AssoNEXT - Associazione Italiana delle PMI Quotate

Listing Package Position Paper

March 2023

AssoNEXT is enthusiastic for the effort of the Commission to make EU capital market cool again and very happy that most of the recommendations of the Technical Expert Stakeholder Group on SMEs (TESG), to which AssoNEXT has participated, have been considered by the Commission in the Listing Package as well as the suggestions we have proposed in the public consultation.

We warmly welcome the Listing Package which represents a paramount milestone in EU capital markets regulation after more than 40 years of non-stopping legislative interventions on two pillars of corporate disclosure - market abuse and prospectus regulations – which have built, piece by piece, a suffocating overregulation contributing to the dramatic decline of the number of listed companies in EU. To reinforce the simplification in progress at EU level we suggest that the Commission strongly recommends to Member States and NCAs to remove all cases of gold-plating in relation to EU rules applicable both to companies going through a listing process and to companies already listed on EU public markets.

We are in favour of all the proposed amendments, but we hold that some fine-tuning could be considered to achieve further improvements and clarifications for a consistent framework, reducing compliance tasks, costs and risks for issuers.

1. Prospectus

We support all the new exemptions the Commission is proposing to introduce (i.e. increase of the percentage, for both offer and admission to trading of securities, from 20% to 40%; new exemption from the obligation to publish a prospectus for offer and admission of securities fungible with securities that have been admitted to trading for at least the last 18 months) **and the design of the EU Growth issuance and of the Follow-on prospectus**.

AssoNEXT welcomes the **proposed length of offer documents, their standardised format and sequence and the reduced information to be disclosed and the deletion of the requirement to prioritize the risks factors**.

We support prospectuses pages limits. In our view the twofold importance of prospectuses, as a means of reducing informational asymmetry and helping investors make informed investment decisions shall be reviewed considering that information overload is counterproductive and that empirical research shows that market efficiency is severally undermined by behavioral biases, which is typical of both retail and sophisticated investors ([1]). Regarding retail investors it should be noted that, as a significant number of authors have pointed out, they generally do not read prospectuses ([2]). Accordingly, prospectus regulation may be seen as an expensive disclosure regime aimed at protecting people that do not read prospectuses.

For these reasons, policymakers have gradually addressed these problems introducing a simplified prospectus with Directive 2001/107/EEC (UCITS III), the Key Investor Information Document (KIID) with

([1]) S. Alvaro, R. Lener, P. Lucantoni, *The Prospectus Regulation. The long and winding road* (2020), CONSOB Legal Research Papers no. 22, available at SSRN: https://ssrn.com/abstract=3752798 or http://dx.doi.org/10.2139/ssrn.3752798, p. 1.

([2]) G. Ferrarini, and P. Giudici, *Digital Offerings and Mandatory Disclosure: A Market-Based Critique of MiCA* (2021), *European Corporate Governance Institute - Law Working* Paper No. 605/2021, available at SSRN: https://ssrn.com/abstract=3914768 or http://dx.doi.org/10.2139/ssrn.3914768, p. 5.

Directive 2009/65/EU (UCITS IV), the prospectus summary with Prospectus Regulation 1129/2017.

It is certainly true that standardization of streamlined document – while preserving the content of disclosed information - is a core challenge that policymakers ([3]) are currently facing and, therefore, we welcome the Listing Package proposals to set a page limit for the different prospectuses which clearly go in the right direction and looks coherent with the current simplification of the whole EU framework on mandatory disclosure ([4]).

The Listing Package is perfectly focused on how to make investors choices better informed putting them in a position to price in all the available information and make informed decisions and, in our view, the Commission has correctly identified the tools to mitigate the above-mentioned issues.

In particular, the Listing Package has finally turned the spotlight also for prospectuses on the need to provide **investors with lighter, and clearer information, to facilitate product comparability** ([5]).

We fully support the proposal to introduce a standardized sequence for the content and order of presentation in the prospectuses which may correctly address the boilerplate language issue, that could be harmful for investors and for market efficiency ([6]). Indeed, research have shown that boilerplate disclosure is associated with lower legal costs on average, but also with higher average losses to issuers from mispricing and more fraud litigation ([7]). One of the techniques for correcting biases **is to standardize and streamline the disclosure**, so that it can be easily read by investors ([8]). **Pursuing standardization while preserving the content of the disclosed information and, thus, limiting boilerplate language** is a core challenge again correctly addressed in Listing Package.

To this aim in our view prospectuses shall be also **machine readable**. As per MiCA regulation the Commission should be empowered to adopt implementing technical standards, to be developed with ESMA, about machine readable formats for prospectuses and procedures for the approval.

The proposal amends Article 6(2) introducing a standardized format and sequence of the prospectus (i.e. a fixed order of disclosure of the information contained therein) and provides for the empowerment to the Commission to adopt delegated acts to set out the format and content of the prospectus (Article 13(1). We suggest clarifying that those delegated acts should also consider the need to include **in an additional section of Annex I the information necessary for offers addressed to investors in jurisdictions outside EU** (see U.S.), this would allow to close the gap between EU prospectuses and international offering circulars giving the option to issuers to prepare only one offer document (*i.e.* the EU prospectus) including the additional information normally contained in the international offering circular, with an clear cost savings.

We would like to note that the **300-page limit is in line with the average page number of prospectuses in several Member States** in the 2006-2018 period ([9]):

([3]) S. Alvaro et al., p. 1.

([4]) Similarly, the Regulation PRIIPs focused attention on the way in which information is disclosed and require a Key Information Document (KID). Again, the clarity and conciseness to improve the comparability of financial products for an average investor.

([5]) S. Alvaro et al., p. 21**.**

([6]) Alvaro et al., p. 18 «*Indeed, the extensive use of boilerplate language strikes at the very heart of the function of prospectuses, which is to mitigate asymmetries of information between the issuer and investors. Indeed, it shifts the burden of due diligence directly to investors, since boilerplate language is largely general rather than firm-specific. Such practice is a serious source of concern for regulators and NCAs, asking for a language tailored to the issuer's business, avoiding paste and copy of generic statements from previous deals*»

([7]) S. Alvaro et al., p. 18.

([8]) *Ibidem*.

([9]) S. Alvaro et al., pp. 35-36.

- in Germany the average number of pages for debt and equity prospectuses is 283.5 and 298.1;

- in France the average number of pages for debt and equity prospectuses is 93.15 and 131.85;

- in Ireland the average number of pages for debt and equity prospectuses is 195.85 and 126 respectively. The analysis showed that issuers from all over the world choose Ireland to apply for approval for their prospectuses: North Carolina, Kingdom of Jordan, Italy, Netherlands, Republic of South Africa, Japan, Germany, Turkey, Bulgaria, Sweden, and Luxembourg are some of the examples extrapolated from the sample;

- in Italy the average number of pages for debt and equity prospectuses is 179.75 and 406;

- in Luxembourg the average number of pages for debt and equity prospectuses is 126.15 and 242.75 respectively; issuers from all over the world choose Luxembourg for the approval of their prospectuses, such as: Germany, Netherlands, France, UK, Italy, Portugal, Turkey, and Switzerland;

- in Sweden the average number of pages for debt and equity prospectuses is 66.85 and 105.3;

- in UK the average number of pages for debt and equity prospectuses is 256.6 and 241.75.

AssoNEXT **supports the choice of the language**, provided that the summary is published in the official language of the home Member State, **and the publication in an electronic format only**.

We consider that the following clarifications and additional changes are necessary:

- the exemption threshold of 150 natural or legal persons laid down in Article 1.4(b) of PR should be raised to **500 natural or legal persons**;

- the **offer and admission of securities issued in connection with a take-over bid by way of exchange offer or in connection with merger and division transactions should not be subject to the publication of a prospectus**. These transactions currently benefit from an exemption of prospectus provided that a document is made public describing the transaction and its impact. In practice, this requirement can result in some Authorities requiring the filing of the information document before the transaction takes place and reviewing said document as they would do for a prospectus. These transactions should be excluded from the scope of PR because they are covered by other pieces of EU legislation and subject to specific disclosure requirements (see Amendment 5 in Annex 1);

- **it should be provided for a more streamlined EU Follow-on prospectus for issuers transferring to a regulated market without an offer** (risk factors not to be corroborated, no proforma, no information on trends). **We suggest exempting issuers, transferring from a SGM to a regulated market using the Follow-on prospectus**, from the obligation to include in the prospectus: (a) **proforma statements** in case of significant gross change or significant financial commitment (see article 1(e) and 18(4), Regulation 980/2019). If an issuer is already listed on a SGM and has been involved in the last completed financial year in a significant gross change or significant financial commitment these transactions have been previously disclosed to the market having in mind market abuse regime and incorporated in the price. Therefore, we do not see merit to include a new set of aggregate information previously disclosed to the market obliging issuers to spend additional time and money; (b) a **working capital statement**, which is an extremely costly requirement and should there be a material change in the issuer's financial perspectives, it would be obliged under MAR to have notified the market of this in any case, and therefore this

requirement in not necessary;

- **issuers shall be exempted to prepare the Key Information Document (KID) provided by Regulation (UE)1286/2014**. In Italy, issuers are preparing KIDs in case of rights offer or in case of warrant or convertible bonds offers, with an unacceptable duplication of costs.

2. Market abuse

2.1. Article 11 - Market soundings

We welcome the clarification of the market sounding regime (article 11), so that compliance to market sounding requirements creates a safe harbour for market participants but remains only an option to comply with market abuse rules. We also propose to extend the exemption introduced for private placements of bonds addressed to qualified investors (art. 11, 1a) to equity placements and including, for both types of placements, investors who acquire securities for a total consideration of at least EUR 100 000.

2.2. Article 17.1 - Public disclosure of inside information

To bring more clarity, we propose a rewording of art. 17.1 as it follows:

«*An issuer shall inform the public as soon as possible of inside information which directly concerns that issuer. That requirement shall not apply to intermediate steps in a protracted process as referred to in Article 7(2) and (3)* ~~*where those steps are connected with bringing about a set of circumstances or an event.*~~ ***In a protracted process only the final event shall be disclosed when it has actually occurred***».

We also appreciate the proposal to issue a non-exhaustive list defining the final event in a protracted process that is subject to disclosure and the timing for disclosure. Given the complexity and criticality of the indicative list, we encourage the EU Commission to entertain a market consultation on the content of the indicative list.

To help issuers to **manage the approval procedure of their financial statements** the recitals or the list of the European Commission Delegated Acts shall specify it constitutes a protracted process unless a profit warning or earnings surprise occur.

Regarding art. 17.1b, sentence 1, MAR Proposal refers to the **confidentiality of intermediate steps in protracted processes** that qualify as inside information under art. 7 MAR, we hold necessary to **repeal the obligation provided in Art. 17 (1b) sentence 2 of the MAR proposal to disclose intermediate steps early in case of a leakage** in coherence with Art. 17(7) which provides a duty of disclosure only for delayed inside information. This would make the proposal consistent without being a risk for market integrity, because in case of a leakage (which will most likely be related to rumours in the market) the authorities will still have all means at hand to explore who has infringed the general obligations.

2.3. Article 17.4 - Delay

According to paragraph 4, the notification to the NCA has to take place immediately after the decision to delay disclosure is taken instead of immediately after the information is disclosed to the public.

We **strongly suggest keeping the *status quo* and to provide that the notification should be made only after the information is disclosed to the public and not before** (art. 17.4), also to avoid delay notifications of inside information that will not be published having lost meanwhile the nature of inside information (see ESMA MAR Q&A 5.2). This regime has proven to be efficient and sufficient for purposes of market integrity. In contrast, the proposed changes will increase the administrative burden for issuers (instead of reducing it) as they will have to document their decisions of delaying during a stricter time frame to be able to

communicate to the NCA at the point of time when the decision is taken.

2.4. Article 17.7 – Rumours

One remark concerns art. 17.7 which states "'This paragraph includes situations where a rumour explicitly relates to inside information the disclosure of which has been delayed in accordance with paragraph 4 or 5, where that rumour is sufficiently accurate and reliable to indicate that the confidentiality of that information is no longer ensured".

It appears that the change is meant to help issuers allowing to identify rumours. This approach is generally welcome. However, it is unclear how an issuer might assess if rumours come from a reliable source or not once the information is on the market, the reliability test could be useful for media (CJEU, Case C-302/20) but not for issuers. **We propose, therefore, to delete the reliability test for issuers or to clarify its meaning**.

2.5. Article 18 - Insider lists

We are convinced that it is necessary repeal of the duty to keep the insider list, it is an old-fashioned investigation tool that is completely useless considering the duty of each issuer to keep its commercial record for 10 years and modern investigation tools. This view is widely shared see impact assessment p. 229 "*Most market participants would be in favour of removing such a requirement altogether*". A conservative approach as suggested by ESMA and NCAs shall be bounced back.

It is a costly and risky bureaucratic task, where issuers could be fined for tens of thousands of Euro for not having kept the list in a ex-post review by NCAs.

If article 18 could not be deleted, we support the proposal to extend the regular access register to all issuers deleting the option now provided for Member States to avoid fragmentations in Member States. Issuers will be more than happy to adopt the new register considering cost savings and risk reduction. In Italy most of our associates listed on a SGM have immediately switched to the new register without any doubt and are now happy to have less duties and risks.

Moreover, **it is necessary to strongly reduce the data entry**, name, surname, address and one telephone number are sufficient.

The regime provided for **person acting on behalf or on account of an issuer has been left untouched in the Listing Package** and as per the insider list for issuers we suggest deleting this burdensome bureaucratic task or, as second-best scenario, to **reduce the data to be included as said above**. The **insider lists for person acting on behalf or on account of an issuer shall be proportionate and represent a very light administrative burden**.

2.6. Article 19 - Managers' transactions

The method for calculating the threshold for the managers' transactions shall be modified as to provide that once the threshold (e.g. 20.000 Euro) has been reached, **the calculation of the threshold should restart from zero until a new threshold has been reached again** (meaning that all the following amounts must be summed up until they reach again the threshold), in this case a manager will inform the market only when a new threshold is reached (e.g. 20/40/60.000) and clarify that transactions on different securities shall be calculated separately (art. 19.8).

Under MAR the obligation to notify a manager transaction is triggered by the conclusion of an agreement, whereby, in the case of conditions precedent the obligation to notify arises only upon execution of the transaction, provided that the conditions are satisfied. The decisive factor is not the conclusion of the transaction, but its execution. This also results from Recital 30 of Delegated Regulation 522/2016, according

to which, in the case of a conditional transaction, the requirement to notify only arises with the occurrence of the relevant condition, i.e., when the transaction in question actually takes place. According to Recital 30, a double notification – at the time of the conclusion of the contract and the time of occurrence of the condition – is expressly rejected. ESMA has clarified (MAR Q&A 7.9) that the types of transaction prohibited during a closed period under Article 19.11 of MAR are the same as those types of transaction subject to the notification requirements set out under Article 19.1 of MAR. Notwithstanding the above some commentators have argued that a PMDR may not enter into a conditional transaction during a closed period, even if the transaction is only completed after the end of the closed period. This has created a relevant incertitude on the market mainly for M&A transactions where a PDMR is both a manager and a shareholder of the issuer. **We therefore suggest clarifying in Recital 30 of Delegated Regulation 522/2016 providing that PDMR may enter into an agreement (so called signing) subject to conditions precedent if the execution (closing) will occur after the expiry of the closed period**.

To reduce bureaucratic burden and thus follow the objectives of the listing act with more consistency, we suggest **deleting the duty to draw up a list of closed associated persons and the duty on issuers to notify closed associated persons** (art. 19.5) which have proven to result in significant compliance efforts for issuers.

Also, for the sake of consistency, we call for the **exclusion** from the notification obligation of **gifts, inheritances and donations** that were not included among the transactions to be notified under MAD because they are completely passive from the PDMR's point of view (see art. 10.2 let. (k), EU Delegated Regulation n. 2016/522), have no signalling value since the price field in the notification form of managers' transactions for a gift, donation or inheritance shall be populated with 0 (zero) (see ESMA MAR Q&A 7.4) and considering the difficulties to calculate the value of a donation, a gift or inheritance (see ESMA MAR Q&A 7.4);

Finally, it should be clarified that where *performance shares are allocated to PDMRs as part of a remuneration package, the obligation to notify arises only when the PDMR sells the shares as this is the moment in which there is a real signaling value for the market; as the ESMA Q&A (see 7.5) does not clarify the issue, we think that t*he moment in which shares are granted for free to PDMRs (meaning the moment in which shares are credited in the account of the PDMR) should not be notified (there is no discretion by the PDMR who is passive and there is no signalling value for the market) while when the shares are sold there should be a notification. A different interpretation would imply a duplication of notifications, more work to be done by the issuer's staff and the increase of indirect costs. For phantom stock, the notification duty should be excluded as the PDMR has only the right to receive cash. The above-mentioned clarifications could be included in the ESMA guidance.

2.7. Article 30 Administrative sanctions and other administrative measures

Regarding infringements of articles 18 (insider lists) and 19 (managers' transactions), which have no impact on market integrity as they are only burdensome bureaucratic tasks, the Commission's proposal even introduces new turnover-related maximum sanctions. This appears particularly inconsistent to the overall objective of the Commission to reduce potential risks for issuers.

The Commission proposal also does not consider any intervention on sanctions for natural persons (see article 30(1)(i)). We suggest providing for a more proportionate framework also in this case. Administrative sanction for natural persons **shall be based on annual compensation** (instead of the total annual turnover) for infringements of article 17(1); moreover, **we recommend to strongly reduce sanctions for infringements of articles 17(4) (delay)** (actually 1 million Euro), **18 (insider lists)** and **19 (managers' transactions)** (both actually 500,000 Euro). One tenths of the actual maximum amount seem appropriate. Finally, penal sanctions in case of infringement of articles 17(4), 18 e 19 MAR shall be repealed.

We welcome a lighter regime for SMEs but we hold that the definition included in article 30 shall abandon

the old meaning included in Commission Recommendation 2003/316/EC and **introduce a definition based on market capitalisation** (500,000,000 or 1 billion Euro would be more appropriate), as suggested by the TESG Report and HIGH Level Forum CMU Report.

2.8. Debt-only issuers

We suggest clarifying that debt-only issuers should disclose only information that is likely to impair their ability to repay their debt.

3. Dual listing

Regarding dual listing, the existing legislation (MiFID II) may be understood that a company may seek dual listing (i.e. admission to trading on a venue other than the original trading venue) only based on a third-party request. Therefore, **we recommend providing legal clarity on the issue of dual listing** by amending Article 33(7) of MiFID II to **make it explicit that issuers admitted to trading on an SGM may on their own request demand to be admitted to trading on another SGM**. This issue is considered in the Impact Assessment (p. 90) but not addressed in the legislative documentation. It should be noted that «*The overwhelming majority of respondents (59%, or 23 respondents) were in favour of further clarifying Article 33(7) of MiFID II with a view to ensuring an interpretation whereby the issuers themselves can request a dual listing*».

4. Research

With reference to the proposal to increase the market capitalization threshold for small and medium-sized listed enterprises to 10 billion euros, below which financial research fees and trading fees may revert to a "re-bundled" regime, **we note that it does not seem address the problem correctly as research continues to be seen as an incentive**.

A first solution could be to exclude research (even only on SMEs with a market capitalization below 10 billion EUR) from incentives. By removing research below 10 billion from incentives, a healthier and more organic development would be favoured, and a more in-depth approach to investment choices thanks to a wider choice of research providers available. To do this, the current proposal could be modified by replacing Article 24, paragraph 9-bis in its entirety with the following: «9-bis. *The provision of research services by third parties to investment firms that provide portfolio management services or other investment services or ancillary services to clients is considered compliant with the obligations set out in paragraph 1 if it concerns issuers whose market capitalization has not exceeded EUR 10 billion as expressed by year-end quotations for the 36 months preceding the provision of research services or their equity for the financial years in which they were not listed*».

However, this proposal may not be sufficient as investment firms and managers may decide to continue paying low fees for order execution services on small and medium-sized enterprises (SMEs) securities, thus not incentivizing research effectively. Therefore, in our view, it is also necessary to add an additional modification to the proposal described above to expressly include research as one of the evaluation criteria for transaction execution quality for the purposes of best execution. This would redirect orders for companies with a market capitalization of less than 10 billion EUR to brokers who invest in research on those securities, thus promoting its production. To do this, it would also be necessary to intervene in Article 27, paragraph 1, which could be modified as follows: «1. Member States require investment firms to adopt sufficient measures to obtain, when executing orders, the best possible result for their clients, taking into account the price, costs, speed and likelihood of execution and settlement, the size and nature of the order, *the availability of research (in the case of issuers whose market capitalization has not exceeded EUR 10 billion as expressed by year-end quotations for the 36 months preceding the provision of research services or by equity for the financial years in which they are or were not listed)* or any other consideration relevant to the execution. However, whenever there are specific instructions given by the client, the investment firm

is required to execute the order in accordance with such instructions».

These two changes, together, would have a greater chance of achieving the objective set by the Commission to improve the visibility of SMEs, facilitating the development and production of research. Brokers could resume contacting investment managers and investment firms to send research, providing free trial services and facilitating the entry of new investors, thus promoting the further development of the European capital market.

5. Multiple voting rights

AssoNEXT **welcomes the proposal to enhance shares with multiple voting rights to encourage more companies to seek listing on EU capital markets** and it suggests **extending the option to issuers to be listed on all MTFs or regulated markets**. In Italy, we are supporting the increase of MVR up to ten votes for companies willing to list on regulated market or a MTF.

We have also appreciated the arguments used by the EU Commission to support MVR that have the merit to tear down the ideological barricades used in the past to back the one share one vote principle.

Regarding the protection of minority shareholders, we believe that they should not harm existing national regime already in place by imposing different requirements. This is the case, for instance, for the combined request of a maximum weighted voting ratio and a requirement on the maximum percentage of the outstanding share capital that the total amount of multiple votes shared can represent (Article 5, paragraph 1, b, i).

We also question the advisability of a legislative provision limiting the voting weight of MVSS by restricting the exercise of MVSS to matters requiring approval at a qualified majority. This is indeed an issue which should be left to companies' decision.

As to the additional optional safeguard measures, such as time-based sunset clause, event-bases sunset clause, and transfer-based sunset clause avoiding that MVSS are transferred to third parties or continue to exist in case of incapacitation, retirement or death of the holder, we agree that they should be left to Member States, to the extent that they are also optional for each company.