

FESE Response to ESMA Consultation Paper on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU

I. Introduction

We thank ESMA for the opportunity to respond to the current Consultation Paper. The Federation of European Securities Exchanges (FESE) represents 46 exchanges active in equities, bonds, derivatives and commodities through 21 full members from 30 countries, as well as 7 Corresponding Members from European emerging markets. FESE is a keen defender of the Internal Market and many of its members have become multi-jurisdictional exchanges, providing market access across multiple investor communities. FESE members operate Regulated Markets (RMs), which provide both institutional and retail investors with transparent and neutral price-formation. In line with the interests of the broader market, securities admitted to trading on our markets have to comply with stringent initial and ongoing disclosure requirements and accounting and auditing standards imposed by EU laws.

At the end of 2010, FESE members had up to 9,050 companies listed on their markets, of which 8% are foreign companies, contributing towards the European integration and providing broad and liquid access to Europe's capital markets. Many of our members also organise specialised secondary market MTFs that allow small and medium sized companies across Europe to access the capital markets; 1,035 companies are listed in these specialised markets/segments in equity and bonds, increasing choice for investors and issuers. Through their RM and MTF operations, FESE members are keen to support the European Commission's objective of creating a single market in capital markets. At the same time, as will be explained further below, the objective of integrating secondary trading at the European level does clash with another EU objective: that of maintaining the access to capital markets for vibrant local companies that are vital to economic growth and employment. Policies must find the right balance of their objectives.

II. General Remarks

FESE fully agrees with European supervisors that there is an adequate level of flexibility in the current Prospectus regime. Our principal view regarding this consultation is in line with supervisors. FESE does not wish to see any proposals that will hurt investor protection, dilute the existing framework or potentially increase risks.

As a starting point, we include a table (Table 1) that outlines FESE's understanding of the current application of the Prospectus Directive. We are interested to have feedback from ESMA as to whether they have a different interpretation of the Directive. We feel strongly that the current distinction between a Regulated Market and an MTF in this context should be retained. This requires the continued application of the principle that admission to trading on a MTF, as opposed to admission to trading on an RM or a public offer, does not trigger the obligation to publish a prospectus.

Table 1

	Whether the obligation to publish a prospectus applies:		
	Regulated Market	MTF	OTC (private placement with no listing)
No public offer:	YES	NO	NO
If there is a public offer:	YES	YES	YES

SME Markets

FESE does not support the proposal of what is called a “proportionate” regime for SMEs. While the concept of proportionality sounds benign, the effect would not be positive. We support the maintenance of a distinction between Regulated Market and MTF coupled with one set of rules for RMs. We firmly believe that this distinction ensures that SMEs have the necessary choice as to where to raise capital, depending on their needs, expected benefits and level of evolution. Once they choose RMs, they should be subject to the same rules as all other companies.

In the recent MiFID consultation, it is stated that the Commission services consider that Regulated Markets and MTFs could be given the possibility of creating a specialised SME market. The framework directive could be amended to include a new definition of an “SME market” and to introduce specific harmonised requirements for SME markets under the provisions on Regulated Markets and MTFs. The regime would set out requirements that are proportionate and tailored to take into account the specific nature and needs of these markets. From discussion we understand that this would primarily mean MTFs for junior markets receiving such a label.

We believe that the provision outlined in the MiFID consultation has already been taken into account in the establishment of MTFs run by Regulated Markets, as permitted by the FSAP. Looking at European platforms, a number of them have already established MTFs which apply ‘lighter’ regulation to smaller companies wanting to access the market. The market knows very well which MTFs cater to SMEs and this quality label therefore already exists.

SMEs are listed (and traded) on both RMs and MTFs. This provides a good spectrum to meet the needs of SMEs. At the start, SMEs need the environment of their national jurisdictions with which they are familiar (language and proximity to investor remain important). The idea behind the MTF listing is to foster SMEs’ ability to comply with listing rules and to ‘grow up’, allowing them at a later stage to list on a Regulated Market. Therefore the current spectrum is in principle sufficient.

One of the more fundamental problems facing exchanges – not easy to address via policy - is the lack of revenues from these MTFs. Many exchanges see these markets as a ‘nursery’ for them to graduate to a full listing. An important point is that SMEs are by definition relatively illiquid; whether the platform is national or European does not play a big role. The trading revenues from this segment of the market will always be limited. Given the commercial background, the market should be allowed to find the right balance between national, regional and pan-European platforms for this market segment. We therefore do not support policies to either water down the RM rules or tighten the MTF rules.

FESE Study on Listed Shares¹

On page 61 – 62, ESMA points out that a large number of companies listed in RMs are small. This is indeed true. Following an internal study based on statistics from 2009, it was clear that even though it is perceived that exchanges only deal in ‘blue chips’, on average 50% of the market accounts for what is classified as extra small companies (below 50 million EUR market capitalisation) and this segment in turn only accounts for a small amount of market cap, trades and turnover. However, it is important to point out the fact that 50% of FESE listed companies are below 50 million Euro cap does NOT mean that they are all SMEs. It just shows that, with the difference of size in the economies of Europe, 50% of RM companies are below that size. Some of these companies are genuine SMEs in their own context, while some are actually large companies in small countries.

¹ FESE Study on Listed Shares (2009)

European Central Bank data on SMEs

There are 20 million SMEs in Europe. According to the ECB survey, access to finance is one of their top problems. When they do access external finance, many of them go to banks. Capital markets are a viable option for only a sub-set of them. However, even though the number of such small companies is only a small proportion of the total SMEs, the ability to tap capital markets is a very important tool for the growth of small companies. There is a logical evolution of the needs/abilities of SMEs' finance from banks to private equity funds/venture capital to MTFs to RMs. Policy must ensure that this 'financing ladder' continues uninterrupted

What are the advantages of smaller companies accessing capital markets?

1. Capital markets provide an exit for venture capital invested in SMEs
2. Better governance – listed companies are in the public eye
3. Brings more benefits to investors in terms of transparency
4. Diversifies the source of financing that SMEs can readily access
5. Increases SMEs' exposure and public stature towards, not only clients and employees, but very importantly external stakeholders and potential investors.
6. Facilitates inter-generational transition in family owned companies, which is a key issue in Europe
7. Enables the development of leading European companies
8. Spreads the wealth to wider segments of society
9. A company listed on an MTF has the opportunity to grow and eventually be listed on a Regulated Market, which has its own set of benefits.

We believe that the main attribute an Exchange or an MTF operated by an Exchange can give to a company is a quality label and assurance that the market is being regulated to the highest level. By establishing the junior market MTFs, the Exchanges now offer a new alternative to companies in terms of less strict regulation but with the possibility of entering the main market once that company grows. Our main concern is that if the Commission were to decide to lighten regulation for RMs, and especially if this were done based on an across-the-board, absolute threshold, then potentially 50% of companies could be affected. In addition, we strongly believe that it is not possible to look at SMEs from a European angle only; as there is such a diverse range of exchanges in Europe (what is small in Germany is big in Bratislava) and proximity to the market is so important. On the other hand, using 'relative' benchmarks (such as relative size in comparison with the local markets) is also not useful, because it would create disadvantages for the smaller economies of Europe.

European Directives

While the Prospectus Directive focuses on issuers it does not cover the conduct of business of the underwriter. It is important to have the right balance between ease of access and investor protection. The Commission has already proposed possible changes to the regulatory framework for SME listings. These are summarised below:

- Prospectus Directive: Possible lightening of listing requirements for RMs for SMEs and some changes to MTFs as well.
- MiFID: Proposal to create a "quality label" for SMEs on RMs and MTFs FESE believes that, given the strong home bias characterising the trading of SMEs, there is no need to create inter-linkages between SME markets. However, we support the harmonisation of the requirements applicable to the listing of SMEs on MTFs so as to provide all investors with a similar level of protection. In addition, we would like to stress the importance of ensuring that the secondary market for SMEs is regulated by the same rules as the secondary market for other types of shares. It would be counterproductive to adopt lighter rules for trading SMEs: SMEs are often

perceived as riskier than blue-chips, and therefore, investors should be offered a high level of protection in order to encourage them to trade SMEs.

- Market Abuse: The original idea was to extend Market Abuse to MTF listings. This would increase the burden on issuers if not done appropriately. FESE is against extending costly issuer requirements to MTF listed SQCs but has nothing against extending certain useful requirements to MTFs, since we agree that market abuse should not happen there either. We would recommend the extension of the scope of certain aspects of the Market Abuse Directive so as to cover MTFs (but not others, such as insider lists).

An increasingly relevant problem with listing is that it has been somehow discouraged as an option to companies. Listed companies in recent times have been under close scrutiny by authorities and supervisors and subject to particular requirements most of which do not apply to private companies, making this latter status more attractive. It is not clear what the final impact of FSAP, in particular MiFID, Prospectus Directive, MAD and Transparency Obligations Directives, was on SMEs' access to financing. Any legislative measure should rest on an impact study to accurately determine this impact.

Certain FESE members believe that IFRS is an important part of this process, as this allows investors to feel confident with the reporting requirement for companies that they are considering investing in. However, a certain level of flexibility should be maintained in order to avoid listing becoming too costly for certain listed companies.

Response to Consultation Questions

Format of the final terms to the base prospectus (Article 5(5))

Q1: Do you consider the list of “Additional Information” in Annex B complete? If not, please indicate what type of information could be classified as “Additional Information” and to what item they would belong to (CAT A, CAT B or CAT C, as defined in Part 3.III). Please add your justifications.

We feel that the overall approach is unnecessarily restrictive. The issuer should be able to determine what information is appropriate to insert within the final terms over and above that contained within the base prospectus. We believe that there should be greater flexibility for the issuer to include additional items in the final terms which do not relate to the securities note but which are important for investors.

Q2: As for the “additional provisions, not required by the relevant securities note, relating to the underlying”, please provide the information which could fall under this item.

Q3: Under “CAT. B” items, is the list of details which can be filled out in the final terms complete? If not, please indicate with your justifications what elements should be added.

We feel that it is very limiting to issuers to impose these categories on them and we do not agree that it is the best approach.

Q4: Based on the instructions given in this document, could you please estimate the increase of the number of supplements to be approved in per cent?

We cannot give an estimate in relation to the increase in the number of supplements.

Q5: Based on the instructions given in this document, could you estimate the increase of the relevant costs?

Q6: Do you agree with the proposed mechanism of combining the summary with the final terms? If not, please provide your reasons and an alternative suggestion.

FESE believes that cost for issuers should be limited and that easier access to information be made available to investors. However, ESMA should ensure that investors are not provided with false comfort through simplified information. The base prospectus is still the key source of investor information. FESE agrees with the proposal to combine the final terms with the summary, with ESMA having the ability to review these documents.

Q7: Please estimate any possible costs that this mechanism would imply for issuers.

Format of the summary of the prospectus and detailed content and specific form of the key information to be included in the summary (Article 5(5))

Q8: Do you agree with our modular approach?

While the modular approach will ensure that key points are contained in the summary, ESMA needs to be cautious that the proposed method of “points” disclosure is not too prescriptive and does not serve to usurp the function of the prospectus.

Q9: Do you agree with our approach of identifying the mandatory key information to be contained within five sections?

While ESMA’s approach of identifying the key information in the five sections set out in the mandate will provide a key information guide to investors, ESMA should ensure that the function of the prospectus is not usurped and the investor is afforded any false comfort. FESE agrees that the length of the summary should be limited.

Q10: Do you agree that we have provided sufficient flexibility for issuers and their advisers in drafting summaries – whilst ensuring that summaries are brief and provide the reader with the necessary comparability between prospectuses?

Although comparability appears to be important, it would be beneficial for ESMA to investigate the extent this is the case for securities that the prospectus is produced for. The goal of the summary is always to give the best synthesised view of the investment.

Q11a: Do you agree that our approach adequately limits the length of summaries?

ESMA needs to make sure that the minimum level of detail that is required in the points under the five sections does not increase the length of the summaries.

Q11b: What is “short” for a summary for: (i) an issuer; & (ii) an investor?

Q11c: Do you think that there should be a numeric limit on the length of summaries? If so how might that be done?

We agree there should be a limit to the length of the summary (numeric or otherwise).

Q12a: Do you agree with our proposed content and format for summaries?

FESE urges ESMA to ensure that the content does not produce excessively long summaries and does not provide false comfort for investors. ESMA must ensure that the prospectus remains the premier source of investor information.

Q12b: Are there other pieces of information which should appear in summaries? and are there disclosure requirements in our tables which are not needed for summaries?

There is a risk that the information in the tables is too prescriptive.

Q13: Is there a need to augment Point B.9 with additional disclosure requirements, such as key assumptions, or to state that the forecast is reported on in the main body of the prospectus?

The summary should state that the forecast is reported on in the main body of the prospectus.

Q14: Do you agree with our proposal for amending Article 3, 3rd paragraph, Prospectus Regulation?

No, as there is a risk that the proposals for the summaries could be too prescriptive.

Q15: Could you estimate the change in costs that will arise from the proposals in this document for summaries?

We have no view on costs.

Proportionate disclosure regime (Article 7)

Proportionate disclosure regime regarding rights issues

Q16: Do you agree with the proposal to consider that “near identical rights” should have the same characteristics than pre-emption rights? Do you agree with the definition given in paragraph 117? Are there any other characteristics which should be taken into account?

If a definition of ‘near identical rights’ is deemed necessary, then it should be aligned as closely as possible with pre-emption rights.

Q17: Do you agree that there should be only one single proportionate regime and not two separate regimes, one for regulated markets and one for MTFs?

There should be one single ‘proportionate’ regime and not two separate regimes, one for Regulated Markets and MTFs. This will establish one set of rules for investors and financial market participants.

Q18: Do you agree with the proposal to consider that appropriate disclosures requirements for MTFs would include, as a minimum, obligations to publish:

- annual financial statements and audit reports within 6 months after the end of each financial year,
- half-yearly financial statements within a limited deadline after the end of the first six months of each financial year, and
- inside information?

We would disagree with any proposal that would fundamentally change the obligations on companies listed only on MTFs. Assuming that the question is about rights issues of companies already listed on RMs, then we agree in principle with proportional disclosure wherever the trading is happening. However, we believe this is an issue to be addressed by the Transparency Obligations Directive (TOD). If this is to be dealt with in this context, we offer the following additional views: There is an increasing need to ensure that there is a regulatory level playing field in terms of investor protection. Investors must receive a similar level of information within the context of the proportionate regime for right issues, which implies that when the rights are issued on MTFs, issuers should abide by certain initial (i.e. regarding the underlying instruments) disclosure requirements in order to benefit from the proportionate disclosure regime. This must be the case to guarantee investor protection and to promote confidence in the market place.

Q19: What should be the maximum deadline for publishing half-yearly financial statements?

Q20: For issuers listed on MTFs where there are no disclosure requirements on board practices and remuneration, do you agree that this information should be included in the prospectus?

Yes, however the remuneration details to be included in the prospectus should only be required on an individual basis if this is already a requirement in the issuer's home country.

Q21: Are there any other disclosure requirements not listed above which should be required for MTFs?

Q22: Regarding the appropriate rules on market abuse, do you agree that there should be provisions in order to prevent insider trading and market manipulation? Do you consider it necessary to require that the rules of the MTFs fully comply with the provisions of the Market Abuse Directive?

FESE has stated its position on the extension of the MAD regime beyond RMs to MTFs in the recent European Commission consultation on MAD. We agree that these delegated acts to the Prospectus Directive are not the best place to extend the scope of application of the Market Abuse Directive. However, in general, we support the extension of the scope of certain aspects of this Directive so as to cover MTFs as well as RMs, in order to protect investors and the market as a whole.

Q23: Are there any other EU Directive or Regulation not listed in paragraph 122 which should be taken into account?

The list in paragraph 122 appears to be comprehensive.

Q24: As regards MTFs with appropriate disclosure requirements and market abuse rules, do you agree that in order to benefit from the proportionate prospectus, issuers should be required to make available their periodic and ongoing disclosures in a way that facilitates access to information by posting them on their websites?

Yes, we agree with publication on the issuer's website and/or on the exchange's website when the MTF is operated by a market operator.

Q25: Do you agree with the approach proposed in order to determine which items to delete from Annexes I and III of the Prospectus Regulation?

To the extent that the information items identified in paragraphs 127 and 128 have already been made available to investors, then it is appropriate not to require them to be included in a prospectus.

Q26: Do you agree with the proposed items which could be deleted from Annex I (Minimum Disclosure Requirements for the Share Registration Document) and Annex III (Minimum Disclosure Requirements for the Share Securities Note) of the Prospectus Regulation?

Yes, the proposed items for deletion seem appropriate.

Q27: Do you consider that the language regime could be a concern in terms of investor protection in case of passporting? Do you consider that the proportionate disclosure regime should be

conditional upon compliance with the language requirements of Article 19 of the Prospectus Directive?

FESE does not view the language regime as a concern for investor protection.

Q28: In case of issuers listed on regulated markets, do you consider that disclosures on remunerations required by item 15 of Annex I of the Prospectus Regulation are redundant with information already made available to shareholders and the public in general and could therefore be deleted from the proportionate prospectus for rights issues?

Yes, as this information is made available in the annual financial statements of issuers with securities admitted to trading on a regulated market.

Q29: Considering the objective to enhance investor protection, do you agree that information regarding the issuer's activities and markets and historical financial information cannot be omitted?

FESE agrees that information regarding the issuer's activities and markets and historical financial information cannot be omitted.

Q30: Do you consider that, in order to reduce administrative burden, incorporation by reference could be a solution? Do you have any suggestions to improve the incorporation mechanism?

FESE agrees that incorporation by reference could be a solution if the documents have been filed with the home competent authority.

Q31: Do you agree with the proposals to require basic and updated information regarding the issuer's principal activities and markets?

FESE agrees that basic and updated information regarding the issuer's principal activities and markets is required to enhance investors' protection.

Q32: Do you agree with the proposal to require only the issuer's historical financial information relating to the last financial year?

FESE agrees with the proposal to require only the issuer's historical financial information relating to the last financial year

Q33: Do you agree with the proposal to redraft certain items of Annex I and III of the Prospectus Regulation as proposed in paragraphs 132 to 134? Are there any other items which should be redrafted?

FESE agrees with the proposals as set out in paragraphs 132 to 134.

Q34: Do you agree with the proposal to include a statement in the proportionate prospectus drawing attention to the specific regime and level of disclosure applicable to rights issues?

FESE agrees that it should be made clear to investors and other market participants that a specific regime is applicable.

Q35: Do you agree with the schedule for rights issues presented in Annex 2 of this consultation paper?

Q36: What are the costs for drawing up a full prospectus? What are the most burdensome disclosure requirements? Can you provide any data? Can you assess the costs that the proposed proportionate prospectus will allow issuers to save? Proportionate disclosure regime regarding SMEs and issuers with reduced market capitalisation.

The risk factors and the operating and financial review (OFR) tend to be quite burdensome sections for issuers when preparing a prospectus. The removal of the OFR requirement in particular for rights issue prospectuses is likely to contribute to a reduction in administration effort for issuers.

Proportionate disclosure regime regarding SMEs and issuers with reduced capitalisation

Q37: Do you agree that a full prospectus should always be required for an IPO and for initial admission to a regulated market (as described in paragraph 141 above)?

Please refer to our initial general remarks on this consultation and the Table 1 that we have included. This table represents our understanding of the Prospectus Directive, which we believe to be fully in line with the law.

We do not believe that the fundamentals of the Directive should be changed. It is very important to note that any change to the current Directive needs to be made after the correct level of assessment has been carried out.

Q38: Do you agree with the proposal summarized in the table in paragraph 141?

In line with our general objection to ESMA's proposal, we disagree with this table.

Q39: Do you agree that there should be only one schedule for a proportionate prospectus for both unlisted and listed SMEs and Small Caps or do you believe that further consideration should be given to having a separate regime for unlisted companies, dealt with under the proposed revision to MiFID?

No, see response to question 37.

Q40: Can you provide data on the average costs for SMEs and Small Caps to draw up a prospectus? What are the most burdensome parts of a prospectus to produce?

Q41: Do you consider that the three items identified in paragraph 147 (the OFR and the requirements to include a statement of changes in equity and a cash flow statement when the audited financial statements are prepared according to national accounting standards and to produce interim financial statements when the registration document is dated more than nine months after the end of the last audited financial year) could be omitted without lowering investor protection?

Q42: Do you agree with the items ESMA proposes to delete and to redraft listed in Annex 4 and the proportionate schedule for the share registration document presented in Annex 5?

Q43: Are there any other items which could be deleted or redrafted? Please justify any suggestions, including, if possible, the costs that would be saved and the impact on investor protection.

Q44: Taking into account the items which ESMA proposes to delete or redraft as per Annex 4, do you consider the proportionate disclosure regime for SMEs/Small Caps could strike the right balance between investor protection, the amount of information already disclosed to the markets and the size of the issuers?

FESE is concerned that a lighter prospectus regime for SMEs will not encourage investors to bring capital to SMEs and will increase the risk of reinforcing investor confidence in the SMEs seeking access to finance from public capital markets. A lighter prospectus regime for SMEs will inevitably cause investors to perceive SMEs as less attractive given the more limited information being made available.

Q45: Given the number and nature of the items ESMA proposes to delete and to redraft listed in Annex 4, do you consider the proposal would suppose a significant reduction of the costs to access financial markets for SMEs and Small Caps? Can you estimate the costs that the proposed proportionate prospectus will allow SMEs and Small Caps to save? Proportionate disclosure regime regarding credit institutions and other issuers.

Proportionate disclosure regime regarding credit institutions and other issues

Q46: Do you agree with the proposal to require historical financial information covering only the last financial year for credit institutions issuing securities referred to in Article 1(2)(j) of the Prospectus Directive?

Yes, FESE agrees with this proposal.

Q47: "In performing its work on the proportionate disclosure regime, ESMA has sought to identify all possible omissions with regards to content of prospectuses as part of this Consultation Paper, however do you believe that further omissions are possible particularly with respect to the areas indicated in the request for advice by the Commission?"

The omissions for a proportionate disclosure regime for rights issues and credit institution appear satisfactory.