Targeted consultation on the listing act: making public capital markets more attractive for EU companies and facilitating access to capital for SMEs. International Bulletin, March 2022.

On 19 November 2021 the European Commission (EC) published a **targeted consultation** to gather information from interested parties **on how to attract European Union (EU) companies, in particular small and medium-sized enterprises (SMEs), to public capital markets** so as to reduce their reliance on traditional sources of financing and, consequently, how to promote the activity of the public capital markets of the EU.

Access to public markets encounters **three main obstacles**: 1) the great administrative burden that compliance with the regulations implies and the high costs, 2) the difficulty of meeting the financial needs of listed companies due to the lack of flexibility or clarity of the regulations and 3) the lack of research and the insufficient liquidity of listed companies that deter investors. The document analyses the **adequacy of the most relevant existing legislative** frameworks such as the Prospectus Regulation, the Market Abuse Regulation, the Markets in Financial Instruments Directive (MiFID II), the Transparency Directive and the Directive on the admission of securities to official listing.

This consultation, open until 11 February, 2022, **seeks input from a broad set of stakeholders**: Member States and their National Competent Authorities (NCAs), ESMA, market participants – including SMEs (admitted to trading on a market or that have applied for admission) and other companies other than SMEs -, regulated markets, retail and institutional investors and their organisations, investment firms (IFs) and other financial intermediaries, advisers on going public from the Initial Public Offering (IPO) process and any other related service providers.

This targeted consultation, which is part of an **EC initiative** on how to make trading on the EU's public markets more attractive to businesses (particularly SMEs), is in line with A**ction number 2 of the Action Plan of the Capital Markets Union (CMU)** of the EC of September 2020 according to which it would assess whether a greater simplification of the rules for admission to trading of companies on public markets was necessary.

For the purposes of this consultation, the term **SMEs** covers both those included in Commission Recommendation 2003/361 and those in Article 4.1.13 of MiFID II. The former classifies as SMEs those companies that employ fewer than 250 people and have a turnover that does not exceed €50 million and/or balance sheet totals not exceeding €43 million. The latter (MiFID II) defines SMEs as companies with an average market capitalisation of less than €200 million based on closing prices for the previous three calendar years. MiFID II introduced "SME growth markets" such as MTFs (Multilateral Trading Systems) in which at least 50% of the issuers are SMEs, in order to facilitate access to markets for those with high growth and increase their funding opportunities.

The consultation is divided into two main sections:

First section- General questions on the overall functioning about the general operation of the current regulatory framework: 1) Whether the **regulatory framework is adequate** to facilitate access to financing through public markets, ensure an adequate level of investor protection, attract professional and retail investors, integrate capital markets and provide clarity. 2) The **factors of unattractiveness** of markets (regulated, SME growth markets and other public markets) in the EU: high compliance costs, lack of flexibility due to shareholding structures and rigid forms of trading, lack of liquidity of securities or lack of attractiveness of SME securities. 3) **The relative importance of each cost** with respect to the total cost compared to the benefits, both at the IPO stage (lawyers, auditors, underwriters/placement agents, market fees in relation to the IPO, NCA fees for prospectus approval, paying agents and others), as well as in the continuous trading phase (market fees for trading, payment agents, lawyers, auditors, costs associated with corporate governance or others), to which must be added the indirect costs in both phases, mainly costs of compliance. In particular, it asks whether the requirements of the Prospectus Regulation represent a disproportionate burden compared to the benefits it could bring in terms of investor protection. 4) Whether **the measures aimed at improving the flexibility of issuers** would increase IPOs, such as regulating multiple voting share structures, clarifying double listing conditions, or reducing/eliminating free float requirements. 5) The **specific causes of low investment in SMEs** (lack of visibility leading to illiquidity of securities, lack of investor confidence, lack of tax incentives, or low retail participation in public markets).

Second section- Questions on different technical aspects of the current admission to trading rules grouped by the legal text to which they belong

Prospectus Regulation

As for the costs, information is requested on the costs of preparing the different types of prospectuses: standard prospectus for public offering of shares and securities other than shares, basic prospectus for securities other than shares, EU growth prospectus for shares and securities other than shares, simplified prospectus for secondary issues of shares and securities other than shares and EU recovery prospectus for shares. The costs considered are: internal costs of the issuer, auditors, legal fees for securing the offer, NCA fees and others. The consultation also asks which sections of the prospectus are the most difficult and costly to draft and, in percentage, the savings of the EU growth prospectus and the EU recovery prospectus for shares compared to the standard prospectus.

On the thresholds of exemption from the obligation to publish a prospectus, the consultation asks whether more clarity is needed on the application of the various thresholds below which no prospectus is required (for example, on the consideration of the total amount of the offers and the calculation of the 12-month period), whether other public offerings and admissions to a regulated market can be carried out without a prospectus while maintaining adequate investor protection, whether the exemption thresholds are adequate or should be adjusted so that a greater number of offerings are carried out without a prospectus and what those new thresholds would be and, finally, whether the Member States should maintain the discretion to raise the threshold for mandatory prospectuses and adapt it to national specificities.

The standard prospectus for offers and admissions to trading on regulated markets is, according to a part of the industry, too long and complex and therefore expensive, especially for SMEs. To strike a balance between effective investor protection and adequate administrative burden for issuers, the consultation raises several options: replacement with a more simplified and efficient prospectus (for example, the EU growth prospectus), elimination/relief of certain information (and which ones) or replacement by another type of admission document. Specifically, it asks about: i) the limitation of the maximum number of pages distinguishing prospectuses for shares and securities other than shares, with possible exceptions to said limitation; ii) whether there is room for improvement in the regulation of the summary note of the prospectus and in the

incorporation by reference and iii) whether the prospectus for securities other than shares, which is subject to specific rules (preparation of the basic prospectus and dual regime: institutional and retail) has been effective for financing companies.

The EU growth prospectus, which can be used by SMEs (along with other issuers), is more streamlined than a standard prospectus because it contains less information, although some industry feedback indicates that the size has not substantially decreased. For this reason, the consultation raises different options: introduce a size limit, replace it with a new prospectus for SMEs aligned with the prospectuses for admission to trading in MTFs (including SME growth markets) or with another type of admission document.

As for the prospectus format and language, the consultation raises the possibility of the prospectus being provided only in electronic format and being written only in English in different scenarios (always, except for the summary, only for cross-border offers, among others).

On the prospectus for secondary issues of companies whose securities are already admitted to trading on a regulated market or on an SME growth market and/or for transfer from an SME growth market to a regulated market, the consultation asks whether issuers admitted continuously during 18 months should continue to be subject to the obligation to publish a prospectus and what are the most proportionate options to simplify its content: replacement of the prospectus by a statement of compliance with continuous obligations of disclosure of financial information, by a simplified prospectus or by an admission document to be defined. As for the EU recovery prospectus, various proposals are put forward: make it permanent for secondary issues of all types of securities or just shares, or use it as a simplified prospectus for secondary issues.

The consultation asks whether the liability regime and the sanctioning framework for issuers are adequate and proportionate and whether the responsibility of NCAs in relation to the prospectus approval process is properly determined and consistent across the EU. It also asks what is the sanction with the greatest impact among issuers and asks whether the maximum financial sanctions for legal entities and individuals should be reduced and/or the possibility of criminal sanctions eliminated.

As for the rules of prospectus review and approval and their possible convergence, the consultation considers it necessary to know the opinion of the interested parties on: i) whether or not there is alignment between the different NCAs; ii) whether the approval terms are appropriate; iii) whether the number of days between the publication of the prospectus and the end of the offer should be extended to favour the participation of retail investors and iv) whether the dual regime for determining the home Member State for issues of securities other than shares should be modified and if so how or whether this dual regime should also apply to shares.

As for the Universal Registration Document, the consultation highlights its scarce use and the possible causes: the time needed to be classified as a frequent issuer, approval time, update costs, compliance costs, not suitable for non-equities, or onerous language regime. It also proposes that its content be aligned with the information in secondary issues, be approved only in the first year, not be subject to an NCA review and approval process when a prospectus is reviewed, or be written only in English for passport purposes.

As regards other areas for improvement, there is a question on the advisability of: i) making permanent the regulations on supplements introduced in the Capital Market Recovery Package, in which the terms of the obligation of financial intermediaries to contact investors and of these to exercise their rights are extended and ii) modifying the equivalence regime to allow the EC to make equivalence decisions.

Market Abuse Regulation (MAR)

In view of the expert reports, the EC considers that there may be a series of MAR provisions and requirements that discourage companies from trading on public markets (high cost of compliance, some legal uncertainty due to the difficulty of applying certain precepts and a somewhat disproportionate sanctioning regime).

Therefore, it proposes improvements that ensure proportionality and reduce the cost of compliance.

As for costs and charges, the query asks for each MAR provision and for each type of issuer how high on the scale they are and what are the reasons why they are so high, classifying them as one-time and ongoing costs. The area of application of MAR extends even to those companies that have only submitted an application for admission to the MTF but are not yet trading, leading the consultation to asks whether a market abuse is possible before the first real day of trading.

On the definition of inside information one part of the industry is of the opinion that the current definition does not clarify when information becomes privileged and when the disclosure obligation arises. The consultation asks whether some ESMA guidelines could clarify the intermediate phases of the information until it becomes "privileged" and what should be the meaning of them: i) distinguish what it is for the purpose of prohibiting market abuse and when the disclosure obligation arises; ii) define what it is that “may influence the price in a significant way” or iii) clarify that inside information should only be made public in the final phase, unless there has been a leak. The document also considers the possibility of moving to a system that triggers the disclosure obligation in the event of the occurrence of certain material events, as well as the possible interaction of this approach with market integrity. Regarding the conditions for delaying the disclosure of inside information, certain stakeholders underline that there are interpretive challenges around what these conditions are, especially in relation to when the delay is unlikely to mislead the public and wonder whether the review of the ESMA Guidelines is sufficient to clarify these conditions. Referring to the disclosure of inside information for issuers only of bonds, the consultation raises the option that they disclose only the information that affects their ability to pay their debt.

In relation to the threshold of €5,000 for the communication of transactions carried out by directors and people closely linked to them, the consultation proposes different options to raise it (to between €10,000 and €50,000 euros) and the possibility or not of maintaining the discretion of the NCAs or raising their threshold (€20,000) to other amounts (of between €25,000 and €50,000). It also asks about the cost of complying with this obligation and what would be the savings (estimated cost) if the threshold were raised and who should be the obliged subject (always the issuer, the NCA or as established by national legislation). Lastly, it asks about ESMA’s opinion on the possible amendments to MAR and the possibility of further changes/clarifications: apply the thresholds in a non-cumulative way, clarify the transactions that are subject to the reporting obligation or eliminate the list of closely related people.

As far as the insider lists it asks whether they should be simplified for all types of issuers or only for SME growth market issuers or repealed for the latter. Another set of proposals seeks to reduce the complexity of market prospecting. ESMA, in its recent report on MAR, recommended maintaining the current regime while simplifying the procedure. The consultation asks about the sufficiency of the ESMA proposal or the need for a substantive modification and in which markets. In particular, it asks about the application of the market sounding rules exemption for private equity placements for all issuers or only for issuers in SME growth markets.

In relation to the sanctions regime, it asks about: i) the proportionality of administrative and criminal sanctions (see their objective, type and size of entities and costs); ii) the impact of the amount of financial penalties on the decision to go public, taking into account the different types of issuers and markets and iii) whether the maximum financial penalties for legal and natural persons should be reduced and the possibility of criminal sanctions eliminated. Regarding the “total volume of business” criterion, as a basis for determining the fine for legal entities, whether or not it should be replaced and if so by what criterion.

The consultation also proposes the suppression of the obligation of the market operator to accept the terms and conditions defined by issuers and IFs in liquidity contracts used in SME growth markets. Lastly, in order to promote research on the smallest issuers, the exemption/lightening of the regime for filing investment

recommendations for securities admitted to trading on SME growth markets is proposed.

MiFID II

The consultation proposes some specific adjustments to facilitate the access of SMEs to public markets: i) introduce at level 1 the possibility of registering a segment of an MTF as an SME growth market (currently this possibility is recognised in an ESMA Q&A); ii) clarify that issuers can request trading on two SME growth markets (dual listing) and the conditions of the same in terms of corporate governance or initial/continuous disclosure with respect to the second market, as well as whether the second market could be other than an SME growth market and iii) to ease, beyond the measures of the COVID recovery package, which allowed non-compliance with the unbundling rule in the financial analysis of issuers that do not exceed €1 billion market capitalisation in the 36-month period prior to the investigation, specifically, increasing the cases of minor non-monetary benefits that can be added to the list and proposing the extension of the unbundling to research on fixed income, currencies or derivative contracts on commodities and independent research. Finally, it asks what type of research is most useful (independent, issuer-sponsored or trading venue) in making an investment decision and whether issuer-sponsored research should be subject to rules on conflicts of interest between issuer and researcher.

Other possible areas for improvement

Transparency Directive. The consultation asks whether there is potential to simplify the reporting obligations of issuers, specifically, the need for interim reports or notification of significant changes in shareholders, taking into account the need to facilitate the accessibility, analysis and comparability of information on the issuers.

Special Purpose Acquisition Companies (SPACs). In view of their use via IPOs and in the secondary market, an opinion is requested on the following aspects: i) whether they constitute an alternative to traditional IPOs and what safeguards should be introduced to allow the development of SPACs; ii) what measures should be in place to manage risks for investors; iii) whether they should be reserved for professional investors; iv) whether it is necessary to harmonise the information disclosure regime in the EU, for example, so that post-IPO investors are aware of the warranties signed by the sponsors and/or the initial shareholders; v) whether it is necessary to clarify the custody and management framework of the securities in an escrow account of the SPAC and vi) whether they should be subject to ESG (environmental, social and governance) disclosure obligations.

Directive 2001/34/EC on the admission of securities to official stock exchange listing (as amended by the Prospectus and MiFID Directive). The consultation asks whether: i) it should be amended, transformed into a Regulation or repealed; ii) the definitions of the Directive are obsolete; iii) the flexibility granted to Member States and NCAs is adequate for adaptation to local market conditions; iv) the specific conditions for the admission of shares to trading are still adequate: expected figure of €1 million of market capitalisation, disclosure of pre-IPO information (publication of annual accounts for the three previous years), minimum figure of free float of the 25% of the subscribed capital as a measure to favour liquidity; v) whether the specific conditions for the admission of debt securities are adequate and vi) whether any amendment is necessary in the regime for cooperation between NCAs.

Multiple Voting Shares is a mechanism used to enable companies to go public without the initial owners losing control and direction of the companies. The consultation asks: i) whether you consider that its use would encourage IPOs; ii) the impact
on a company’s attractiveness to investors and whether limits on the number of votes (2:1, 10:1, 20:1)) for each share would improve that attractiveness; iii) whether the clauses that eliminate multiple voting after a time can produce an adequate balance between the interests of the founders and the investors and iv) whether it would be useful to establish the possibility of trading in any EU trading venue following the structure of multiple voting rights.

Corporate governance standards for companies admitted to trading on an SME growth market. The consultation raises: i) its possible use to make SMEs more attractive to investors and what would be the most appropriate option: include them in the regulations of the operators of SME growth markets adapted to local conditions or establish them in the form of general principles in EU legislation that can be flexibly implemented by Member States and ii) the content of the standards and the cost of their implementation: information on transactions with related parties and on the acquisition/sale of voting rights for holders of significant holdings, appointment of an investor relations officer, minimum requirements for delisting or appointment of at least one independent director.

Lastly, the consultation requests information on cases of gold-plating by NCAs or Member States in relation to admission to trading rules, understood as measures that go beyond what is required by EU legislation.

Useful link:

Targeted consultation on the listing act: making public capital markets more attractive for EU companies and facilitating access to capital for SMEs https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2021-listing-act-targeted-consultation-document_en.pdf