined terms, including transactions executed by an independent discretionary asset manager, duly authorised corporate actions, acceptance of inheritances, gifts and donations, or exercise of derivatives agreed outside the closed period.

The increased flexibility to waive the prohibition of transactions during the change period is generally welcome. However, where the purpose of the closed period (avoidance of even a theoretical risk of insider dealing) is not affected, as there is no active investment decision by a PDMR during the closed period, transactions should generally be allowed without requiring the issuer's explicit consent.

This may include, for example, automatic conversions of financial instruments or investment decisions taken by an independent portfolio manager without the involvement of a PDMR as indicated in Recital 67 of the draft Listing Act.

(V) MiFID Research (Unbundling)

Background:

The Commission is of the opinion that the MiFID research unbundling rules may have led to diminished availability of research, especially for SMEs, as described in the Explanatory memorandum to the proposal[2]. The Commission has put forward specific suggestions to adjust the MiFID research unbundling regime in the proposals for a new Listing Act ("the proposals") intended to rectify this outcome. To increase research coverage for such SMEs in particular, the Listing Act proposes the

[2] Explanatory memorandum to the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises and repealing Directive 2001/34/EC

introduction in MiFID of an increased threshold of a companies' market capitalisation from EUR 1 billion to EUR 10 billion, below which the unbundling rules do not apply.

Executive summary

While AFME members note ESMA's Report on Risks, Trends and Vulnerabilities of 2nd September 2020[3], which did not find material evidence of harmful effects on research coverage from the MiFID unbundling rules, the Commission's stated intention to take steps to improve research coverage is noted and generally supported. AFME recognises the importance of the objective to improve access to capital markets funding for SMEs.

However, it is our assessment that the European Commission's proposals to increase SME research in the Listings Act are not optimal to achieve the stated policy objectives. AFME members are concerned that the increased scope of the market capitalisation threshold captures almost all EU27 listed companies (96.5%[4]). In AFME's view, increasing the threshold will not achieve the European Commission's desire to increase production of SME research given that the current exemption already covers 86% of EU27 primary listed companies but there has been little demand from clients for rebundled research.

In addition, the European Commission's proposal would effectively potentially create a dual track system of research provision, where firms would have to maintain two systems to provide research on both an unbundled and rebundled basis. A dual track system introduces significant complexity and increased costs. AFME members have not reported any demand from clients for rebundled provision of research as provided for under the MiFID "quick fix" adjustments to the research regime. Members would welcome the opportunity to discuss alternative measures with the Commission.

We set out below the particular concerns facing AFME members as a result of the proposals.

Scope of the Listing Act proposals: When we apply an increased threshold of EUR 10 billion, as per the proposal, we find that 96.5% of EU27 primary listed companies would be eligible for the relief. Inversely, we find there to be just 202 (3.5%) EU27 listed companies with a market capitalisation above EUR 10 billion, which would not be eligible for the proposed relief.

The fact that the vast majority of EU27 primary listed companies would be eligible for relief brings into question the Commission's support for the fundamental principle of unbundling research from trading commissions. Should the Commission wish to revisit the fundamental principles of research unbundling, then AFME members would welcome the opportunity to discuss alternative courses of action through a formal consultation process accompanied by a full cost benefit analysis.

[3] ESMA-50-165-1287
[4] Source: Reuters/Eikon Q4 2022 data (excluding funds or US primary listed companies traded in the EU).

Complexity of a dual track system: AFME members note, given the scope of the Listing Act proposals would make the vast majority of EU27 primary listed companies eligible for the exemption, the potential for massively increased complexity in maintaining what might become a dual track system of research provision. Should a single client request research to be provided on a rebundled basis, two separate research provision systems would have to be built and run in parallel. This would add significant costs to providers of research, which ultimately must be passed on to end clients, and could in and of itself reduce the overall volume and quality of research provision. This runs counter to the CMU aims of reinforcing the EU's global competitiveness.

Experience of MiFID "quick fix": Furthermore, since the MiFID "quick fix" revisions[5] entered into force on 28th February 2022, AFME members have not observed any such increase in research coverage for small and mid-cap issuers. Nor have AFME members reported any demand from consumers of research for a return to pre-MiFID bundled research provision arrangement. With the significant increase in the exemption threshold, there could be a higher uptake by clients, which will place greater pressure on firms to introduce two systems to provide both unbundled and bundled research, which would impose significant complexities and costs across impacted firms.

AFME members also note that the MiFID "quick fix" targeted exemptions from the unbundling rules have been in force for only just one year, which is arguably insufficient time to allow for the market to react to the adjustments and for data to be collected to assess its outcomes and efficacy. AFME members would consider a formal assessment of the outcomes of the MiFID "quick fix" targeted exemptions from the unbundling necessary prior to making any further adjustments.

Given the short period of time this new regime has been in place, the lack of take up by consumers and no observed increase in research coverage for small and mid-cap issuers, this raises serious doubts about the effectiveness of the current measures. These doubts are compounded by the fact that some 86% of EU27 primary listed companies are currently eligible for the existing relief, which suggests that further increasing the threshold would not address the perceived underlying issues with research coverage. Given these shortcomings, AFME members question the logic of increasing the threshold in the proposals before other alternative courses of action can be properly assessed.

International initiatives and milestones: AFME notes a number of international initiatives and milestones upcoming in the research space. In the US, the Securities and Exchange Commission (SEC) has set out plans to allow its no-action letter to the Securities Industry and Financial Markets Association (SIFMA), based on enforcements surrounding research services, to expire on 3rd July 2023. AFME does not consider the Commission proposals to remediate any problematic outcomes from the SIFMA no-action letter expiry.

[5] Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis

In the UK, since 1st March 2022, it has been possible to exempt from the FCA's inducement rules certain SME (<£200 million market capitalisation) and fixed income, currency or commodity instruments (FICC) research. Also in the UK, as announced in the governments Edinburgh reform package in December 2022, an Investment Research Review[6] (IRR) will report in June 2023. The IRR will examine the provision of investment research in the UK, including the effects of the EU's MiFID unbundling rules.

Given these initiatives and milestones are imminent, and the interconnected nature of global research provision, AFME believes now is not the most opportune time to make fundamental changes to the research regime in Europe.

AFME and its members welcome this opportunity to provide our views on the proposals being put forth by the Commission. Please let us know if you have any questions or if we can provide any additional information. We generally support efforts to improve access to capital markets funding for SMEs, and would welcome an opportunity to discuss the proposals and our views further with Commission.

[6] https://www.gov.uk/government/publications/investment-research-review#:~:text=The%20Investment%20Research%20Review%20was,Kent%20would%20chair%20the%20review.

AFME is the European member of the Global Financial Markets Association (GFMA) a global alliance with the Securities Industry and Financial Markets Association (SIFMA) in the US, and the Asia Securities Industry and Financial Markets Association (ASIFMA) in Asia.

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