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Response

Consultation on a draft proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

The Federation of European Securities Exchanges (FESE) is a not-for-profit international association (AISBL) representing the interests of 23 Market Operators which operate a total of 42 exchanges (Regulated Markets and MTFs) in equities, bonds, and derivatives. FESE Members come from all the EU Member States and Iceland, Norway and Switzerland. In addition, we have seven Corresponding Members from European emerging markets.

I. Remarks on DG Markt's General Assessment of the Prospectus Directive (Section 2)

We agree with the broad thrust of the general assessment of the Directive contained in this section. We believe that the Directive functions well and has been a significant improvement over the previous regulatory framework.

We also share the concerns raised on page 4 regarding certain continuing divergences in the application of the Directive. We agree that CESR should continue working on reducing these divergences. In this regard, although at the beginning CESR's use of the Frequently Asked Questions and Answers format was justified for efficiency purposes, we find it ineffective today at addressing divergences. In some cases the FAQ simply disclosed the different approaches taken by jurisdictions (which in some cases may even have been faulty transposition but mostly were different supervisory interpretations) without concluding with a common approach. We strongly encourage CESR to eliminate all instances of supervisory divergences that undermine the use of the passport and the ability of issuers to raise capital efficiently across the EU.

We also have a comment on the assertion on the same page that the costs of compliance have decreased once the participants became used to the regime. Our experience shows that costs have not declined, essentially because of the continuing high costs of liability and litigation. Within this overall package, the direct marginal costs of a public prospectus as opposed to those of preparing a private placement document are not significant. Therefore until the costs of liability can be brought down, we do not expect the costs of prospectuses (public or private) to be brought down.

II. Remarks on the Changes Proposed (Section 3)

3.1. Article 2(1)(e) — Definition of qualified investors

In principle we sympathise with the objective of reducing the costs for the intermediaries associated with classifying their clients. However, any simplification in this regard should take into account the purpose for which the classification is to be used and whether the investors' interests will be well protected. In this regard, we are not entirely convinced that the definition of a qualified investor for the purpose of the PD can be based on the same parameters as the definition of a professional investor under MiFID. The two definitions were intentionally kept separate during the negotiations for the PD, at which point the MiFID definitions were already known. The reason was that an investor knowledgeable / wealthy enough not to need a prospectus was considered to be different from a client of a firm who is knowledgeable / wealthy enough not to need a retail type of protection under Article 19 (the most relevant part of MiFID in this context). In fact, this view is consistent with the ESME paper to which reference is made in footnote 11 of the Commission's Background Document. We encourage the Commission to look further into this question and, before proposing such a change, to be sure that investors would not be adversely affected.

In addition, it is unclear as to how the proposed amendment will truly reduce the costs/complications of the current definition of a qualified investor, given that it does not touch any of the subparagraphs (iii), (iv) or (v). Based on our experience, the real difficulty with respect to this definition is in these sub-paragraphs, which were formulated as a compromise primarily between governments who could not agree on a common definition of natural persons and SMEs which should qualify as qualified investors. Again based on our experience we find that the register system simply does not work. With the additional time that has passed and the experience that has accumulated, we believe that now may be the right time to explore whether the definition could be harmonised and the national discretions eliminated. This would require a new attempt at a possibly new consensus definition but could be worth the effort in terms of the benefit it would yield.

In conclusion, we support amending the definition of qualified investors in the PD so that the register system can be used by issuers and functions well. Whereas aligning the definition in the PD with MiFID could be a useful first step, we believe that, to achieve a register that is used in practice, it will be necessary to reconsider the definition of qualified investors in its entirety. Finally, further thought needs to be given, with a focus on the specific purpose of the PD, to whether the alignment of PD and MiFID should include professional investors as opposed to eligible counterparties only.

3.2. Article 3 — Exempt offers

We agree that bringing clarity and legal certainty to the further distribution of a privately placed security is very important. In doing so, it is necessary not only to clarify and simplify the obligations of the intermediary and the issuer, but, even more importantly, to avoid a situation whereby an investor who is not a qualified investor may be sold a product without appropriate information.

We find that the PD has reduced the occurrence in Europe of situations as those described as retail cascade; in some cases, these distributions have not disappeared, but moved to other regions (e.g. clients in Asia).

While we agree with the underlying purpose of the amendment, we do not find that it improves the current wording of the PD; on the contrary, the proposed deletion of the last sentence of this subparagraph would appear to have the opposite effect by allowing any kind of retail cascade. We think it will lead to greater confusion and more diverse approaches among the Member States on the issue of subsequent resale of securities of credit institutions to their customers. We strongly advise against this deletion. The private placement regime implicitly defined in the PD should not facilitate the massive distribution of securities to retail investors without any documentation.

As a better solution, we would propose introducing a positive definition of private placement with a timeframe accompanied by a secondary trading exemption. An alternative would be the creation of a restricted securities regime.

3.3. Article 4 — Exemptions for Employee Shares Schemes

We support the initiative to address the issue of employee shares schemes as the current wording is causing practical difficulties for US multinationals that wish to offer shares to EU employees. We however think it may be preferable to achieve the result sought by DG Markt through other means, for example by either adding offers to employees in Article 3(2) or including employees in the qualified investors definition (Article 2(1)(e)). Treating the issue of offer of securities to employees outside Article 4 would also provide for the possibility of having a harmonised regime for cross-border employees' offers. Currently, the document mentioned in Article 4(1)(e) is not benefiting from the passport regime. We think that this treatment could be harmonised by including a specific "comitology" authorisation in order to ease the difficulty for multinational groups to address offers to all their employees within the EU.

The current exemption relies on the assumption that employees have sufficient information because the issuer is already a public company and therefore corporate information with regard to the issuer is publicly available (because of the Market Abuse and Transparency Directives). The prerequisite of a document instead of a prospectus can therefore be limited to the description of the securities offered, without presenting the company. However, this assumption would not hold if the company in question was not subject to the above mentioned Directives.

As a consequence, the deletion of the reference to listed companies in this Article would significantly modify the nature of the Directive. We think that the Directive does not distinguish between employees and other individuals in the context of the definition of a public offer of securities, even with the proposed amendment. Therefore, it seems that issuers and individuals (which are not employees of the given issuer offering its securities) could argue that they are discriminated against because they are subject to a more stringent and different regime in case of public offer of securities.

Moreover, it is also relevant to highlight the broader discussions on mutual recognition between the US and the EU, which started in 2007 but which have been interrupted. The exemption for employee share schemes was limited to Regulated Markets as defined in the EU legislation because of the then (and still valid) absence of reciprocity from non EU countries (offers of securities from EU companies to their non-EU resident employees are subject to prospectus requirements, notably in the US). The introduction of this flexibility to US companies could be included in the renewed transatlantic dialogue.

3.4. Article 10 — Information

We fully agree with the deletion of Article 10, which duplicates the obligation set out in the Transparency Directive, which was adopted after the PD. It makes sense to streamline the two obligations by removing this article from the PD. (For coherence, Article 11 will have to be modified as well).

3.5. Article 16 — Supplement to the prospectus

We agree that the withdrawal period is an area where there is room for further harmonisation in the Directive and believe a time period of two days should generally be accepted. This should be done in a way that does not reduce the protection for investors, however, especially considering the fact that the confidence of investors in capital markets in the current environment needs to be re-built.

With this in mind, we find the proposed wording of the change to the Directive not at all clear. If the purpose is to achieve full harmonisation instead of minimum harmonisation, it seems to us that the words "at least" should be deleted so that this period becomes the standard. If the purpose is to also allow issuers to set a longer withdrawal period for a specific offer, this should also be made clear in the wording of article 16(2). In this case, however, the maximum period may also have to be agreed within the EU – considering that it would undermine the confidence in the Single Market to have significantly varying periods. In fact, our advice would be to have a single standard – since we see no reason for treating differently two investors in the Single Market subject to the same conditions – i.e. being subject to material supplementary information that might cause a withdrawal of the investment.

3.6. Modification of thresholds

We support the proposed amendment in Article 2(1) point m, paragraph (ii). The main consequence is the removal of convertible bonds from the equity category to the debt category in the context of the determination of the home competent authority. This would remove the current inconsistency between the last sentence of recital 12 and Article 2(1) (m) (ii).

4.1. Disclosure obligations: the prospectus and its summary

We believe that the prospectus summary should not be shortened. The summary is already very condensed. Further shortening of the summary is not likely to result in a reduction of costs for issuers but could materially undermine the protection of investors. It should not be forgotten that the summary is in some cases the only part of the prospectus that is provided in the local language. Reducing it any further would risk damaging investors' interests.

It also seems that issuers are not generally demanding shortening the summary. On the contrary, there appear to be cases where issuers draw up a longer, rather than a shorter, summary. Moreover, we also advise against mandating any specific structure for the summary. Since the quality of a summary is more important than its exact length or structure, and since those drawing up the summary need some flexibility in choosing the most important elements, we recommend keeping the current length with a flexible content subject to the overall obligation that it reflects the most important elements of the prospectus.

4.2. Disclosure obligations for retail investment products

No comment.

4.3. Disclosure obligations for small quoted companies

We fully support reducing costs and burdens for SMEs, as long as this does not impinge on investor protection and the health and soundness of our markets. In relation to the specific disclosure obligations for SMEs, our members have differing views as to how this should be achieved.

Some members prefer the option of raising the threshold in Article 1.2(h) on the basis that creating a mini prospectus regime within the PD would mean introducing another layer of rules, which would not serve the purposes of simplifying the prospectus regime and reducing the administrative burden. It would instead complicate the regulatory environment for issuers while maintaining, with perhaps some small reduction, the costs for drawing up a document for the same number of smaller issuers. It is also worth pointing out that smaller issuers tend to have less complex businesses and operations compared to larger issuers, and therefore naturally have less information to include in a prospectus, which has proportionate effects on costs.

Other members favour introducing a "mini" prospectus regime and adapting the PD disclosure requirements to SMEs' less complex businesses and operations compared to larger issuers: they believe that it is important for the protection of investors to have an information package even for smaller issuers which can be simplified compared to the one required for larger companies, but reviewed and approved by the competent authorities. FESE will continue working on this issue further and keep DG Markt informed of any additional views / facts that might emerge in relation to the needs of SMEs listed on RMs.

4.4. Disclosure requirements and Government Guarantee Schemes

We agree that issuers should not be required to provide information on Member States as guarantors and support changes to the Directive in this regard. We also note that by the time such changes have been implemented in national legislation, the issuances targeted by the proposal will already be closed. In the meantime a possible fast track would be for CESR to agree on practices as regards information on Member States as guarantors.

4.5. Rights issues

We support addressing the issue of rights issues and exempting rights issues from obligation to draw up a prospectus. The reason is that for issuers whose shares are already admitted to trading, information relevant for investors has already been disclosed by the issuer in accordance with the Market Abuse and Transparency Directives. This is valid for shares admitted to trading on RMs.

For clarity, the term "rights issue" should be defined in the Directive.

It should also be noted that the proposed exemption should also be considered for other types of equity issues (e.g. open offers) by companies that already have shares admitted to trading on a RM.

4.6. Article 2(1)(d) — Definition of offer of securities to the public

We agree that guidance from the Commission and CESR Level 3 are more effective tools to remove legal uncertainty than legislative amendments.

4.7. Liability

We agree with the importance of the issue (as highlighted in our comments about the costs) and also agree with the analysis that it cannot be tackled in isolation here. Liability was raised early on in the preparation of the PD and its limited treatment in the Directive reflects the difficulty of resolving this issue within the boundaries of the current legal framework.

4.8. Equal treatment of shareholders

We agree that equal treatment of shareholders should not be covered in the PD review. In any event, it is dealt with in the Transparency and Shareholders' Rights Directives.

Other issues:

For the sake of simplicity and tidying up of the Directive, specific provisions which make reference to timelines which have expired or are due to expire (e.g. Article 21(2), Article 30(1), Article 30(3)) should be amended or deleted, as appropriate.

III. Conclusion:

We thank DG Markt for the opportunity to offer our views and remain ready to provide any further input required.