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# COMMISSION STAFF WORKING DOCUMENT

# IMPACT ASSESSMENT REPORT

*Accompanying the documents*

**Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2014/65/EU to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises and repealing Directive 2001/34/EC**

**Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market**

**Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises**

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## GLOSSARY

| *Term or acronym* | *Meaning or definition* |
|---|---|
| CMRP | Capital Markets Recovery Package |
| CMU | Capital Markets Union |
| CMU AP | Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM/2020/590 final - A Capital Markets Union for people and businesses-new action plan EUR-Lex - 52020DC0590 - EN - EUR-Lex (europa.eu) |
| CMU HLF | High Level Forum on CMU |
| CMU HLF Final report | Final report of the High Level Forum on the Capital Markets Union - A new vision for Europe's capital markets \| European Commission (europa.eu) |
| EEA | European Economic Area |
| ESAs | European Supervisory Authorities |
| ESMA | European Securities and Markets Authority |
| EU | European Union |
| FESE | Federation of European Stock Exchanges |
| GDP | Gross Domestic Product |
| IA | Impact Assessment |
| Inside Information | In the Market Abuse Regulation inside information is defined in Article 7(1)(a) as "information of a precise nature, which has not been made public, relating to the issuer or to a financial instrument, and which, if it were made public, would be likely to have a significant effect on the price of that financial instrument or on the price of a related derivative financial instrument" |
| IPO | Initial Public Offering |
| Listing Directive | Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities. |
| Loyalty Shares | Loyalty shares are shares that give enhanced voting power to shareholders that have held them for a specified time period. |
| Market Abuse Directive or MAD | Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive). |
| Market Abuse Regulation or MAR | Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. |

| | |
|---|---|
| MiFID II | Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (Markets in Financial Instruments Directive). |
| MiFIR | Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (Markets in Financial Instruments Regulation). |
| MTF | Multilateral Trading Facility |
| MVR share structures | Multiple voting right share structures means the share structure of a company that includes at least two distinct and separate classes of shares with a different number of votes. |
| NCA | National Competent Authority |
| Non-Voting Shares | A non-voting share is a type of share that does not give the holder any voting rights in the company. It usually constitutes a separate class of share |
| Preferential Shares | Preferential shares are shares of a company's stock with dividends that are paid out to shareholders before common stock dividends are issued but that hold no voting power. |
| Prospectus | A legal document that a person or a company (unless exemptions apply) needs to draw up and the NCA scrutinise and approve i) where a person or company makes an offer to the public of transferable securities; or ii) where a company applies for its securities to be admitted to trading on a RM (including in the context of secondary issuances). A prospectus needs to contain the information on the company and the securities offered or admitted to trading that an investor needs in order to make an informed investment decision. |
| Prospectus Regulation | Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. |
| Oxera study | Oxera Consulting LPP, Primary and secondary equity markets in EU, Final report, November 2020, Oxera-study-Primary-and-Secondary-Markets-in-the-EU-Final-Report-EN-1.pdf |
| SME growth market | A new category of trading venues (a multilateral trading facility) dedicated to smaller issuers, introduced in MiFID II. To be eligible as an SME growth market, the venue would have to meet the following criteria: (i) a 50% threshold on the minimum number of SME issuers traded on the SME growth market, (ii) appropriate criteria for initial and ongoing admission to trading, (iii) sufficient information published and appropriate ongoing financial reporting of issuers, (iv) dissemination of information to the public and (v) compliance with systems and controls under MAR. |
| SME listing package | Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the Promotion of the use of SME growth markets |

| | |
|---|---|
| SMEs | Small and Medium-sized Enterprises |
| SPAC | Special-Purpose Acquisition Company |
| Trading venue | A regulated market, an MTF or an OTF |
| TESG | Technical Expert Stakeholder Group on SMEs |
| TESG Final report | Final report of the Technical Expert Stakeholder Group (TESG) on SMEs - Empowering EU capital markets - Making listing cool again (europa.eu) |
| TFEU | Treaty on the Functioning of the European Union |
| Transparency Directive or TD | Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. |
| URD | Universal Registration Document |

# 1. INTRODUCTION: POLITICAL, LEGAL AND MARKET CONTEXT

## 1.1. Political context

By developing EU capital markets and decreasing their fragmentation along national borders, the CMU project aims to enable companies to tap funding sources other than bank lending and to adapt their financing structure when maturing and growing in size. More diversified financing in the form of debt and equity would decrease risks for individual firms and the overall economy as well as help EU companies, in particular SMEs, realise their growth potential.

A core aim of the CMU is to give better access to market-based sources of financing for EU companies at each stage of their development, including for more mature companies seeking access to public markets. Recently-listed companies often outstrip privately-owned companies in terms of annual growth and job creation[1]. By listing on public markets, companies can diversify their investor base, gain easier access to equity capital and debt finance, raise their public profile and increase brand recognition.

Since the first CMU Action plan in 2015[2], progress has been made to make it easier and cheaper for companies, in particular smaller ones, to access public markets (see Annex 14 for more details on the past CMU initiatives). Among others, the Commission has put forward new rules to facilitate financing through capital markets for small businesses[3]. The aim was to cut red tape for SMEs listing on SME growth markets, a new category of trading venues dedicated to smaller issuers, to reduce the regulatory burden while preserving an appropriate level of investor protection and market integrity.

Nevertheless, stakeholders continue to argue[4] that more needs to be done on the regulatory side, in particular with respect to streamlining the listing process and rendering the regulatory treatment of companies more proportionate to their size. Such simplifications could encourage companies to access public markets, while safeguarding investor protection and market integrity. This conclusion was shared by the CMU HLF, which, in its final report published in June 2020[5] recommended the Commission to make targeted modifications of, in particular, the prospectus and market abuse regulatory frameworks to make public listing in the EU more attractive, in particular for SMEs.

In July 2020, the Commission adopted the CMRP[6] that introduced targeted amendments to encourage investments and facilitate a more rapid re-capitalisation of companies, notably in the Covid-19 context. However, given the strong recovery focus of the package, in some cases, the amended rules apply for a limited period of time, thus providing only for a temporary relief to companies. Therefore, while the CMRP facilitated the access of companies to public market financing in the Covid-19 context, it did not replace the need to assess carefully and in a more structural way the merit of further and/or permanent adjustments to the overall listing regime to make it easier for businesses to list on EU venues, without undermining market integrity and investor protection.

[1] TESG Final report, p.6
[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM/2015/0468 final - Action Plan on Building a Capital Markets Union
[3] SME listing package
[4] Views expressed in bilateral meetings, expert groups, public consultations and conferences/workshops.
[5] CMU HLF Final report
[6] See: Making capital markets work for Europe's recovery (europa.eu)

In recognition of this, the new CMU Action Plan that was adopted in September 2020[7] announced that '*in order to promote and diversify small and innovative companies' access to funding, the Commission will seek to simplify the listing rules for public markets*'.

Following up on this, and building on the measures already introduced with the 2019 SME Listing Act, the Commission set up a Technical Expert Stakeholder Group (TESG) on SMEs. The Expert group confirmed the concerns expressed by the stakeholders that further legislative action is needed to support listing of companies and especially of SMEs. In their final report, published in May 2021, the TESG made 12 recommendations to amend the listing legislative framework which applies both on regulated markets as well as on SME growth markets.

On 15 September 2021 President Von der Leyen announced in her letter of intent[8] addressed to the Parliament and the Presidency of the Council a legislative proposal to facilitate SMEs' access to capital, which has been included in the 2022 Commission work programme[9].

The decision to list is affected by a multitude of factors, most of which are outside the regulators' reach. Geopolitical instability, Brexit, Covid and low interest rates have had an impact on the decision to list and, in particular, on the timing of listing. Other factors relate to the features of the ecosystem that determine the cost of services relevant for listing (underwriting services, due diligence, legal advice, etc.). This Impact Assessment does not claim to address any of those elements directly. It cannot be considered a silver bullet that – on its own – will change remarkably the situation. However, it evaluates a targeted set of measures aiming to reduce the regulatory burden, where it is considered to be excessive (i.e. where regulation does not contribute to investor protection/market integrity in the most cost efficient manner for stakeholders) and increase flexibility for issuers.

While the proposed policy options are unlikely to fully revive EU public capital markets on their own and should not be understood as a single remedy in itself, they constitute a step in the right direction. The ultimate aim is to build the necessary conditions for structural improvements to occur over time. A more favourable regulatory regime would encourage the development of a more favourable ecosystem, contributing in a multi-faceted manner to the CMU objective of improving access to financing by companies.

Furthermore, this proposal should be analysed in conjunction with other proposed initiatives. The proposed amendments are part of a broader package of measures outlined in the CMU Action Plan[10], which aim to address other issues currently preventing companies from raising capital on public markets (see Annex 13 for more details). The Listing Act focuses on alleviating the regulatory requirements that can deter a company from deciding to list or to remain listed (*'supply-side'*). However, other factors may deter issuers from listing, such as a narrow investor base, especially for SMEs, and a more

[7] CMU AP
[8] See p. 4: state_of_the_union_2021_letter_of_intent_en.pdf (europa.eu)
[9] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission work programme 2022 Making Europe stronger together COM (2021) 645 final cwp2022_en.pdf (europa.eu)
[10] CMU AP

favourable tax treatment of debt over equity. These elements are addressed by other ongoing initiatives (see Annex 13 for more details).

The creation of a consolidated tape through the review of MiFIR will in particular centralise trading information across the Union, contributing to more efficient trading across the EU (by institutional investors). By facilitating access to company data (including trading data), this initiative will make it easier for investors to identify an investment target and the most efficient venue to trade it on, potentially driving up their interest in investing and hence increasing the liquidity and attractiveness of companies' listed securities. Increased liquidity of listed securities would decrease the illiquidity premium paid by many (in particular smaller) companies when listing, overall decreasing the cost of capital for a listed company and, hence, making listing generally more attractive. The creation of an EU Single Access Point (ESAP) will tackle the lack of accessible and comparable data for investors, making companies more visible.

Another legislative proposal will reduce the debt-equity bias for investors (DEBRA), making equity financing more attractive (and less costly) in general, by introducing deductibility of new equity allowance from taxable profit, akin to the deductibility that currently already exists for interest paid on debt. Furthermore, a series of Commission initiatives will further seek to strengthen the investor base for listed equity. The EU SME IPO Fund will play the role of an anchor investor to attract more private investment in SMEs' public equity by partnering with institutional investors and investing in funds focused on SME issuers. CRR and Solvency II reviews will increase the investor base for issuers by facilitating investments from banks and insurance companies in public (long-term) equity. Lastly, the forthcoming Retail Investment Strategy will improve disclosures and distribution of investment products to retail investors in a way that promotes investors' trust, further contributing to the demand for listed securities and their liquidity on public markets.

Most of these initiatives are currently in the legislative phase (e.g. the MiFIR review, ESAP proposal, proposal on a debt-equity bias reduction allowance). As the final contours of the political agreement on these files are not known yet, it would be impossible to measure their individual or combined impact, and the extent to which they will contribute to a more favourable listing environment in the EU (including to the number of potential additional IPOs).

### 1.2. Legal context

Companies can raise capital through the issuance of equity or non-equity securities either on regulated markets or on MTFs. While both types of markets are accessible to companies of all sizes, regulated markets are generally more appropriate for large and mature businesses.

Regulated markets require companies to comply with a wide range of EU requirements. This ensures that investors are given sufficient, timely and accurate information, both at the time of listing and on a continuous basis while listed, so that they can make informed investment decisions. For companies, especially SMEs, these requirements imply high administrative costs, thereby potentially reducing the relative benefits of listing. However, they also carry benefits (and potentially reduce their cost of capital) by fostering market confidence in these companies and by facilitating risk pricing by investors of securities issued by these companies.

The Prospectus Regulation harmonises requirements for the prospectus which has to be published when securities are offered to the public or admitted to trading on a regulated market. Using this document, investors can decide whether to invest in the securities issued by a company.[11] The Listing Directive, a minimum harmonisation directive adopted in 2001, provided the basis for listing on European markets before the adoption of the Prospectus Directive and the TD, that have subsequently replaced most of the provisions harmonising the conditions for the provision of information regarding requests for the admission of securities to official stock exchange listing and the information on securities admitted to trading (See Annex 7 for more details).

Once admitted to trading, issuers must ensure disclosure of ongoing and periodic regulated information and its dissemination to the public. The regulated information comprises, among other, financial reports and information on major holdings of voting rights, pursuant to the TD, as well as information disclosed pursuant to MAR. MAR is a comprehensive legislative framework that aims to foster investor confidence and market integrity, by prohibiting, among others, to (i) engage or attempt to engage in insider dealing; (ii) recommend that another person engage in insider dealing or induce another person to engage in insider dealing[12]; (iii) unlawfully disclose inside information[13] or (iv) engage in or attempt to engage in market manipulation. Issuers are also subject to several disclosure and record-keeping obligations and, notably, under a general obligation to disclose inside information to the public "as soon as possible".

Under EU law, issuers seeking admission to trading or listing on the same type of trading venue, irrespective of their size, are subject to the same requirements. In such a way, investors on the same type of a market feel confident that all companies listed thereon are subject to a single set of rules. Smaller companies can however choose to list on an MTF to benefit from a lighter regulatory regime. Issuers on MTFs are largely subject to listing rules of market operators/investment firms that operate them, usually enjoying more flexibility around the listing criteria and more streamlined disclosure requirements.

MiFID II created the SME growth market, a subcategory of MTFs, in order to facilitate access to capital for SMEs or smaller issuers, and enable them to attract more investment and grow. For an MTF to qualify as an SME Growth Market, at least 50% of the issuers whose financial instruments are traded on the MTF need to be SMEs, defined under MiFID II as companies with an average market capitalisation of less than EUR 200 million[14]. In order to ensure the appropriate level of investor protection, the listing rules on SME Growth Markets must satisfy certain quality standards, including the need to draw up an appropriate admission document (when a prospectus is not required) and to comply with periodic financial reporting. MiFID II also anticipated that *'[a]ttention should be focused on how future regulation should further foster and promote the use of that market so as to make it attractive for investors, and provide a lessening of administrative burdens and further incentives for SMEs to access capital markets through SME growth markets*'.

[11] For more information on prospectus, see the Glossary.
[12] Insider dealing occurs when a legal or natural person in possession of inside information takes unfair advantage of that information by entering into market transactions or by amending or cancelling an existing order, to the detriment of third parties who are unaware of such information.
[13] This arises if any natural or legal person discloses inside information in a situation other than the normal course of their employment, profession or duties.
[14] On the basis of end-year quotes for the previous three calendar years.

The Prospectus Regulation then introduced the EU Growth prospectus – an alleviated form of a standard prospectus - for SMEs listed on SME growth markets. It aimed to reduce the costs of preparing a prospectus by smaller issuers, while providing investors with material information to assess the offer and take an informed investment decision. Issuers listed on an SME growth market can also use a simplified prospectus to transfer subsequently to regulated markets.

MAR included specific alleviations for SMEs whose shares are listed on SME growth markets. These issuers obtain regulatory relief, for example, in terms of an exemption from the requirement to produce insider lists on an ongoing basis.

The CMRP strengthened the measures around the visibility of companies, looking for additional funding on public markets. These measures in particular aimed at addressing the issue of the low level of research coverage, in particular of SMEs, and included alleviations to the unbundling rules under MIFID II.

### 1.3. Market context

EU capital markets remain underdeveloped in size, notably in comparison to public markets in other major jurisdictions. Since the financial crisis of 2008-2009, EU capital markets have been experiencing a negative trend, lagging increasingly behind the US and having been more recently surpassed by Asia in relevance and size. The negative trend experienced by the EU capital markets was exacerbated after the departure of the UK from the EU: at that time the UK had been the largest capital market in the EU and the prevalent listing venue for EU companies. Several factors explain the state of EU capital markets, such as a pronounced bank financing bias (over market based funding) by EU companies, shallower pools of long-term capital (specifically pension assets), burdensome listing rules and the fragmentation of capital markets along national borders (resulting in a high number of national trading venues with fragmented liquidity and insufficient scale).

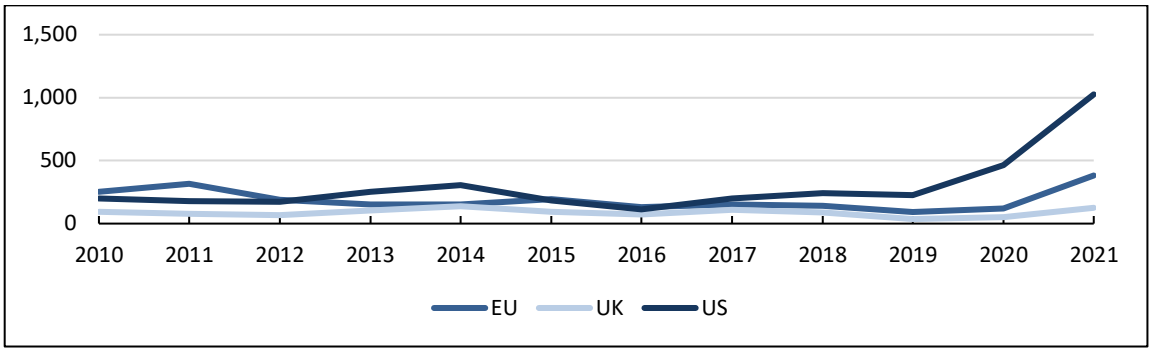
Underdeveloped public capital markets prevented some EU companies, particularly SMEs, from raising funding on capital markets[15], translating into a significant opportunity cost for the EU economy, in terms of foregone economic growth, job creation and innovation. Companies that issue securities are known to grow faster in terms of assets, sales and number of employees than companies that do not[16]. The difference in growth rate is even larger for SMEs.

IPOs have been following a negative trend in the EU over the last decade (notwithstanding a rebound from Q3 2020 to Q4 2021[17]). The EU has gone from surpassing the US in number of IPOs per year in 2011 to, ten years later, being behind the US, with around one third of global IPOs taking place in the US[18] in 2021 (Figure 1).

[15] Maria Demertzis, Marta Domínguez-Jiménez and Lionel Guetta-Jean Renaud, June 2021 - Europe should not neglect its capital markets union, Policy Contribution Issue n°13/21 PC-CMU.pdf (bruegel.org).
[16] Tatiana Didier, Ross Levine and Sergio L. Schmukler (2016), Capital market financing, firm growth, and firm size distribution.
[17] This rebound, however, was not driven by a change in the fundamentals of the listing ecosystem in the EU, but rather by large government stimuli programs which improved the market sentiment globally regarding the COVID-19 recovery. Furthermore, it seems that the rebound has finished in 2022, with global Q1 2022 IPO figures stating a -37% YoY decline in number of IPOs.
[18] The US figures have been further inflated by the growing trend in listing via SPACs, which have not taken off in the EU yet (See Annex 15 for more information on SPACs).

In 2021 only 11% of global IPOs took place in the EU, while 38% were in the US, 18% in China and 4% in the UK alone[19].

**Figure 1. Number of IPOs in different jurisdictions**



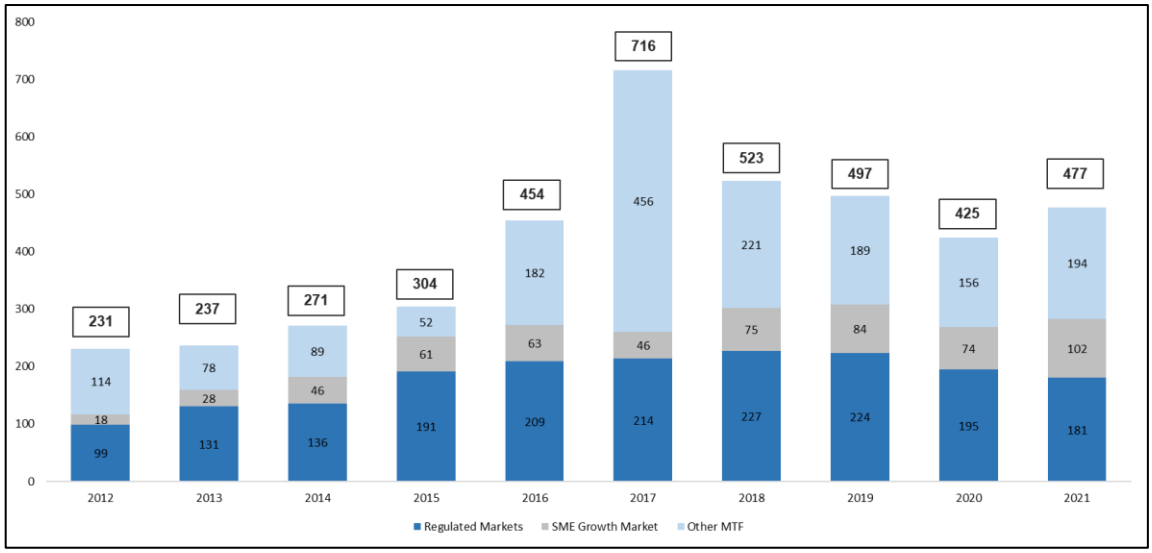

*Source: Jay Ritter, Fese, PWC & LSE*

In terms of IPO proceeds the value of capital raised through IPOs in the EU declined from 0.9‰ of GDP in 2015 to 0.3‰ in 2020. These figures are much lower than those of the US or the UK[20].

Furthermore, the structural issues of EU capital markets are not only observed in the decline in IPOs but also in the increase of companies delisting from EU public markets. While there could be multiple reasons to a company's delisting, such as the company's acquisition by another company, buy-out by a private equity firm or NCA's or exchange's request due to non-compliance with obligations, the majority of delistings were voluntary (i.e. not mandatory). In a survey conducted by Oxera[21], companies mainly cited: (i) challenges associated with meeting regular financial reporting requirements; (ii) time and cost associated with compliance and administration; (iii) annual fees paid to advisers, brokers and exchanges; and (iv) requirements to disclose sensitive information (under MAR). In short, for those companies, the benefits of remaining listed simply no longer outweighed the costs associated with remaining listed. Since 2012, the amount of delistings in EU capital markets has more than doubled (Figure 2).

**Figure 2. Number of annual delistings in the EU classified by type of market**

[19] https://www.pwc.com/gx/en/audit-services/ipo-centre/assets/pwc-global-ipo-watch-2021.pdf
[20] IPO proceeds as a ‰ of GDP was 4.1‰ for the US and 4.2‰ for the UK.
[21] Oxera study, p. 78.




*Source: Commission services based on FESE data*

Delistings have been heavily outpacing listings, therefore reducing the total number of listed companies in the EU and with it - the overall size of EU public markets. Shrinking public markets risk triggering a vicious cycle, where investors stop investing due to less investment opportunities and lower liquidity (and higher spreads), which in turn discourages companies from seeking public listing due to less investors (or narrower investor-base).

Underdeveloped EU public markets push EU companies to list in other jurisdictions, with a few EU companies having recently chosen this option[22]. If EU public markets cannot provide the scale and services that issuers are looking for, EU companies will look elsewhere for funding and EU competitiveness and innovative capacity may be seriously impaired as a result. Efficient and attractive public capital markets are therefore central to making the EU economy more globally competitive and resilient, thus underpinning the EU's open strategic autonomy.

## 2. PROBLEM DEFINITION

### 2.1. What are the problems?

#### 2.1.1. Lack of flexibility for issuers when listing

Founders of companies are more likely to choose to list on public markets if it allows them to continue shaping the business in accordance with their respective original ideas and aspirations. Flexibility for issuers to choose how to distribute voting rights may therefore influence their decision on whether to list or not.

Fear of losing control over one's company appears to constitute a deterrent to getting listed and tapping public markets for founders and family owned companies. Existing owners rarely want to cede control of their business, but new investors will want to have

[22] Prominent examples include the Swedish company Spotify, the world's largest music streaming service provider seated in Stockholm, which listed on the New York Stock Exchange via a direct listing in 2018, and the German biotechnology company BioNTech, which listed on NASDAQ in 2019.

control over their future investment and EU law fosters responsible engaged share-ownership.[23, 24]

Multiple voting right ("MVR") share structures are one of the most effective ways to allow founders and families to retain control post-listing while raising a larger amount of funds and enjoying the benefits associated to listing.[25] The implementation of this type of structures has been supported in several reports and studies. The CMU HLF recommended that companies are allowed to implement a MVR share structure with a view to allowing the owners to maintain control of their company. The Oxera study suggested that regulators could ease restrictions on control-enhancing mechanisms (such as MVR share structures) to encourage companies to list without owners having to relinquish control of their companies. The TESG echoed this, noting that MVR share structures have been used in a number of countries, where they were seen as an efficient way for founders to go public, while retaining control of their company.

In the targeted consultation, the overwhelming majority of the respondents (76%)[26] considered that shares with MVR encourage firms (especially family-owned and high-growth, innovative companies) to go public as they allow founders to access public equity financing while retaining control of their business[27].

MVR share structures have proven to be especially popular among high-tech companies with Facebook, Google, Alibaba[28] and Snap – to name a few – using MVR share structures in their IPOs. Overall, about 46% of US tech companies chose these structures for their IPOs in 2021 (this contrasts with just 9% in 2001). MVR share structures are also gaining popularity among non-tech companies.[29] At the moment, most of the largest financial centres allow for MVR share structures in IPOs (e.g. US, China/Hong-Kong, UK, and Singapore). The UK has recently further flexed its rules, allowing for MVR share structures in companies listing on the premium segment of the London Stock Exchange.[30] As part of the review, the UK also introduced safeguards to mitigate concerns regarding the protection of minority shareholders' rights. There is evidence that

[23] The results of an issuer survey run by Oxera show that control is a key influencing factor in the listing decision. Loss of control is widely cited by unlisted companies as the most important reason for staying private. These results echo findings of other academic surveys including the one carried out by the EIB that stated that preference for corporate control explains 150 bps of the equity premium.

[24] The EU Shareholders Rights Directive 2 of 2017 aims to foster responsible exercise of control and voting rights of shareholders, in particular institutional investors and asset managers.

[25] For more explanation on MVR share structures, including the different positive and negative aspects of such share structures see Annex 5.

[26] 34 respondents out of 45. Exchanges, supported by issuers and privately-owned companies, consider that MVR share structures can open opportunities for companies to transition from private financing to public capital markets. 2 NCAs noted that the lack of mechanisms to ensure that control would not be lost acts as a strong disincentive to seek a listing, while two other NCAs explained that they remain sensitive to and interested in this subject, measuring its advantages and disadvantages for every party involved in public markets. A few stakeholders (4 out of 45) responded negatively including institutional investors' association that expressed their concern about the disappearance of the one share – one vote principle.

[27] The Portuguese supervisory authority (Portugal being the most recent Member State that allowed MVR share structures in 2022) noted that a wide study on the reasons why companies do not access Portuguese capital markets revealed that the lack of mechanisms to ensure that the control would not be lost is a strong disincentive to seek market based financing by Portuguese unlisted companies. The same finding appears in a study published by the Deutsches Aktieninstitut, where the lack of flexibility around MVR share structures is cited as a reason why companies, especially start-ups, may decide to list in the US rather than in Germany (where these shares are banned).

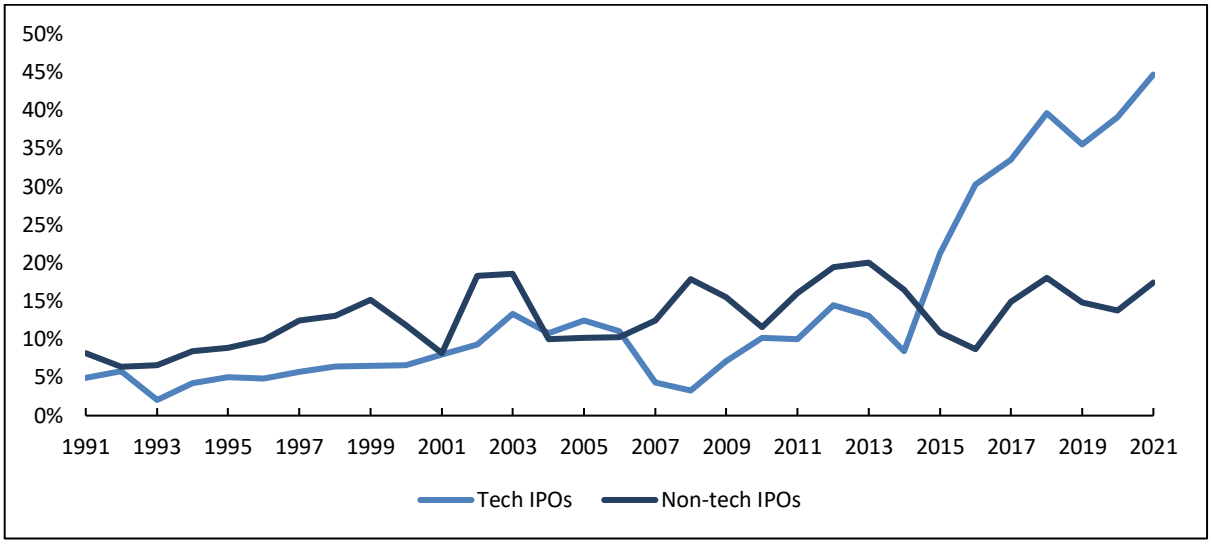
[28] Alibaba decided against listing on the Hong-Kong exchange due to the inability to use MVR share structures. This prompted the Hong Kong authorities to adapt their laws. (Source: CFA Institute, dual-class shares: the good, the bad, and the ugly, p. 2).

[29] In 2021, 32% of all US IPOs used a MVR share structure (corresponding to a total of 117 companies). Out of those companies, 44 companies were from the non-tech sector - the highest number since 1996. This suggests that the MVR share structures are increasing getting more important also with non-tech companies.

[30] https://www.fca.org.uk/publication/policy/ps21-22.pdf

absent such safeguards,[31] there is risk that minority shareholders may be consistently outvoted by controlling shareholders on important decisions. For more information see Annex 5.

**Figure 3. % of IPOs with MVR share structures in the US (2y moving average)**




*Source: Jay Ritter, University of Florida*

### 2.1.2. Unnecessary regulatory burden for companies

When making a decision on whether or not to list, companies weigh expected benefits against the costs. If costs prevail, or if alternative sources of financing offer a less costly and easier option, companies will not seek access to public markets. Feedback from the market indicates that the initial and ongoing costs of becoming a public company have risen considerably in recent decades, both in absolute terms and relative to private equity funding, in particular for SMEs[32].

The costs of listing can be broadly categorised into direct and indirect costs, as well as initial (one-off) and ongoing costs. The direct costs mostly derive from fees paid to parties involved in supporting a company through the listing process and once listed (such as underwriters, accountants, legal advisers, listing venue)[33]. Alongside fees, issuers face a range of indirect costs stemming, among others, from the efforts (and the management time) required to comply with the requirements associated with the listing process as well as the ongoing regular reporting and disclosure requirements.

The sources that quantify IPO costs point to a range of 3-10% of the issuing amount. There is, however, little quantitative information about the ongoing costs and in particularly about the costs of complying with the obligations stemming from MAR. Annex 4 provides further analysis on the costs of listing and staying listed.

The direct costs of listing (i.e. underwriting and legal fees) are largely fixed and generally (but not entirely) influenced by a high degree of fragmentation and hence a limited degree of competition in the EU listing ecosystem. Such ecosystem is represented

[31] As evidenced by the developments at the recent (2022) Meta General Meeting, the founder's outsized voting power may result in fending off minority shareholders' ESG proposals, aiming at improving the sustainability of this company.
[32] TESG Final report, p. 6
[33] Oxera study, p. 62.

by investment banks, brokers, market-makers and other third party advisors specialised in listing/listed companies. Regional fragmentation of EU markets and different languages lead to a rather small market for legal experts and financial intermediaries that accompany companies in the issuance process and, where necessary, after listing. For this reason, and despite representing a considerable share of the overall listing costs the level of these costs largely reflects the limitations of the established market structure, which would not be possible to address directly in the short term with regulatory measures. These direct costs may nevertheless be reduced in the longer-term. As regulatory measures address some barriers, more companies would be expected to list on EU markets, driving up the scale and creating room for entry by competitors, hence driving down the level of fees charged by financial intermediaries and legal experts.

This IA focuses mainly on the indirect costs of listing, i.e. the costs induced by the initial and ongoing listing requirements, as well as in part on the direct costs related to the production of listing documents (such as prospectus). Contrary to most types of direct costs, indirect costs can be more easily reduced through targeted legislative amendments aimed at streamlining and clarifying existing rules.

Regulatory burden, in particular related to ongoing compliance, is usually considered an indirect cost of listing. Compliance with these requirements requires companies to hire additional (expert) staff. This can prove particularly burdensome, especially for SMEs. Extensive regulatory requirements also typically increase liability and litigation risks for issuers and their advisors as well as the amount of time spent by the management on the listing process (and on the subsequent compliance with post-listing rules). Finally, they often force issuers to look for external legal advice, thus further contributing to higher legal, accounting and advisory fees. The drawing up of a prospectus (as a pre-condition for a public offer/admission to trading) is, in turn, a direct cost, notably when it is (entirely) outsourced to an external legal counsel.

Both the CMU HLF and the TESG confirmed that the listing process and ongoing requirements for companies, and in particular for listed SMEs, have become excessively burdensome over time. Similarly, the Oxera study stressed that the indirect ongoing costs of being listed are often cited as having the most significant impact on the decision to seek a listing, or, indeed, deciding to delist[34]. Several industry practitioners have highlighted the efforts required to comply with the regulatory requirements associated with the listing process, and the related litigation risk, as the most significant costs of listing. Furthermore, they confirmed that management time and other indirect costs associated with an IPO have increased over time[35]. This view is backed by the results of the public consultation as well as by feedback received from stakeholders in the context of workshops organised with stakeholders, such as representatives of exchanges, issuers and investors (See Annex 2 for more details).

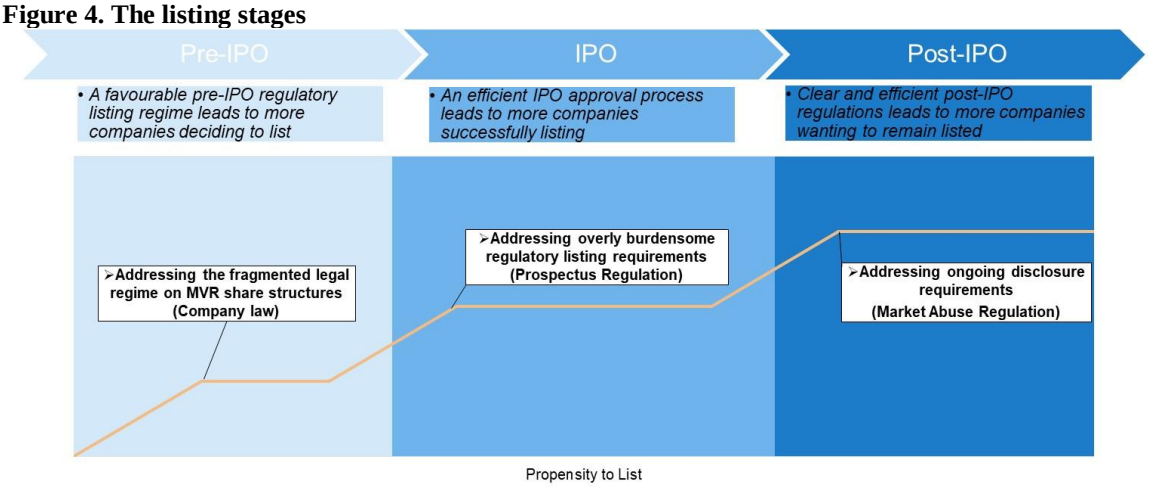
## 2.2. What are the problem drivers?

This IA focuses on the selected drivers related to the specific barriers in the regulatory framework. The 'out-of-scope' drivers are briefly described in section 2.2.6. below and more extensively in Annex 12.

[34] Oxera study, p.69.
[35] Oxera study, p 62.

The listing cycle is made up of three stages: the pre-IPO stage, the IPO process itself and the post-IPO stage. The regulatory environment impacts all three stages of the process and is among the main driving forces for the problems described in the previous section. To make it more attractive for firms to list and remain listed in the EU would require that the regulatory barriers in all stages of the listing cycle are addressed.

**Figure 4. The listing stages**




## Pre-IPO: Company Law

The decision to list for a company is made after analysing the cost-benefit of listing in public capital markets when compared to other sources of funding. Currently, many EU companies do not find the prospect of being listed as beneficial when compared to attracting funding from other sources such as private equity or bank loans. There are several drivers that impact the decision to list at this stage, one of which is the flexibility accorded under company law to use various share structures, such as MVR share structures, and thus allowing the issuer to retain more control post-listing.

## IPO: Prospectus Regulation

Once a company makes the decision to list, it must go through the IPO process. During this process the regulatory regime is very relevant as it determines the information that must be published by the company (Prospectus Regulation). The requirements to produce such documentation can be quite onerous in some cases and this may act as a deterrent from listing.

## Post-IPO: MAR

Once a company has listed, it may enjoy the benefits associated with public listing such as superior growth in terms of assets, revenues and employees and a higher brand recognition. At the same time, the company must also comply with a number of requirements and failure to properly comply with these requirements could lead to sanctions and litigations for the firm (MAR). Both a lack of clarity regarding such requirements and a disproportionate sanctions regime could lead to companies refraining from listing in the first place (or trigger delisting for the already listed companies). In addition, listed companies, especially SMEs, need to make themselves known to possible investors: the current low level of investment research on such issuers, driven by many

underpinning factors,[36] leads to their low visibility and scarce investors' interest, further limiting the liquidity for the already listed companies (See Annex 9 for more details).

The drivers and, subsequently, proposed policy options follow the order of the listing cycle and hence focus on addressing regulatory barriers that emerge at various stages of the listing process, i.e. those stemming from company law (rules on MVR share structures), Prospectus Regulation and MAR. Annexes 5, 6 and 8 provide elements of an evaluation of the legislative framework applying to each of these stages. Annex 5 provides for an overview of the current national rules on MVR share structures and sets out positive and negative aspects of these share structures. Annexes 6 and 8 take a critical look at whether the regulation applying at the IPO and post-IPO stages is fit for purpose and delivers its intended objectives at minimum cost (i.e. avoiding unnecessary costs or burdens).

#### 2.2.1. *Unequal opportunities for EU companies regarding governance structure, when listing, due to different national rules on MVR share structures (Pre-IPO phase)*

While there are different ways to protect shareholder control across Member States, there is currently fragmentation in the EU as regards MVR share structures, in particular, which leads to unequal opportunities for EU companies when listing. MVR share structures are currently available in twelve Member States,[37] while the remaining fifteen do not allow them. Loyalty shares are allowed only in 5 Member States[38]. Table 1 in Annex 5 provides an overview of the Member States' legislation regarding MVR share structures.

Some Member States (banning MVR share structures) provide for alternative share structures, such as loyalty shares, preferential shares and non-voting shares. These alternative structures can allow a founder to preserve control in the company. Nevertheless, being more rigid in their set-up[39], they naturally constrain the amount of equity that can be raised at the IPO stage and through follow-on issuances (since further ordinary shares issuances would inevitably dilute the founder's interest, due to a fixed (lower) voting right ratio). MVR share structures by contrast allow founders to maintain majority-voting control while only retaining a minority of the cash-flow rights (and therefore selling a larger portion of their investment in the company). Furthermore, while MVR share structures are meant to increase the allure of public markets for founder driven company and to isolate their decision-making from market pressures, loyalty shares, are issued to reward long-term investors who hold on to the company's stock for a long time (i.e. any shareholder can obtain additional voting rights if they hold the stock for the designated time) and are not generally used at the moment of the IPO. Loyalty shares are thus expected to lead to a more stable, long-term-oriented ownership base that would benefit companies' development, protecting it from the influence of short-term investors.

[36] These factors may range for example from low profitability of SME research (small ticket), lack of trust in issuer-sponsored research, development of passive investment strategy.

[37] Shares that give enhanced voting power to shareholders that have held their shares for a specified time period (typically 2 years) or met a series of conditions. Any shareholder can obtain the added voting rights provide they maintain the share for the specified time period or comply with the conditions. The additional voting rights are not transferred, when loyalty shares are traded.

[38] Two of these Member States also allow for MVR shares (Italy and Netherlands) and the other three only allow loyalty shares but not MVR share structures (Belgium, France, Spain).

[39] Non-voting and preferential shares allow only for a 0:1 voting ratio (compared to ordinary shares), while loyalty shares typically allow to grow voting rights only gradually over time (i.e. they are typically proportionate to the time the investor stays invested in the company).

While the link between the flexibility to list with MVR share structures and the decision to IPO is difficult to demonstrate empirically (and the decision to IPO is obviously a complicated process, taking into account a lot of different factors), Sweden (a Member State with one of the most flexible MVR share structure regimes in the EU) has consistently had a high number of IPOs relative to its size across the years[40], reporting the highest number of IPOs in the EU in 2021.[41] Furthermore, in the US, 31.7% of all IPOs in 2021 used MVR share structures with 46.2% of tech companies using this structure.[42] Nevertheless, it would not be possible to ascertain that those companies that listed in the US or in Sweden in 2021 with MVR shares would not have listed if these share structures had not been allowed in the US or in Sweden (or would have listed elsewhere). It can, however, be assumed with a reasonable degree of certainty that the ability to list with MVR shares was an important consideration in the overall decision to list. Annex 5 further elaborates on the link between MVR share structures and the decision to go public.

The prohibition of MVR share structures in some Member States leads to a situation where some companies (based in those Member States and that wish to list with MVR share structures) are put in a situation of a comparative disadvantage versus companies in other Member States that allow MVR share structures. In fact, these companies are faced with a choice of either remaining private or moving to another Member State or third country to benefit from this added flexibility. This results in higher costs either in terms of a missed IPO opportunity for those companies (and foregone EU growth and future tax revenues for the Member States in question) or an increased burden associated with listing in another Member State or in a third country (allowing MVR share structures)[43]. To the extent that these firms would decide to list on a trading venue outside the EU, capital market development in the EU is also negatively affected. Annex 5 provides for an overview of the current national rules on MVR share structures and sets out positive and negative aspects of these share structures.

### 2.2.2. *Overly burdensome listing requirements (IPO phase)*

Companies issuing securities on public markets need to publish a prospectus, unless an exemption applies. Many stakeholders indicated, as a driver for the high cost of listing, a considerable length and complexity of the prospectus documentation[44]. This refers to both instances where companies seek access to public markets for the first time (IPO) and where they access public markets for follow-on or secondary issuances of equity and/or non-equity securities.

ESMA collected data on the length of the different types of prospectuses in 2021[45], also distinguishing between EU Member States[46]. A notable difference between the mean and the median length of prospectuses is indicative of discrepancies between the shortest and the longest prospectuses or, more generally, of a wider divergence and, consequently, of

[40] For example comparing the IPO figures from Sweden: 107 in 2021, 28 in 2020, 23 in 2019 and 25 in 2018 with France: 32 in 2021, 8 in 2020, 8 in 2019 and 16 in 2018
[41] PWC IPO watch Europe 2021
[42] This represents 117 IPOs, of which 54 were tech companies.
[43] Additional costs and issues linked to listing outside of a home Member State include having to move headquarters, hiring advisors specialised in the host Member State's laws/rules, complying with an unfamiliar set of regulations, (potentially) working in another language and the home bias of investors.
[44] CMU HLF Final report, p. 68; TESG Final Report, p. 23; Oxera study, p. 67.
[45] See Table 3 of Annex 6.
[46] See Figure 8 of Annex 6.

the lack of uniformity of prospectuses in the EU[47]. The scenario highlighted in Figure 8 of Annex 6 confirms that the length of prospectuses may significantly vary depending on the Member State where the prospectus is approved.

The length of the prospectus makes its drawing up, as well as its scrutiny and approval process time-consuming, expensive and complex, in particular for companies offering their securities cross-border (and hence preparing multiple-language documents). Feedback interviews conducted by Oxera indicate that senior management of firms seeking to list now spend a significantly higher proportion of their time on the listing process than before—between 30% and 50% of the CEO and CFO time in the six months prior to listing[48]. When assessing the specific costs of preparing a prospectus, available data proved to be limited (see section 6.1. below and Annex 4 for more details)[49]. The collected data show that a standard prospectus for equity remains to be the most expensive type of a prospectus (reaching up to EUR 300 000 for large issuers), with the costs of EU Growth prospectus and simplified prospectuses being on average up to 25% lower[50]. While the data on the EU Recovery prospectus is even more limited, given its rather recent introduction, the obtained figures suggest on average up to 40% cost savings[51] (compared to the simplified prospectus for secondary issuances[52]) for companies. The costs of non-equity prospectuses are lower than those of equity, and the difference in costs incurred by SMEs and large companies is less pronounced than for equity.

Data and responses from stakeholders confirm that the current rules that lead to excessive disclosure contribute to both very lengthy and also very divergent prospectuses across Member States. For example, in some cases the Prospectus Regulation requires information that may not be indispensable for investors to make an informed investment decision (i.e. not justified from the investor protection point of view). In other cases, a prospectus is required when a lot of information is already available in the public domain. Feedback to the public consultation (echoed during the stakeholders' meetings) confirmed the view that neither the standard prospectus nor the EU Growth prospectus strike an appropriate balance between effective investor protection and the proportionate administrative burden for issuers. For secondary issuances, the majority of the respondents[53] indicated that a significantly simplified prospectus focusing on essential information only should be available, considering that information on issuers is already available at that point via other sources (See Annexes 2 and 6 for more details).

The excessive length of the prospectus can discourage some, in particular smaller, investors from consulting it or even considering investing. In the case of larger investors, the laborious analysis of lengthy prospectuses would translate into a higher cost of investing in these companies. It also requires a longer period of time for the NCA to scrutinise and approve the prospectus[54], albeit the complexity and quality of the

[47] Based on a sample of 1144 documents, the mean and the median length of a single language prospectus differ by 38 pages.
[48] Oxera study, p. 68.
[49] Less than 10 respondents to the public consultation provided an estimate of these costs.
[50] See Table 7 of annex 4.
[51] See Table 7 of Annex 4.
[52] A simplified prospectus for secondary issuances is the natural reference for comparison with the EU Recovery prospectus (both apply (or applied) to secondary issuances).
[53] 57% of respondents (16 out of 28).
[54] These costs may or may not be in the end reimbursed by the fees charged by NCAs to issuers for the scrutiny of prospectuses. The remaining costs might then be seen as a form of state subsidy, hence translating into higher costs for the administration/state overall.

prospectus are also important factors that can impact the overall length of the scrutiny and approval process.

An additional problem stems from the fact that the current rules do not sufficiently frame supervisory scrutiny by NCAs. This leads to further differences in NCAs' treatment of prospectuses, contributing to overly lengthy prospectuses, in particular in some Member States. When inquired about their satisfaction with the length and outcome predictability of the NCA scrutiny and approval process, the prevalent opinion among the issuers' representatives who took part in a stakeholder workshop on the Listing Act was that they are not satisfied. The representatives of exchanges and investors were more neutral in their reaction. Furthermore, in the context of the targeted consultation, 53% of the respondents (23 stakeholders)[55] argued that there is divergence in the way NCAs assess the completeness, comprehensibility and consistency of prospectuses, calling for more alignment in terms of the documentation required and length of the process. Furthermore, the ESMA peer review of the scrutiny and approval procedures of prospectuses by competent authorities of 21 July 2022[56] highlighted some areas of material differences in NCAs' approaches to scrutiny and approval of prospectuses, such as deadlines imposed by NCAs for issuers to respond to comments, NCAs' procedures for the approval of prospectuses and additional criteria that NCAs apply for the scrutiny of the completeness, comprehensibility and consistency of the prospectus.

The Evaluation of the Prospectus Regulation, set out in Annex 6, highlights that current prospectus requirements place unnecessary burden on issuers and that the intended objectives of the Prospectus Regulation could be delivered with less costly requirements for issuers while maintaining an adequate level of investor protection.

### 2.2.3. *Overly burdensome ongoing disclosure requirements (Post-IPO phase)*

Once admitted to trading/listing, issuers must ensure regular disclosure of periodic and *ad hoc* information and its dissemination to the public. The information to be published includes yearly and half-yearly financial reports, major changes in the holding of voting rights as well as *ad hoc* inside information which could affect the price of securities.

The Fitness Check on financial and sustainability public reporting by companies, published by the Commission in 2021, covered a large group of the public reporting obligations that are relevant for listed companies (including, in particular, the obligations stemming from the Transparency Directive)[57]. Its conclusion highlighted that the EU framework for public reporting is generally fit for purpose and that the cost of regular public reporting stemming from the EU framework seems a relatively modest "cost of doing business" for companies. In the targeted consultation, when asked whether there is potential to simplify the Transparency Directive's rules, 11% of the respondents (9 out of 79) replied "no", while 71% (56 out of 79) either did not reply or did not express an opinion. Therefore this IA only focuses on the disclosure obligation stemming from MAR, which did not fall in the scope of the Fitness check on financial and sustainability public reporting by companies.

[55] Including 10 business associations (of banks, issuers, and law firms), 7 companies (including 2 operators of trading venues, a trade association and a law firm), 3 NCAs and 2 NGOs.
[56] ESMA42-111-70. Available at: esma42-111-7170_final_report_-_prospectus_peer_review.pdf (europa.eu).
[57] Commission Staff Working Document - Fitness Check on the EU framework for public reporting by companies, SWD/2021/81 final. This Fitness Check assessed primarily whether the EU framework on corporate reporting has achieved its objective of providing stakeholders with financial and non-financial information that is sufficient in quantity and quality to enable them to make informed investment decisions, protect their interests and hold companies publicly accountable.

Feedback from stakeholders collected in the context of public consultations[58] as well as of expert groups[59] and by means of bilateral exchanges[60], highlighted that some aspects of the MAR disclosure regime place a particularly high burden on issuers listed on regulated markets as well as on SME growth markets.

Stakeholders notably perceive as burdensome the obligation to disclose as soon as possible all inside information given the broadness of the notion of inside information and the fact that the same notion applies both for the purpose of prohibition of insider dealing as well as disclosure (see Annex 2 and 8, paragraph 2.1. for further details).

While the broad notion of inside information caters for a comprehensive (and very early) prohibition of insider dealing, when applied in the context of the disclosure obligation, it creates legal uncertainty and comes at a cost of either disclosing information that is not yet mature enough or risking high sanctions for a non-timely disclosure.[61] Several respondents to the consultation carried out by ESMA[62] highlighted that the notion of inside information lacks legal clarity. Hence issuers encounter difficulties when delineating between what is and what is not inside information[63]. This has multiple consequences, which span from increased compliance costs – including consultants' and legal advisors' fees – to the risk that issuers either qualify the information as being inside information when in doubt, or, on the contrary, postpone or avoid such classification. Stakeholders sought clarifications both on the general interpretation of certain MAR provisions, relevant for determining when the information needs to be disclosed (for instance, as regards intermediate steps, or the level of certainty needed to consider the information precise), and on concrete types of events (or scenarios) triggering possible disclosure (See Annexes 2 and 8 for more details).

The CMU HLF noted that the current notion of inside information is extremely costly when events are preliminary (e.g. a CEO harbouring plans to potentially step down, board members discussing potential ideas of a merger, preliminary risks of litigation, etc.) and recommended that the Commission narrows down the definition to reduce unnecessary disclosure[64]. This was echoed by the TESG that stressed the need to clarify what constitutes inside information and when inside information needs to be disclosed by distinguishing between "*a definition of inside information for the purposes of market abuse prohibition, and a more 'advanced' notion of inside information, typically linked to a higher degree of certainty of the information, triggering the disclosure obligation*"[65].

Annex 8 points to wide divergences across Member States in the number of disclosures of inside information which are not explained by the size of the Member State in question. For instance, in France in Q1 2022 the number of public disclosures per issuer was 6.76 whereas in Spain it was 0.27. This is illustrative of the fact that there are

[58] Targeted consultation on the listing act: making public capital markets more attractive for EU companies and facilitating access to capital for SMEs | European Commission (europa.eu)
[59] TESG and CMU HLF.
[60] Workshops with exchanges, issuers and investors conducted as part of preparatory work on the Listing Act.
[61] While it was (and probably would be) impossible to quantify the cost of this legal uncertainty stemming from the unclear definition of the inside information, it could be reasonably assumed that compliance with the disclosure obligation under MAR requires additional resources (internal or external) to deal with legal interpretation. Where the lack of legal clarity cannot be removed with interpretation, an issuer must bear either the indirect costs related to the risk of being sanctioned or the direct costs of unnecessary/too early disclosure.
[62] MAR_review_report_-_cp.pdf (europa.eu)
[63] ESMA Final Report on the MAR Review, p. 47, points 131-133.
[64] CMU HLF Final Report, p.67.
[65] TESG Final Report, p.27.

important differences in how stakeholders interpret the current rules, with stakeholders from some Member States having a stricter interpretation than stakeholders from others. As the notion of inside information triggers a varying level of disclosure, it is likely to give rise to costs of legal interpretation, rendering the compliance with the current rules very costly for issuers.

The high costs stemming from the obligation to disclose all inside information are accompanied by a lack of legal clarity around the conditions that issuers need to meet in order to delay disclosure. While the delay mechanism could counterbalance the broadness of the notion of the inside definition, in particular when timely disclosure is likely to prejudice the legitimate interests of the issuers, the lack of clarity around the conditions of its application defeats this objective. As the data in Annex 8 show, in some Member States, issuers regularly rely on the mechanism for delaying the disclosure of inside information, while in others issuers do so only on an exceptional basis. From July 2016 to June 2019, the possibility to delay has been evoked in about 14 000 cases with significant discrepancies across the EU. For instance, in some Member States, in a 3-year period, issuers have never notified delay to their respective NCAs, whereas in others the average number of delays per quarter was above 100.

As a result of the ensuing lack of clarity under MAR, companies are likely to either over-disclose information and over-submit requests to NCAs for delays, to avoid the risk of being sanctioned, or bear the risk of being sanctioned. Both over-disclosure and over-submission of delay requests to NCAs are likely to increase the costs to companies that often prepare the necessary documentation with the help of external (or internal) legal advisors. Furthermore, too early disclosure of information could actually mislead investors and trigger action on his/her part that could prove to be suboptimal in hindsight (e.g. divesting the stock too soon or not divesting soon enough). This is likely to increase the opportunity (both direct and indirect) cost for the investor. Finally, too frequent requests for delays to NCAs are likely to drive up the costs for NCAs who would have to review them. Conversely, the potential cost of being sanctioned might be unacceptable for issuers, not only because of the level of administrative pecuniary sanctions, but also because of indirect costs, like reputational damage.

While ESMA in its Final Report on the MAR Review[66] concluded that the notion of inside information should be left unchanged and that ESMA's guidance would suffice to provide the necessary clarification, a majority of the stakeholders (52%) that expressed an opinion on this question considered that ESMA's guidance would not be fully sufficient (See Annexes 2 and 8 for more details). Similarly, both the CMU HLF and the TESG concluded that changes to the level 1 text would be needed in order to instil full legal clarity and reduce compliance costs for issuers. Annex 8 summarises the assessment carried out by the Commission in relation to the most relevant MAR provisions for which ESMA's conclusions are not in line with the feedback received from experts and stakeholders, including the definition of inside information (Article 7), and delayed disclosure (Article 17(4)).

The burden stemming from the MAR disclosure obligation are amplified by a disproportionate sanctioning regime for disclosure-related infringements[67], in particular

[66] ESMA Final Report on the MAR Review, p. 55.

[67] MAR distinguishes between the market abuse infringements (e.g. insider dealing, market manipulation) and disclosure-related market abuse infringements (e.g. late disclosure/reporting).

for SMEs. The TESG highlighted in their report that the risk of an inadvertent breach of MAR and the associated administrative sanctions are seen as important factors that may lead to companies delisting or even dissuade companies from listing at all. Half of the respondents to the public consultation (22 out of 44)[68] indicated that they do not find the current MAR punitive regime proportionate to the objectives sought by the legislation nor to the type and size and entities potentially covered.

Under EU legislation, which is not prescriptive on the matter, SMEs may potentially be sanctioned at the same level as a large company.[69] In the case of SMEs, breaches of the MAR disclosure obligations may, however, occur due to insufficient resources afforded by those SMEs to regulatory compliance and be of an accidental nature, rather than the result of malicious intent on their part. While the sanctions regime should serve as an effective deterrent for companies not to commit infringements, in the case of SMEs, where breaches are often not intended but rather result from weaker ongoing compliance mechanisms due to the lack of resources, a higher level of sanctions would not necessarily be associated with a higher level of compliance. As SMEs can be imposed a prohibitively high level of sanctions, the current sanctions regime serves rather as a deterrent not to list and not as an effective deterrent not to infringe law, defeating entirely the purpose of the legislation. This appears to be corroborated by evidence provided by an issuers' representative who reported that since MAR entered into force (July 2016), the number of listed companies in its Member State declined (in net terms) by 86 companies (i.e. by 10%) with 53 on the regulated market and 33 on an SME growth market. The same stakeholder attributed the decline to the disproportionate sanctioning regime.

An indirect impact of the excessive and disproportionate sanctions regime is that it acts as a disincentive for companies to list *de facto* preventing them from accessing public equity markets (and generally having less alternative funding sources which may have an impact on the cost of capital for those companies). In addition, the choice not to list could lead to an opportunity cost for these companies (foregone development opportunities), as well as for the EU economy (foregone growth and job creation). Member States might also lose out on foregone tax revenue[70].

Under MiFID II, investment firms and brokers became subject to the so called "unbundling requirement", whereby execution commissions should have been invoiced to clients separately from payments for research. While the CMRP introduced some alleviations in this respect, to tackle the issue of the low research in particular for SMEs, these measures did not effectively address the problem: many investment firms and brokers continued to follow the unbundling rule for the majority of their clients.[71] Therefore, the level of SME research continued to be low in the EU even after the CMRP (See Annex 9 for more details). Considering the effects of the ongoing energy crisis,

[68] 22 respondents believed that the current punitive regime under MAR is not proportionate to the objectives of the legislation (10 companies/business associations, 7 business associations, 3 academic/research institution, 1 non-governmental organisation and 1 public authority). In the group of respondents who believed that punitive regime under MAR is proportionate, the majority are public authorities. See Annex 2 for more details.

[69] Currently, provisions of MAR on the minimum of the maximal pecuniary sanctions do not differentiate between SMEs and large companies. This differentiation is left to the discretion of NCAs. Article 31 of MAR states that Member States shall ensure that when determining the type and level of administrative sanctions, competent authorities shall take into account all relevant circumstances, including, where appropriate "the financial strength of the person responsible for the infringement, as indicated, for example, by the total turnover of a legal person or the annual income of a natural person".

[70] Given the absence of figures in this area, no quantification of the impact is possible.

[71] AMF : Reviving research in the wake of MIFID II, January 2020

companies increasingly struggle with finding investors to finance their operations. Their visibility to investors, including through research, hence becomes ever more important.

### 2.2.4. *Stakeholders' views on problem drivers*

Different groups of stakeholders responded to the consultation and despite diverging interests, their views converged when asked about the different problem drivers.

*Pre-IPO phase: MVR share structures*

For the pre-IPO phase of the listing process, the majority of stakeholders (75% or 34 respondents out of 45 that responded to the public consultation) answered that, where allowed, the use of MVR shares has effectively encouraged more firms to seek a listing on public markets (this included issuers, exchanges, NCAs and financial intermediaries). 36% (four out of the eleven) investors and investor associations replying to this question agreed that the ability by companies to use MVR share structures would support more public listings (five of the responding investors (46%) raised concerns around engagement of minority shareholders).

A large majority of exchanges (88%) that responded to the public consultation (seven out of eight) considered that MVR share structures can contribute to companies' transitioning from private financing to public markets. Representatives of issuers and private companies shared this view. Three investors' associations that replied to this question also stressed that MVR share structures encourage firms to go public with only one stating the contrary and three not giving an answer. Two NCAs noted that the lack of mechanisms to preserve control acts as a strong disincentive for companies to seek a listing, while two other NCAs noted that they were still weighing advantages and disadvantages of MVR share structures. One NCA stressed the importance of leaving sufficient room for manoeuvre to Member States while ensuring that MVR shares can be marketed and admitted to public trading within the EU.

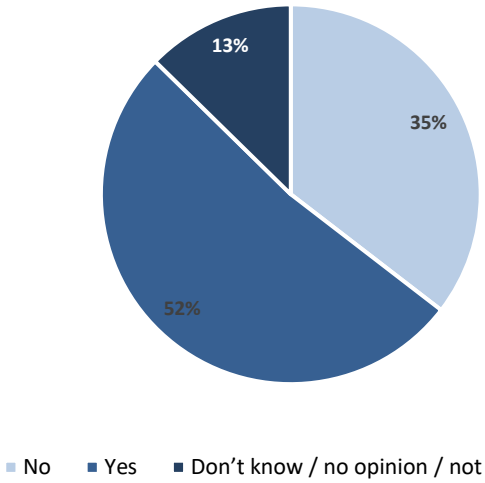
27% of stakeholders (9 respondents out of 33) reacted negatively to the possibility to introduce MVR share structures across the EU. An (institutional) investors' association expressed a concern about the disappearance of the 'one share – one vote' principle, considering that MVR share structures may allow a minority shareholding to gain control of a company, therefore leading to the abuse arising from the dichotomy between shareholder power and economic risk.

*IPO and post-IPO stages: Prospectus Regulation and MAR*

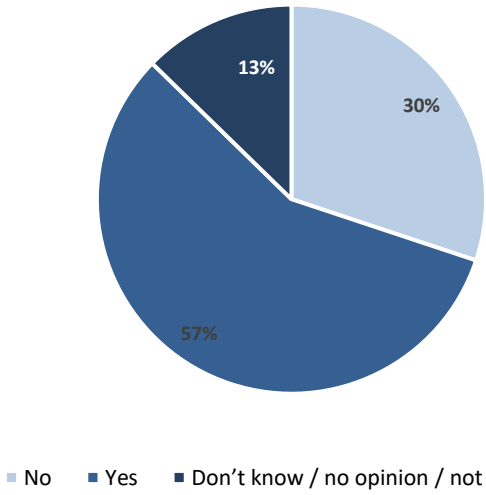
A vast majority of respondents (72%, i.e. 66 respondents out of 91) believed that excessive compliance costs linked to regulatory requirements in the IPO and post-IPO phase were rather or very important factors in explaining the lack of attractiveness of EU public markets. This included the vast majority of issuers, exchanges, investors and some NCAs. On *the IPO stage*, one investor association singled out the length, thresholds (from which publication is required), the deadline and passporting rules of the Prospectus regulation as a large source of general compliance burden that make it unattractive for many businesses to go public. An exchange stated that the costs and burdens associated with the regulatory requirements applicable to companies admitted to regulated markets are the most significant barrier to listing. Several stakeholders stated that the listing burden is similar for large companies and SMEs, therefore making the burden very

disproportionate for an SME. The majority of respondents argued that both listing and post-listing rules lead to a burden disproportionate with the investor protection objectives that these rules are meant to achieve (52%, i.e. 42 respondents out of 80, and 57%, i.e. 45 respondents out of 78 of respondents, respectively).

In your view, does compliance with IPO listing requirements create a burden disproportionate with the investor protection objectives that these rules are meant to achieve?




In your view, does compliance with post-IPO listing requirements create a burden disproportionate with the investor protection objectives that these rules are meant to achieve?




The majority of respondents (59%, i.e. 35 respondents out of 59) considered that the standard prospectus in its current form does not strike an appropriate balance between effective investor protection and the proportionate administrative burden for issuers, and that it should be significantly alleviated. This included the majority of issuers and exchanges as well as banks and an NCA. The same view was also expressed by 44% of

respondents (21 respondents out of 48) with respect to the EU growth prospectus. In contrast, 48% of respondents (20 respondents out of 42) believed that the prospectus regime for non-equity securities has been successful in facilitating fundraising through capital markets.

Regarding secondary issuances, respondents' views were split. While a slight majority of respondents (51%, i.e. 31 respondents out of 61) considered that the prospectus requirement should not be lifted for secondary issuances, a significant minority (43%, i.e. 26 respondents out of 61) considered that issuers listed continuously for at least 18 months on a regulated market or an SME growth market, should not have to publish a prospectus for subsequent issuances. Finally, a majority of respondents (54%, i.e. 23 respondents out of 43) did not think that there is alignment/convergence in the way NCAs assess the completeness, comprehensibility and consistency of draft prospectuses that are submitted to them for approval.

On the *post-IPO phase* of the listing process, as mentioned earlier, a vast majority of stakeholders, composed of representatives of issuers, trading venues, banks, financial intermediaries, institutional and retail investors, that replied to the consultations believed that excessive compliance costs linked to regulatory requirements were also an important factor in explaining the lack of attractiveness of EU public markets. Overall respondents found most aspects of the current MAR regime burdensome. The most burdensome requirements were the ones related to the definition of inside information (64%, i.e. 28 respondents out of 44, said it was very burdensome or rather burdensome) and the conditions for delay of disclosure (70%, i.e. 28 respondents out of 40, mainly representatives of banks, trading venues, issuers, institutional investors, financial intermediaries and legal advisors, said it was very burdensome or rather burdensome).

When asked about the most important costs of remaining listed, respondents specifically pointed to fees to auditors, to ensure compliance with the listing regulation (20% of respondents, i.e. 13 respondents out of 65, replied "very important" and 32% of respondents, i.e. 21 respondents out of 65, - "rather important"). Respondents also pointed to significant corporate governance costs (8%, i.e. 5 respondents out of 65, stated that this cost is "very important" and 29%, i.e. 19 respondents out of 65, - "rather important") and ongoing fees to legal advisors (17%, i.e. 11 respondents out of 64, replied "very important" and 23%, i.e. 15 respondents out of 64, "rather important").

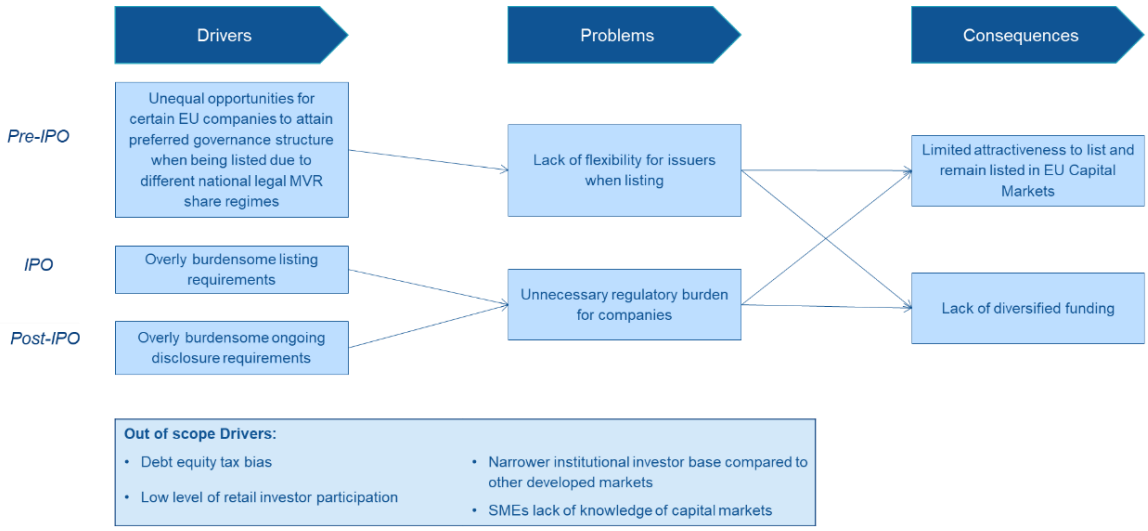
Respondents' views were split, when asked if ESMA's clarifications on the notion of inside information would be sufficient. Almost half of those who expressed an opinion nevertheless believed that ESMA's guidelines would not be sufficient to provide the necessary clarifications around the notion of inside information (54%, i.e. 27 respondents out of 50, including representatives of banks, trading venues, issuers, legal advisors as well as two NCAs).

Half of respondents (50%, i.e. 22 respondents out of 44), including representatives of banks, trading venues, issuers and legal advisors, shared the opinion that the current punitive regime under MAR is not proportionate to the objective sought by the legislation.

### 2.2.5. *Out-of-scope drivers*

Beyond the problem drivers listed above, access to EU public equity markets is also constrained by other factors, such as a more favourable tax treatment of debt over equity, SMEs' lack of knowledge of capital markets and generally a more narrow investor base, when compared to other developed capital markets, which is further constrained by a strong home bias[72] (reinforced by lengthy and cumbersome withholding tax reclaim procedures). Tax incentives are also often quoted as an important element in promoting companies' access to public markets.[73] Stakeholders[74] also expressed concern regarding the narrow application of exemptions under the state aid rules. Furthermore, the level of EU retail investor participation in capital markets remains very low compared to other developed economies. This translates into lost opportunities in terms of the return on long-term savings for EU citizens but also in terms of less funding available for EU companies and less deep public capital markets more generally, which in turn decreases the pace of economic recovery and future growth potential. These and other out-of-scope drivers (See Annex 12 for more details) are not addressed in the current initiative focusing on regulatory barriers, but are nevertheless considered in the wider plan to facilitate companies' access to public markets (see section 1 on political context as well as Annex 13).

**Figure 5. The problem tree**




Companies will opt in favour of (or against) a public listing of their shares/bonds by weighing the costs and benefits of such a decision. Although it would be exaggerated to claim that low listing levels are the direct consequence of only the regulatory issues described above, the latter do contribute to reducing the relative attractiveness of public markets: they increase the regulatory burden imposed on companies when listing on public markets and reduce the possibilities for founders and families to retain control of their company when listing. The reduced relative attractiveness of EU public markets could lead to EU companies choosing to list or raise funding in third countries, depriving

[72] Demonstrated in the CMU indicators, specifically, indicator 28 holdings of equity from other Member States.
[73] Several Member States (such as Sweden, France, the UK and Italy) have all implemented tax incentives to encourage savings in equity, by providing tax reliefs on capital gains.
[74] TESG Final report, p. 60.

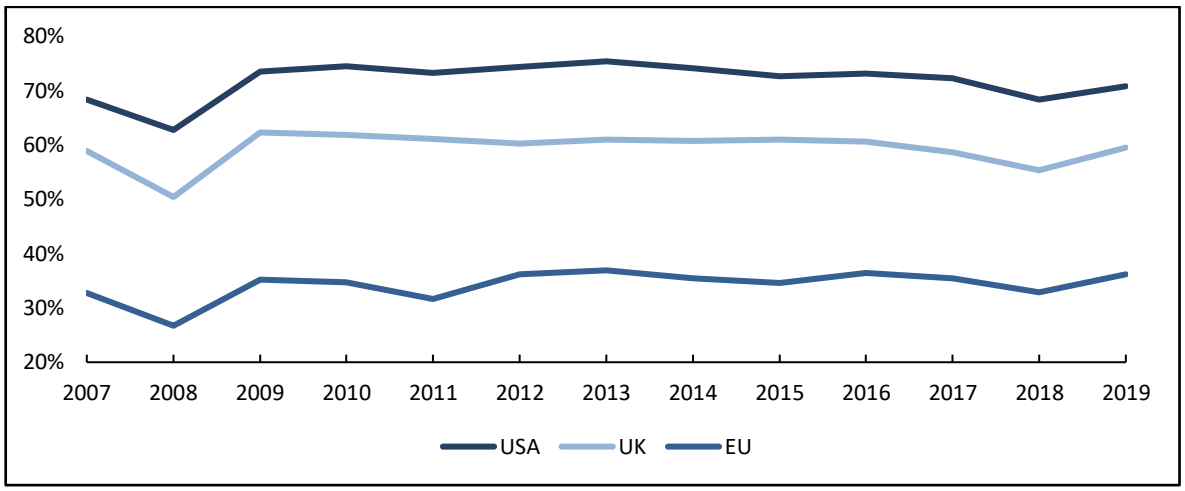
the EU of the full growth and employment potential, or to delist, when already listed in the EU.

The broader consequence would be lower scale and competitiveness of EU capital markets and less efficient risk sharing in the EU economy with impact on, resilience to financial shocks.

### 2.2.6. Lack of diversified funding

Reduced companies' access to public equity and bond markets also results in limited opportunities for EU companies to diversify their sources of funding and reduce their overreliance on bank loans. An unbalanced funding structure (between bank and market-based funding) of a company makes it more exposed to market volatility and makes it less resilient in periods of shocks. Studies[75] have demonstrated that in economies with more bank-based financial structures such as the EU, an increase in bank financing increases systemic risk, while an increase in market financing decreases systemic risk. By contrast, an economy reliant more on market-based funding, such as the US, is overall more resilient to systemic risk when increasing overall financing in the system.

**Figure 6. Market funding ratio**




*Source: OECD*

## 2.3. How will the problem evolve?

Although the regulatory impediments identified in this impact assessment do not explain on their own the low levels of IPO activity in the EU, they contribute to the costs that further disincentive companies to raise capital on public markets and exacerbate unfavourable market conditions. If no EU action is taken, the existing regulatory shortcomings would remain. As companies' access to public capital markets would be impeded, companies, especially SMEs, would continue to be largely dependent on bank financing. On the one hand, smaller family-owned companies and entrepreneurs may have incentives to keep their companies private, not only hampering their own access to finance and the development of the local capital market, but also preventing public shareholders from enjoying the benefits associated with investing in many successful businesses. On the other hand, larger founder-led and high tech companies would most

[75] Joost Bats and Aerdt Houben, 2017. Bank-based versus market-based financing: Implications for systemic risk

likely continue to choose listing in the UK or the US over listing in the EU to scale up and grow. The gap between the EU capital markets and capital markets from other developed economies would continue to widen.

## 3. WHY SHOULD THE EU ACT?

There is a policy imperative for the EU to act swiftly. Policy options set out in this impact assessment would address the issues that have been repeatedly highlighted by stakeholders over the past years as holding back the EU companies, and especially SMEs, from accessing public markets (see Annex 2 for more details). No other policy measures taken by the Commission separately would address the specific problems identified in this impact assessment, which stem from a concrete regulatory failure that can only be addressed by a legislative amendment of the relevant regulation. Market developments, such as the emergence of FinTech and other recent trends in the financial services industry, are not expected to substantially improve the situation regarding the problems at hand. The problem therefore requires a legislative intervention.

Furthermore, waiting longer before taking action would be unlikely to bring better insight and would push back even further the entry into application of the new streamlined regime. The options proposed respect the principle of proportionality, are adequate for reaching the objectives and do not go beyond what is necessary. They aim at striking an appropriate balance between reducing the administrative burden and increasing flexibility for issuers and ensuring adequate and effective investor protection as well as safeguarding market integrity.

### 3.1. Legal basis

The legal basis of the Prospectus Regulation and MAR is Article 114 of the Treaty on the Functioning of the European Union (TFEU) which confers to the European institutions the competence to lay down appropriate provisions that have as their objective the establishment and functioning of the single market.

Article 114 TFEU would also be relevant for the introduction of EU rules on MVR share structures. The fact that rules are different across Member States creates an uneven playing field for companies incorporated in different Member States. In fact, companies seated in the Member State banning MVR share structures would be forced to transfer seat to another Member State, in the case of listing with a MVR share structure (to comply with the law of a given Member State), hence raising costs of listing for these companies. In contrast, a similar company already incorporated in the Member State which allows MVR share structures would not have to incur these costs. Furthermore, in some cases, because of these additional costs/considerations, companies might even decide against listing (i.e. accessing public equity markets) altogether, depriving them of an alternative source of financing and putting them in a situation of competitive disadvantage vis-à-vis companies from the Member State which allows MVR share structures. Finally, the growing trend of EU companies to operate cross-border calls for common European company law mechanisms, including the possibility to depart from the “one share, one vote” principle through the issuance of MVR shares. There is therefore a significant obstacle to the creation of a single market that an EU rule on MVR share structures would seek to remedy.

Article 50(1) TFEU and in particular Article 50(2)(g) TFEU, may also be relevant for the introduction of EU provisions on MVR share structures. They provide for the EU competence to act in order to attain freedom of establishment as regards a particular activity, in particular "*by coordinating to the necessary extent the safeguards which, for the protection of the interests of members and others, are required by Member States of companies or forms within the meaning of the second paragraph of Article 54 TFEU with a view to making such safeguards equivalent throughout the Union*". Recourse to this provision is possible if the aim is to prevent the emergence of current or future obstacles to the freedom of establishment resulting from the divergent development of national laws. The emergence of such obstacles must be likely and the measure in question must be designed to prevent them.

### 3.2. Subsidiarity: Necessity of EU action

Under Article 4 of TFEU, EU action for completing the internal market has to be appraised in light of the subsidiarity principle set out in Article 5(3) of the Treaty on European Union (TEU). According to the principle of subsidiarity, action at EU level should be taken only when the objectives of the proposed action cannot be achieved sufficiently by Member States alone and thus mandate action at EU level.

Legislation applying to issuers and trading venues is largely harmonised at EU level, leaving limited flexibility for Member States to adapt this legal framework to local conditions. As a consequence, modifications of the EU legislation are necessary to bring about desired improvements. In addition, an EU action is more appropriate as the initiative seeks to support cross-border listing and securities trading activity across the whole EU, in order to further integrate and achieve scale on EU capital markets.

With respect to MVR share structures, unless action at the EU level is taken, there is very low likelihood that all Member States that currently do not allow MVR share structures would unilaterally and with no external incentive amend their rules in the near future. It is so because of a number of reasons, starting from historical reasons, stakeholder pressures, past experience and the fact that changing company law, which was developed over centuries, is often seen as complex. Any delays in allowing these structures across the whole of the EU would risk to continue to deprive some companies (i.e. in those Member States that ban those structure) of eligible funding opportunities or impose additional costs on them, ultimately pushing them to list in and relocate to third countries. Finally, even if Member States decided to take action, the approaches could differ significantly, potentially leading to further fragmentation.

### 3.3. Subsidiarity: Added value of EU action

It has to be considered whether the objectives would be better achieved by action at EU level (the so-called 'test of European added-value'). As there is almost no flexibility to adapt MAR and Prospectus Regulation to local conditions, a legislative action at EU level would seem the most appropriate to reduce the administrative burden placed on companies accessing public markets. By its scale, EU action could reduce the administrative burden for issuers, while at the same time safeguarding market integrity and investor protection, thus ensuring a level-playing field.

## 4. OBJECTIVES: WHAT IS TO BE ACHIEVED?

### 4.1. General objectives

In response to the identified problems, the general objective is to make listings on EU capital markets more attractive through streamlined and clear regulatory obligations in order to make capital-raising on public markets by companies of all sizes less costly. This would in turn diversify funding sources for companies in the EU by facilitating access to alternative sources of financing and help increasing investment, economic growth, job creation and innovation in the EU. Public markets should be made more attractive for companies that seek a first-time listing and for firms that are already listed. Larger and more liquid EU public markets, in turn, would also help improve risk sharing in the EU, with positive effects on financial stability.

### 4.2. Specific objectives

The 3 major specific objectives that would contribute to the general objectives set out above are the following:

1. Reduce regulatory and compliance costs for companies seeking to list or already listed with a view to streamline the listing process and enhance legal clarity;
2. Ensure investor protection and market integrity;
3. Provide more incentives for issuers to list.

## 5. WHAT ARE THE AVAILABLE POLICY OPTIONS?

### 5.1. What is the baseline from which options are assessed?

Under the baseline scenario, no amendments are introduced to the legislative framework governing the rules for listing and already listed companies. The excessive regulatory requirements associated with burdensome listing documentation and ongoing disclosures, paired with excessive and disproportionate punitive measures, fragmented legal regimes along national borders, and low SME visibility vis-à-vis investors would continue to weigh on companies' decision to list and stay listed. The baseline scenario, therefore, features EU capital markets that would continue to suffer from inefficiencies regarding to the regulatory framework for listing, which in turn would reduce attractiveness to list, resulting in an economic cost for EU issuers, investors and the EU economy as a whole. The declining trend in IPOs and increasing delistings by companies would likely continue under the baseline scenario.

With falling IPO numbers, the EU markets would gradually lose scale, creating a vicious cycle whereby an increasingly higher number of companies would stay private or be even driven out of EU markets to more efficient markets, impairing the EU overall global competitiveness. The potential for the EU to grow and innovate would be considerably hampered. The EU economy would continue to be financed mainly by banks. The development of capital markets in the EU would lag behind that of other developed economies. In the absence of liquid public markets, price discovery for assets would be impaired in the EU: financial intermediaries would increasingly rely on benchmarks in financial centres in third countries. With reduced risk sharing, the EU economy would also become less resilient to shocks. Overall, EU companies would most likely lose in terms of foregone growth opportunities (e.g. when going/staying public), the EU – in

terms of innovation, jobs and growth potential, Member States – in terms of fiscal revenue, and investors – in terms of reduced investment opportunities. Over a longer terms, the EU might become more dependent on financial markets in third countries, hence reducing its strategic autonomy.

While the regulatory amendments set out in the options below, on their own, could not address all the challenges faced by the EU public markets, together with other measures considered as part of a wider plan to enhance companies' access to public capital markets, they would seek to contribute to reversing the current negative trend.[76]

These broader measures in particular include the forthcoming retail investment strategy that would address the low level of retail participation, the SME IPO Fund that aims to make listings more attractive and strengthen the investor base for SME IPOs, the DEBRA[77] proposal that seeks to address the debt/equity bias for investors and the forthcoming withholding tax proposal that would address barriers related to cross-border taxation procedures. While these measures would be expected individually and jointly to contribute to the creation of a more favourable listing environment in the EU, they would not be able to address the specific legislative challenges addressed by this initiative, which would continue to weigh on listing by EU companies, unless tackled.

## 5.2. Description of the policy options

Policy options presented below aim to tackle the problem drivers identified in the pre-IPO, IPO and post-IPO stages of the listing life-cycle. The policy options that address the same problem driver in a given IPO stage (e.g. post-IPO (MAR)) are mutually exclusive (i.e. only one option can be chosen). Policy options across different IPO stages are, however, cumulative (i.e. the preferred options in the pre-IPO, IPO and post-IPO stages all add up to jointly form a final set of options).

While this initiative has a specific focus on SMEs and SME growth markets, the envisaged policy options cover all companies, including companies trading (or seeking admission to trading) on regulated markets. This is in line with Action 2 of the CMU Action Plan and the feedback received from expert groups and respondents to the public consultation. In Action 2 of the CMU Action Plan, the Commission committed to simplifying the listing rules for all public markets. Furthermore, both the CMU HLF as well as the TESG recommended that the Commission introduce targeted amendments to the listing framework both on regulated markets as well as on SME growth markets. The feedback to the public consultation confirmed that the regulatory compliance costs are seen as an important factor in explaining the lack of attractiveness of listing on both types of trading venues. Addressing all relevant regulatory listing problems (i.e. both on SME growth markets and regulated markets) in one legislative initiative avoids a piece-meal approach to legislation, where the same legislative acts would have to be re-opened several years later to then address problems relevant to, for example, only regulated markets.

Furthermore, the envisaged policy options do not differentiate between SME issuers and non-SME issuers which are listed on the same trading venue. Issuers seeking admission to trading on the same type of trading venue (be it a regulated market or a SME growth

[76] See Annex 12 on out-of-scope drivers.
[77] See Annex 13 on other ongoing initiatives contributing to improving public markets ecosystem.

market), *irrespective of their size*, are currently subject to the same listing requirements. Different listing requirements for smaller issuers compared to larger issuers on the same venue are likely to confuse stakeholders, and in particular investors. This is a fundamental principle underpinning EU financial legislation, as it aims to ensure that investors on the same type of trading venue feel confident that all companies listed thereon are subject to a single set of rules.

### 5.2.1. Options addressing unequal opportunities for EU companies regarding governance structure, when listing, due to different national rules on MVR share structures (Pre-IPO phase)

**Option 1: Minimum harmonisation of MVR share structures across the EU**

Under this option, the Commission would introduce into EU law the possibility for companies to adopt MVR share structures and for MVR shares to be admitted to trading across all Member States.[78] This option would leave flexibility to Member States to determine how the rule would exactly apply, allowing them to better tailor it to national specificities. Member States would be given discretion in determining effective conditions and safeguards attached to the MVR shares (e.g. voting ratios, sunset clauses). The general high-level principles could, however, be set out at EU level, in particular the need to ensure an adequate balance between the interests of founders and minority investor protection or the need to take into account specific considerations, for example, related to sustainability, when designing those safeguards[79]. Furthermore, appropriate safeguards would also need to be put in place to avoid the situation where a Member State imposes far-reaching protections for investors, rendering the issuance of MVR share structures unattractive for issuers. The scope of this option could either cover all companies or be targeted at a specific subset of companies, e.g. issuers listing on SME growth markets. The latter approach could have the benefits of allowing for targeting the measure where it is most needed, reducing risks stemming from a possibly overly permissive approach by some Member States and offering a possibility to those Member States who already have a flexible regime in place not to adjust it.

**Option 2: Maximum harmonisation of MVR share structures across the EU**

Under option 2, the general principles and the options on scope set out in option 1, would be complemented with a detailed set of rules on the safeguards for minority investors, such as voting power limitation clauses, sunset clauses, clauses setting out the limitation on the number of votes attached to a single share, all of which would seek to protect other (minority) investors in the company from undue impact of MVR share structures. Furthermore, under option 2, the EU law could also prescribe inter alia who can hold MVR shares, in which decisions the additional voting rights are taken into account and on which conditions (and whether) they can be transferred to a third party. This option would be quite restrictive in the sense that all Member States would be obliged to implement the same rigid framework including the same safeguards. This policy option

[78] In principle, minimum harmonisation can also be achieved via a Recommendation tool. In the past, Commission recommendations, however, showed only limited effectiveness in fomenting legislative changes in Member States, in particular in the area of company/corporate law.

[79] This may include the provision of sunset clauses, i.e. (i.e. clauses that eliminate higher voting rights after a designated period of time).

would create a harmonised regime in the EU for MVR share structures and would be far more detailed and far-reaching than policy option 1[80].

### *5.2.2.* Options addressing the overly burdensome regulatory listing requirements (IPO phase)

Options set out below refer to both instances where companies seek access to public markets for the first time (IPO) and where they access public markets for follow-on or secondary issuances of equity and/or non-equity securities. In both instances, under the current rules, companies produce voluminous prospectuses that are scrutinised and approved by NCAs in a lengthy process.

**Option 1: Scrutiny by exchanges and non-passportable admission document**

Under this option, the main change would entail a shift in the scrutiny and approval of the prospectus. Exchanges would have the responsibility of scrutinising and approving the prospectus for first-time issuers, thus alleviating the burden of a currently lengthy scrutiny process carried out by NCAs. As the option moves the scrutiny to exchanges, to balance out the considerations of investor trust, first issuance prospectuses on regulated markets (i.e. where no public information already exists) should remain more informative and detailed when they are scrutinised by exchanges than when they are scrutinised by NCAs. In the case of SME growth markets, where exchanges have already established themselves in the role of entities reviewing admission documents (and investors are confident in the process as it currently stands), the option could combine the transfer of scrutiny of the listing documents to exchanges with modifications (i.e. alleviations) to their substance. In the same vein, in the case of secondary issuances, the content of the prospectus could also be streamlined, as public information on the company and its securities is already available.

In the case of IPOs, the responsibility for reviewing the prospectus would be placed on the regulated market where the issuer is seeking admission to trading, while the prospectus would stay substantially unchanged in terms of its contents (for reasons set out above). These prospectuses would only be filed with NCAs (but not scrutinised). SME growth markets would be responsible for the review of a shorter and simpler admission document submitted for publication by issuers. The content of such admission document would be largely left to discretion of the SME growth markets with only minimum standards set at EU level. While this document would allow the offer of securities to the public without a prospectus, it would not be passportable, i.e. securities could not be offered in other Member States.

In the case of secondary issuances, a very short and streamlined prospectus similar to the "EU Recovery Prospectus"[81] would replace the simplified prospectus for secondary issuances for both equity and non-equity securities. Like in the case of IPOs, exchanges would be responsible for the scrutiny and approval of these prospectuses. The EU Recovery prospectus format would also be used by companies wishing to transfer from an SME growth market to a regulated market (i.e. replacing the simplified prospectus for secondary issuances as the "transfer prospectus").

[80] As for option 1, the scope of this option could cover all companies or be limited to a specific subset of companies, such as issuers listing on SME growth markets.
[81] The EU Recovery prospectus was introduced in the post-COVID recovery context in the CMRP.

In order to ensure that the scrutiny by exchanges is done adequately, a set of conflict of interest rules would be put in place. Furthermore, safeguards would need to be considered in order to avoid that exchanges charge excessive fees for scrutiny and approval of prospectuses.

**Option 2: Shorter prospectuses with streamlined scrutiny by NCAs**

Under this option, both the contents and scrutiny of the prospectus would be streamlined, although the scrutiny would stay with NCAs. The option would also seek to exempt issuers from an obligation to draw up a prospectus in certain cases, where a lot of information about the company and securities is already available to public. Furthermore, the prospectus would be further standardised (i.e. its sections would be subject to a fixed order of disclosure), it would be published in an electronic format only (i.e. no paper copies on request) and it would be allowed to draw it up in English as the language customary in the sphere of international finance (except for the summary).

In the case of an offer of securities to the public and/or the admission to trading on *regulated markets*, including the case of an IPO, both the contents and size of the prospectus would be considerably streamlined. On the one hand, it would be clearly set out which sections of the current prospectus would no longer be required or should be alleviated. Furthermore, rules on the incorporation by reference would be further reinforced, making it a legal requirement, rather than a possibility that an issuer could avail itself of. On the other hand, only for shares or other transferable securities equivalent to shares in companies[82], a limit number of pages (300 pages) would be introduced to avoid overly lengthy prospectuses for companies that do not have a complex financial history[83]. In addition, the ability of NCAs to request issuers to include additional information would be more narrowly framed to limit the duration of scrutiny, as well as the length of the prospectus.

Companies offering securities to the public and listing on *SME growth markets* would have to draw up a shorter and simpler EU IPO admission document, which would be subject to a page limit, as well as subject to scrutiny and approval by a NCA. This EU admission document would allow issuers to offer securities to the public, as well as passport them into other Member States. The powers of NCAs in a scrutiny process would also be better framed.

In the case of secondary issuances, issuers of securities *fungible* with securities already admitted to trading on a regulated market or listed on an SME growth market, or companies transferring from SME growth markets to regulated markets would be exempted, under certain conditions, from the requirement to draw up a prospectus or an EU admission document. Instead these companies would only be required to publish a statement of ongoing compliance with reporting and transparency requirements, accompanied with a short summary document that would detail, for example, the use of proceeds and any other relevant information, not yet disclosed publicly.[84] This exemption would, however, not apply to instances, where companies are going through considerable transformations, for example in terms of governance or business model, and using the

[82] Prospectuses for issuances of non-equity securities, or of equity securities other than shares (e.g. certain convertible, exchangeable and derivative securities) tend to be more heterogeneous, may be rather complex and hence should benefit from flexibility in terms of length (as also confirmed by stakeholders in workshops).
[83] See recital 9 and Article 18 of Commission Delegated Regulation (EU) 2019/980.
[84] This takes into account the fact that a lot of information is already disclosed by publicly listed companies on a continuous basis.

proceeds for that purpose[85]. In such cases, as well as in the case of secondary issuances of securities *not fungible* with securities already admitted to trading, issuers would be required to draw up a short and streamlined prospectus similar to the EU Recovery prospectus, which would replace the simplified prospectus for secondary issuances (for both equity and non-equity securities) and would be scrutinised and approved by a NCA.

### *5.2.3.* Options addressing overly burdensome ongoing disclosure requirements (post-IPO phase)

The current lack of legal clarity in MAR stems from the Level 1 text and concerns one of the core concepts of the market abuse framework: the notion of inside information and, in particular, its application in the context of the disclosure obligation. Any guidance provided by a supervisory body might be useful in applying level 1. It would, however, not be sufficient to instil full legal certainty, as it would not have the binding nature of a level 1 text. Hence the below options set out a legislative change rather than an empowerment for ESMA to issue guidelines. This is without prejudice to ESMA and/or NCAs to issue guidance to further clarify level 1.

#### Option 1 – Review of the definition of inside information and of the conditions for delaying its disclosure

This option addresses issuers' concerns in MAR regarding the lack of clarity with respect to the notion of inside information and the broad scope of the notion for disclosure purposes. While amending the definition of inside information for disclosure purposes under MAR, the option leaves the notion unchanged for the purposes of prohibiting insider dealing and market manipulation. It also aims to ensure that sanctions for disclosure-related market abuse infringements are proportionate and do not dissuade SMEs from going public.

Under this option, issuers would still be required, as it is currently the case, to disclose all inside information to the public. However, the notion of what constitutes inside information for disclosure purposes would be refined and narrowed down, so as to ensure that issuers would not be under the obligation to disclose information that is too preliminary and therefore not yet mature enough for disclosure and not reliable enough with a risk to mislead the public. This amendment would be complemented by a non-exhaustive and purely indicative list of events, which are likely to fall under the disclosure obligation (i.e. the fact that an event does not appear on the list would not automatically mean it should not be disclosed). Issuers would therefore still need to assess, on a case-by-case basis, whether certain information needs to be disclosed according to the general duty to disclose inside information to the market. The list would, however, serve as a reference point for conducting such assessment. Furthermore, these changes would be accompanied by an amendment of the conditions required to delay the disclosure of inside information to make sure the delay acts as a proper counterbalance when disclosure is likely to prejudice the legitimate interests of the issuer.

In parallel to the clarifications around the general duty to disclose inside information and the conditions to delay disclosure, administrative sanctions for disclosure-related market abuse infringements would be made more proportionate for SMEs, so as to ensure they

[85] A company is going through a considerable transformation when, for example the management structure changes, the company is involved in a takeover, the business direction changes or the financial structure changes.

do not dissuade smaller companies from going public. For example, the minimum threshold for setting the most severe level of sanctions for SMEs would be lowered. This would give Member States the possibility to decrease in their national laws the cap on pecuniary sanctions for SMEs for disclosure-related infringements, which, in turn, would decrease the cap on sanctions imposed by competent authorities in individual decisions.

**Option 2 – Introduction of a closed list of events which qualify as inside information for the purposes of disclosure**

Under this option, the broadness of the notion in the context of the disclosure obligation would be addressed by setting out a closed list of material events which would spell out the cases when companies must disclose information (i.e. the list would not merely exemplify what events could fall under the disclosure obligation, like it is the case under Option 1, but would be exhaustive – outside of those cases, no disclosure would have to be provided to the public). This closed list of events would replace the notion of inside information for disclosure purposes only (i.e., the current notion of inside information would remain in place for the purpose of prohibiting insider dealing). Issuers could still choose to disclose material information falling outside the list if they wish. However, they would not be under the obligation to do so. As opposed to Option 1, disclosure would be limited to a subset of information that would be specifically identified in legislation. An exhaustive list of events would greatly limit, if not fully remove, the need for delayed disclosure. Hence, the conditions to delay disclosure would be reviewed, reflecting the exceptional nature of delay under the new regime.

Changes to the sanctioning regime are not foreseen under this option, as an exhaustive list would make any accidental breach of disclosure requirements highly unlikely (including by SMEs) due to full legal clarity on when disclosure is required.

### *5.2.4.* Discarded option

**Centralise the supervision of prospectuses (including the scrutiny and approval) with ESMA.**

One option considered but later discarded was to confer to ESMA the supervision (including scrutiny and approval) of certain categories of prospectuses more relevant in the cross-border context, such as for example wholesale non-equity prospectuses and prospectuses drawn up by third country issuers. ESMA's centralised supervision of those prospectuses is likely to be more effective and efficient than their supervision at national level due to the nature of the securities and issuers concerned and potential risks of regulatory arbitrage. This option was however discarded as politically non-feasible, notably building on the experience of 'the ESAs' review', tabled by the Commission back in 2017, and the results of the recent stock-taking exercise conducted by the Commission services on the need for further harmonisation of EU rules and progress towards supervisory convergence.[86]

## 6. WHAT ARE THE IMPACTS OF THE POLICY OPTIONS?

The analysis carried out in this impact assessment aims to identify the costs of regulatory compliance for listing and staying listed and to provide scenarios to what extent

[86] Report from the Commission to the European Parliament and the Council On the operation of the European Supervisory Authorities (ESAs) COM(2022) 228 final

regulatory alleviations could reduce these costs and improve incentives for firms to make more use of public market funding. There is, however, no good empirical basis for translating the cost savings expected under the proposed options into a number for the increase in future IPOs.

The decision to list (i.e. go for an IPO) is complex. It is taken by managers or owners of heterogeneous companies, weighing on a host of economic, financial, (geo) political and legal considerations. This impact assessment refrains from putting forward any estimate of how many IPOs an individual (or joint) envisaged cost saving(s) would lead to with one notable exception, where such an exercise appears justifiable (see section 6.1.1.).[87] The number should, therefore, be considered as a mere illustration of a possible magnitude of the effect, rather than its exact estimate.

Nevertheless, the initiative will directly address the obstacles to the use of IPOs that market practitioners consistently quoted as being the result of the excessive regulatory burden at EU level. While the initiative will not address all obstacles to listing, it will remove those related to the EU regulation from the list of factors that are holding back the development of more active equity markets in the EU. However, legislation cannot force market players to undertake IPOs. Those decisions will belong to companies that will have different needs and constraints.

This impact assessment also does not consider (quantify) a less direct and more long-term impact of the proposed measures on listing costs, such as underwriting fees, that largely reflect the limitations of the established market structure (i.e. the limited degree of competition in the EU listing ecosystem) and that, short of price intervention, cannot be addressed directly with regulatory measures. These costs may be reduced in the longer-term by a potential increase in the number of listings which would create room for entry by competitors.

## 6.1. Options addressing unequal opportunities for EU companies regarding governance structure, when listing, due to different national rules on MVR share structures (pre-IPO)

### *6.1.1. Option 1 - Minimum harmonisation of MVR share structures across the EU*

*Effectiveness in meeting the specific objectives*

Policy option 1 envisages a minimum harmonisation of national legal regimes regarding MVR share structures, while leaving discretion to Member States on how to frame it. This option would ensure that Member States currently banning MVR share structures would allow them, without imposing any further constraints on those Member States that currently already have a flexible regime in place.

By giving flexibility to founders to adopt MVR share structures to retain control, this option would be effective in providing companies (established in a Member State that currently bans MVR share structures) with improved incentives to list. Fear of losing control is one of the largest deterrents to listing for founders. In the public consultation

[87] This exception was included because a widely quoted empirical paper provided numbers considered sufficiently targeted and reliable to undertake a "what-if" scenario. While the number seems high, there is no other empirical study to qualify the result.

an overwhelming majority (76%)[88] of respondents[89] (including the vast majority of issuer associations) agreed that the use of MVR share structures have effectively encouraged more firms to seek a listing on public market. Ten respondents[90] to the targeted consultation stressed that one of the key reasons for the wave of hi-tech, high growth issuers choosing to list in third countries (such as the US or the UK) is the flexibility that these jurisdictions grant to issuers with respect to MVR share structures.[91] Likewise, family-owned and smaller companies are more likely to consider listing on a public market as a viable funding source if reassured that they would not have to cede control over their business once they list.[92] By ensuring that companies can be admitted to trading in all EU Member States with MVR share structures, option 1 would address the existing market fragmentation in this area in the EU. Furthermore, it would reduce the cost of listing for those companies who currently need to list abroad in order to benefit from this flexibility[93]. Finally, MVR share structures would help founders (once listed) avoid short-term market pressures and focus on their long-term vision for the company.[94]

Under option 1, Member States would enjoy flexibility in setting safeguards and conditions around MVR share structures. However, they would need to ensure compliance with few high-level principles[95], that would be set out at EU level, such as the need to strike a proper balance between the interests of founders and minority investor protection, or the need to safeguard sustainability considerations, in particular in order to avoid the founders' ability to block important decisions in this area, or other relevant considerations when designing those safeguards, such as ensuring equal treatment of shareholders. This option would therefore ensure that investors enjoy a minimum degree of protection across the EU, as well as that some important policy considerations are duly safeguarded, leaving to Member States the discretion as to how to tailor safeguards and conditions to the specificities of their local markets. This has also been raised by two respondents to the public consultation, who were in favour of a more homogenous EU-wide regime, noting the need to consider the perspective of investors so that the MVR share regime does not discourage investment and shareholder engagement, particularly for active and engaged investors.

*Cost-benefit analysis*

*Cost-benefit for issuers*: A minimum harmonisation of MVR share structures would be beneficial for issuers established in a Member State that currently bans these structures, as it would allow them to retain control of their company (and continue shaping the business in accordance with their respective original ideas and aspirations), while raising

[88] See footnote 98 for more details.
[89] 34 respondents out of 45, including stock exchanges, business associations (for issuers, banks and capital markets), financial advisors, and 4 NCAs. Among those that disagreed were asset managers, associations of asset managers/investors, an NCA (from the Member State that does not allow these structures) and a consumer organisation.
[90] Stakeholders include issuers' representatives, investors' representatives as well as public authorities.
[91] Issuer association and an investment bank. See Annex 2 for more details.
[92] Oxera report, p. 46.
[93] Additional costs and issues linked to listing outside of a home Member State include having to move headquarters, hiring advisors specialised in the host Member State's laws/rules, complying with an unfamiliar set of regulations, (potentially) working in another language and the home bias of investors.
[94] Joel Seligman, 'Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy' (1986) 54 George Washington Law Review 687, 687.
[95] Even though this proposal is limited to MVR share structures, another form of control enhancing tools, such as loyalty shares, might require a different set of safeguards such as a safeguard that would specifically seek to protect the interests of third-country investors (Loi Florange).

a larger amount of funds (without diluting ownership too much) and enjoying the benefits associated with listing. Option 1 would, in particular, reduce (if not fully remove) opportunity costs[96] currently incurred by issuers that remain private to avoid losing control. It would also eliminate the additional costs incurred by issuers that choose to list in another country in order to benefit from this flexibility. Despite providing for a minimum level of harmonisation, option 1 would include appropriate safeguards to avoid the situation where a Member State imposes far-reaching protections for investors, rendering the adoption of MVR share structures unattractive for issuers (thus protecting the benefits to issuers).

The opportunity costs of the absence of MVR share structures (in those Member States where it is not allowed) could be defined as the missing growth opportunities of companies (i.e. potential issuers) that decide to refrain from listing. The studies suggest that the growth difference is particularly pronounced in the year of issuance and the subsequent two years. When assuming that there could be 21% more IPOs[97] in those Member States that introduce MVR share structures and taking the average number of IPOs in 2015-2021 as baseline, it could be extrapolated that there could potentially be 11 IPOs more per year. If it is furthermore assumed, that the IPO would boost both asset growth in and market capitalisation of these companies[98] by 6%,[99] i.e. the EU market valuation could be EUR 737 million higher than without these additional IPOs taking place (See Annex 4, chapter 3 for more detail).

For issuers established in a Member State that already allows these structures, option 1 would not entail any substantial change/cost saving. Furthermore, a minimum harmonisation approach would allow Member States that currently provide for a very flexible regime on MVR share structure to retain it (thus not decreasing the benefits already enjoyed by companies in those Member States). However, as this option would leave to Member States most of the discretion as to the specific conditions and safeguards attached to MVR share structures, in the case of a cross-border listing, a company would still face a certain degree of fragmentation (unlevel playing field). Nevertheless, overall the impact on issuers is likely to be positive.

*Cost-benefit for investors*: 22% of the investors that responded to the public consultation expressed support for this measure, while 36% were critical.[100] The introduction of MVR share structures would mean that investors would enjoy diminished decision making power when investing in certain companies. Unless subject to investors safeguards, such as a sunset clause, MVR share structures may provide founders with perpetual control and thereby lead to controlling shareholder entrenchment. This may potentially increase the risk that insiders extract private benefits from control and lead to agency costs and

[96] These cost savings would however be impossible to quantify.
[97] 20% may be considered as a rather conservative assumption in light of the fact that, for example, around 40% of all publicly listed companies in Sweden (that has one of the most flexible MVR share regimes in the EU) used MVR share structures at IPO (although the number of companies with MVR share structures varies on an annual basis). Skog. R, Lidman, E (2022) *London allowing dual class Premium listings: A Swedish commentary*
[98] Taking the average market capitalisation of firms that had IPOs 2015-2021 per Member State.
[99] The growth difference documented in Didier et al. (2016)
[100] When asked about the impact that MVR share structures have on the attractiveness of a company for investors, 36% of respondents (equivalent to 15 respondents) opted for negative or slightly negative, 22% (equivalent to 9 respondents) opted for positive or slightly positive, while 29% (equivalent to 12 respondents) opted for neutral. Some of the respondents who viewed the attractiveness negatively (including two NCAs and some investors' associations) expressed their concern about the disappearance of the one share – one vote principle and noted, in particular, that MVR share schemes may undermine existing accountability mechanisms in corporate governance law, such as shareholders' ability to elect directors, and lead to management's entrenchment.

expropriation risk, all of which may damage company value over time (see Annex 5 for further details). Such risk would be only in part mitigated by the inclusion of minimum high level safeguards at EU level. In the public consultation, an institutional investors association expressed their concern that MVR share structures may allow a minority shareholding to gain control of a company, and may therefore lead to abuse arising from the dichotomy between shareholder power and economic risk.

There is no compelling evidence that would demonstrate that investors would be overall unwilling to invest in the companies issuing MVR shares. Research, however, shows that restrictions on MVR share structures, such as imposing a maximum voting ratio, may contribute more towards maximising shareholder value compared to the case where no restrictions are in place.[101] Thus, under this option, in view of the corporate governance risks of MVR share structures, Member States would be required to ensure an effective and proper balance between founders' and investors' interests, however enjoying discretion in setting the appropriate safeguards. It would, thus, be expected that overall the costs for investors would be neutral or only slightly negative.

*Cost-benefit for exchanges*: This option would entail no direct benefit or cost for exchanges. As a second order effect, by bringing more companies to list, it would benefit exchanges in terms of increased listings and higher revenues. This was the view expressed by exchanges in the public consultation that were largely in favour of MVR share structures.[102]

*Cost-benefit for NCAs*: This option would entail no changes for NCAs.[103]

### *6.1.2. Option 2 - Maximum harmonisation of national legislation to allow for the MVR share structures be adopted across the EU with specific conditions and clauses*

*Effectiveness in meeting the specific objectives*

Under this policy option a full harmonisation of legal regimes regarding MVR share structures would be achieved. The objective would be to harmonise both the possibility to be admitted to trading with MVR share structures as well as all the conditions and safeguards attached, such as a cap on voting rights attached to a MVR share or instances where MVR shares cannot be used.[104] This option would likely to increase listing restrictions and requirements for companies in certain Member States (notably in those that have a flexible MVR share regime).

Like with policy option 1, companies across the whole EU would be allowed to be admitted to trading, while using MVR share structures in their home Member States. For companies that are based in the Member States that currently do not allow MVR share structures, this would eliminate the costs associated with having to list in another

[101] See: Dual class IPOs: A theoretical analysis - ScienceDirect

[102] For example, Euronext stated that the introduction of an MVR share regime at EU level would be an important development. According to them, an EU harmonised regime would avoid a competitive disadvantage for some markets, where MVR share structure are currently banned.

[103] In the public consultation, 4 NCAs agreed that MVR share structures make listing more attractive, 1 NCA - disagreed and 7 NCAs did not give an answer. Two NCAs noted that the lack of mechanisms to ensure that control would not be lost acts as a strong disincentive to seek a listing, while the views of the two other NCAs were less clear-cut with them still weighing the costs and benefits of a possible intervention.

[104] It is possible to limit the use of MVR share structures in certain cases. Under this approach, certain decisions where there is non-negligible risk that MVR shareholders may be subject to a conflict of interest or where stronger influence from (minority) shareholders could be beneficial to the overall value creation in the company, MVR shares could be treated as ordinary shares (e.g. voting on sustainability matters or on appointing senior management).

Member State in order to benefit from the flexibility to use MVR shares. It would also reduce the opportunity cost of not being able to list publicly for those who abandon the decision to list (as a result of the ban) and potentially lower their cost of capital.

Like option 1, option 2 would also be effective in regards to providing issuers with more incentives to list. Similarly to option 1, it would ensure that the Member States that have banned MVR share structures adapt their rules to allow them. However, Option 2 would also likely reduce the flexibility that issuers currently enjoy in certain Member States where these structures are allowed with few restrictions. In fact, this policy option could lead to potential interferences with existing MVR share regimes, thus reducing – rather than increasing – the companies' attractiveness to list in certain Member States. Conditions set out at EU level could include a cap on voting rights attached to a MVR share, a time-based sunset clause, after which these shares would convert to normal shares, limitations to the use of MVR shares and their transfer to third parties.

*Cost-benefit analysis*

*Cost-benefit for issuers*: similar to option 1, the maximum harmonisation of the MVR share regime at EU level would generally be beneficial for issuers as it would provide in particular the companies planning to list in those Member States that banned MVR share structures with more flexibility, reducing the opportunity cost for those companies, as well as potentially their cost of capital. However, this option would also include more stringent conditions and safeguards that must be complied with by issuers across all Member States in order to be admitted to trading with these share structures. This would lead to certain issuers having to comply with more restrictive regimes then currently in place, therefore increasing either direct or indirect costs of accessing public markets for these companies.[105]

Similarly to option 1 (See section 6.1.1 for more detail), it is estimated that the EU market valuation could be EUR 737 million higher if MVR share structures are introduced across all Member States (See also Annex 4 for more detail). Nevertheless, under option 2 (unlike option 1), this reduction should then be balanced against a higher cost of compliance with a more restrictive regime (than is in place today) for companies in the Member States that already allow MVR share structures. The final (net) saving is therefore likely to be smaller than in the case of option 1 (although it would be impossible to quantify the difference between the two).

This option would provide a level playing field among issuers from different Member States and enhance market integration in the EU. Like in option 1, option 2 would also eliminate additional costs linked to moving to another country that a company would have to incur if it wanted to list using MVR share structures. Overall the cost efficiency for issuers would be slightly positive.

*Cost-benefit for investors*: The introduction of MVR share structures would mean that investors would now have to accept diminished decision making powers when investing in certain companies. However, under option 2, all EU investors would be subject to the

[105] Investors in different Member States are characterised with a different degree of overall engagement. For example, in some (Nordic) Member States, despite the fact that many companies issue MVR shares, investors do not appear to suffer from the lack of engagement/influence in these companies (as confirmed in discussions with stakeholders). It may, however, not be the case in all Member States, where investors may be disadvantaged by MVR share structures, unless extensive investor protection safeguards are introduced. This may depend, in particular, on the maturity of capital markets, historically established investor relationship and even cultural aspects in those countries. Skog. R, Lidman, E (2022) *London allowing dual class Premium listings: A Swedish commentary*

safeguards and conditions harmonised at EU level that would provide the same level of protection to all investors across Member States. This would be in line with the views of investor associations that stated in the public consultation that they view safeguards as necessary in the case of MVR share structures. The overall impact on investors is likely to be neutral/marginally positive. On the one hand, investors from those Member States that previously banned MVR share structures are likely to be negatively affected due to their reduced ability to influence decisions in the company (although this risk would be somewhat mitigated by the safeguards introduced for minority investors under option 2). On the other hand, investors in Member States that allow MVR share structures with rather loose safeguards for minority investors may be – at least in theory - positively affected by the option. Nevertheless, as MVR share structures in at least some Member States (e.g. Nordics) do not appear to give rise to serious issues related to corporate governance and investor engagement, these benefits are likely to be immaterial in those Member States.

*Cost-benefit for exchanges*: Same as policy option 1.

*Cost-benefit for NCAs*: Same as policy option 1.

**Table 1 - Cost efficiency by stakeholder type (section 6.1)**

| **Cost efficiency by stakeholder type**[106] | | | | |
|---|---|---|---|---|
| | Issuers | Investors | NCAs | Exchanges |
| *Option 1: Minimum harmonisation of MVR share rules across the EU* | ++ | 0/- | 0 | 0 |
| *Option 2: Maximum harmonisation of MVR share rules across the EU (with detailed investor safeguards set out at EU level)* | + | 0 | 0 | 0 |

*Other economic, environmental, social and fundamental rights impacts for the two options*

MVR share structures may reduce the accountability of founders and could potentially have a negative impact on the company's governance. However, the introduction of the specific safeguards should ultimately minimise the negative impact on corporate governance.

*Coherence with other initiatives relating to the two options*

This area is currently not regulated under EU law. The Shareholders rights Directive 2 requires institutional investors and asset managers to engage with their investee companies. Under the proposed Corporate Sustainability Due Diligence Directive[107], investors are required to engage with investee companies if they identify human rights or environmental adverse impacts in the investee. Hence, the Member States would seriously need to consider the introduction of investors' safeguards in this respect.

[106] **Legend**: +++ = very positive, ++ = positive, + = slightly positive. 0 = no effect, - = slightly negative, -- = negative, --- = very negative.

[107] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final.

## 6.2. Options relating to overly burdensome regulatory listing requirements (IPO phase)

### *6.2.1. Option 1 - Scrutiny by exchanges and non-passportable admission documents*

*Effectiveness in meeting the specific objectives*

This option would only in part achieve the specific objectives of reducing regulatory compliance costs. In case of companies issuing securities on a regulated market, the compliance costs would be reduced to an extent by streamlining the scrutiny and approval procedure. As companies in the run-up to the IPO already extensively interact and exchange information both with exchanges and NCAs, removing the extra-layer of the NCA's approval is expected to reduce the overall approval time and hence cut down some costs associated with the preparation (and approval) of the prospectus. However, option 1 (unlike option 2) would not address the direct cost of drawing up a standard prospectus (and some indirect costs associated with it), which would stay largely unchanged under this option.

In case of companies listing on a SME growth market or accessing public markets for follow-on or secondary issuances, the compliance costs would be reduced through a possibility to draw up, in the first case, a more streamlined admission document set out by the exchange, and in the second case, a more streamlined prospectus. However, the admission document of an SME growth market could not be made "passportable", as its content and format would be decided by the relevant market with no consistency across EU jurisdictions, which would raise issues in terms of regulatory arbitrage (e.g. potential 'race to the bottom' on the overall quality and soundness of the document) and harm investor protection. Therefore, issuers listing on an SME growth market and offering their securities to the public in more than one Member States would need to draw up either multiple admission documents, thus, incurring higher costs than it is currently the case, or a prospectus on voluntary basis, in which case there would be little to no efficiency gains compared to the status quo. This (limited cost efficiency gains) would affect in particular SMEs that make up for the majority of companies listed on SME growth markets.

Option 1 is deemed to be less effective than option 2 when it comes to ensuring investor protection and market integrity. Whilst several issuers that participated in the workshops (and expressed an opinion on NCAs' scrutiny and approval) indicated that they are unsatisfied with the current process, they also considered that the optimal scenario is the one where the scrutiny and approval continues to be performed by NCAs (see Annexes 2 and 6 for more details), although subject to more safeguards. This view was shared by the investors' representatives, who perceive the NCAs' approval as a seal of quality, the absence of which would negatively impact the investors' confidence in investing in the company. Therefore, some cost savings resulting from the regulatory changes foreseen under option 1 would be at least somewhat outweighed by a likely increase in the cost of capital, as the investors are likely to demand a higher premium for potentially taking up higher risk in investing in a company whose listing documentation has not been vetted by a public body. This would likely impact in particular securities offered cross-border. A company from abroad without a seal of quality from its NCA could raise caution among investors. As the cost reduction for the issuer is likely to be marginal, this option would only have a marginal and indirect impact on the issuer's propensity to go public.

Cost-benefit analysis[108]

*Cost-benefits for issuers*. The time for approval of a prospectus varies depending on the type of prospectus, complexity of the business, complexity of securities as well as on the specific requests put forward by NCA approving the prospectus. Currently, there are substantial discrepancies and inconsistencies in how different Member States (NCAs) approach these aspects. The targeted consultation included a question on whether there is alignment in the way NCAs assess the completeness, comprehensibility and consistency of the draft prospectuses that are submitted to them for approval and 54% (23 out of 43 of respondents stated that there wasn't alignment. Some issuers pointed out to divergent scrutiny and approval practices from NCAs and highlighted in particular the frequent requests to produce additional information going even beyond the Prospectus Regulation requirements (even in presence of clear ESMA's guidelines) and the tendency of some NCAs to challenge the issuer on most items of the relevant prospectus annexes. This results in some cases in extremely lengthy approval times. Interaction with NCAs often starts long before the formal submission of a draft prospectus and continues during the review process. In parallel, issuers get in close contact with the exchange and its listing specialists, who verify that the application for admission to trading complies with the market rules. Should the scrutiny and approval be entrusted to exchanges, one of the two interaction channels (e.g. with the NCA) would no longer be necessary. Under option 1, the EU average scrutiny and approval period of the prospectus is therefore expected to substantially decrease compared to the case where the scrutiny and approval process is handled by the least efficient NCAs and decrease only slightly for the most efficient ones.[109] This also entails that issuers would save on legal costs (i.e. billable hours) of lawyers who review any subsequent draft of the prospectus which is then submitted to NCAs.

There are however notable downsides to option 1, which may lead to more direct or indirect costs, thus possibly outweighing the initial cost decrease:

(i) exchanges, which are commercial entities, might raise the level of fees to scrutinise and approve prospectuses, although this risk could be mitigated by appropriate safeguards set out at EU level. The liability that the exchanges would assume by scrutinising and approving prospectuses could also be reflected through higher fees charged by exchanges;

(ii) prospectuses approved by exchanges would remain to be subject to subsequent (ex-post) reviews by NCAs, which could fine the company or the exchange or, in the worst case, even halt the trading of an instrument in the case of identified violations. Active ex-post scrutiny may be more likely for cross-border offers or admission to trading, where NCAs are likely to be less confident in the result of scrutiny by exchanges supervised by another NCA. This is likely to create legal uncertainty and translate in more (direct and indirect) costs for issuers who would try to minimise the risk by seeking additional legal advice.

[108] For the purpose of this analysis, the estimated costs and cost savings for different types of prospectuses are based on the data provided by stakeholders (please see Tables 4, 5, 6 and 7 of Annex 4).

[109] As highlighted in section 4.7 of Annex 6, ESMA's peer review report indicated that some NCAs can be more efficient, for example by not using at all or not systematically additional scrutiny criteria, by having more efficient deadlines to ask for and respond to issuers' comments, by allowing pre-consultations with issuers, by having shorter approval procedures, efficient practices for withdrawal and refusal of prospectuses and adequate liability regime for NCAs' staff.

(iii) the lack of the NCAs' approval stamp might reduce investors' confidence and therefore increase the cost of capital for issuers with investors requiring a premium to compensate for a (potentially) higher risk.

On *SME growth market*, issuers (the majority of whom are SMEs) would only be required to file a (simpler) admission document with the relevant SME growth market rather than drawing up a dedicated prospectus, which would entail lower costs of drawing up this admission document (and of a lighter scrutiny and approval by the exchange). This would address the concern of the respondents to the public consultation, in which the number of stakeholders who consider that the EU growth prospectus did not strike a right balance between investor protection and the reduction of administrative burdens for SMEs (44% or 21 out of 48 respondents) largely outnumbered stakeholders who believe that it did (13% or 6 out of 48 respondents), while the remaining respondents did not have an opinion on that matter. Nevertheless, considering that already today no prospectus is required for listing on an MTF (unless coupled with a public offer), the only change compared to the baseline would be that the admission document would now also suffice to offer securities to the public.[110] However, according to the feedback received from stakeholders[111], today's listings on MTFs/SME growth markets are already benefitting from the exemption to draw up a prospectus (e.g. 90% of listings on Nasdaq Baltic Exchange and almost all listings on Euronext Growth Milan).[112] Therefore, only those (currently few) companies that are planning a public offer that is currently not in the scope of an existing exemption would benefit from cost savings under option 1.

Extrapolating from 2021 ESMA's data on prospectuses approved in 2021 for a public offer and initial listing on an SME growth market[113] and the average costs of an EU growth prospectus[114], for *primary issuances*, the estimated gross cost savings for SMEs and other issuers under option 1 would amount to EUR 6 750 000[115], less the cost of drawing up an admission document. Assuming that a cost of an admission document is 20% of the total costs incurred by issuers to list on an SME growth market,[116] the estimated total net cost saving for companies listing on an SME growth market would amount to EUR 3 712 500[117]. This figure is, however, likely to underestimate the actual accrued benefits under option 1, as it could be expected that at present some companies did not offer securities to the public because of the burdensome requirement to draw up a prospectus. Should this requirement be lifted, more companies could be expected to benefit from the upside of a public offer, including a wider investor base and greater liquidity, leading to potentially further benefits for these companies (e.g. lower cost of capital).[118]

For *secondary issuances*, the estimated cost saving under option 1 (thanks to the requirement to produce the more streamlined EU Recovery prospectus instead of the

[110] Although the admission document could still not be used for cross-border offers.
[111] Predominantly business associations representing the banking sector.
[112] In those cases, a public offer falls under one of the exemption provided in the Prospectus Regulation (e.g. offers to qualified investors only).
[113] See Table 8 of Annex 4.
[114] See Table 6 of Annex 4.
[115] See Table 11 of Annex 4.
[116] See section 4.5 of Annex 4 for more details.
[117] See Table 11 of Annex 4.
[118] These benefits, however, could not be estimated.

simplified prospectus for secondary issuances) would amount to further EUR 3 816 000 million.[119] Furthermore, the scrutiny and approval time (by exchanges) would fall (i.e. the timeline for NCAs to provide a notification on the decision regarding the approval of an EU Recovery prospectus is reduced from 10 to 7 days[120]). For secondary issuances (by the already listed and well-known companies), the level of efficiency[121] stemming from exchanges scrutinising and approving a 30 page-EU Recovery prospectus (for issuances of *non-fungible* securities) is expected to be even greater than in the case of IPOs (i.e. first-time listing by a new/unknown company).

The estimated quantified cost savings for primary and secondary issuances, however, do not take into account possible countervailing costs due to the identified downsides (see above). Having said that, as it was not possible to quantify the benefits stemming from a more streamlined scrutiny by exchanges, it could be assumed that benefits of option 1 and additional costs from the identified downsides cancel each other out.

**Table 2 - Estimated potential cost savings for issuers under option 1**

| Potential cost-savings for issuers | Amount in EUR |
|---|---|
| Estimated cost savings for primary issuances on regulated markets | N/A |
| Estimated cost savings for primary issuances on SME growth markets (enjoyed in particular by SMEs) | EUR 3 712 500 |
| Estimated cost savings for secondary issuances | EUR 3 816 000 |
| **Estimated total cost savings** | **EUR 7 528 500** |

*Cost-benefits for investors*. Option 1 is expected to have an overall negative impact on investors. Based on the feedback received in a dedicated workshop with issuers and investors, the investors felt more comfortable in investing where the prospectus is approved by NCAs (although the views of other participants were split[122]). In particular, for cross border offers or admission to trading, the lack of convergence on scrutiny and approval conducted by exchanges and the uncertainty related to the possibility for NCAs to perform an ex-post review puts the efficiency and effectiveness of the passport mechanism with an exchange scrutiny into question. This would require investors to perform additional due diligence checks of the prospectus in order to make an informed investment decision, which is likely to translate into additional direct costs for investors.[123]

Furthermore, for securities listed on an SME growth market, which would now be exempted from the prospectus requirement, investors would no longer be able to rely on an EU document whose content is harmonised across Member States and which would be passportable. Albeit some minimum disclosure criteria on the admission document on

[119] See Table 13 of Annex 4.
[120] Article 20(6a) of the Prospectus Regulation.
[121] It is, however, impossible to quantify the increase in efficiency due to shorter scrutiny/approval by exchanges.
[122] 57% of all respondents were in favour of keeping scrutiny by NCAs (4 out of 7), 29% were in favour of ESMA playing a bigger role in ensuring more consistency/convergence of scrutiny and approval procedures (2 out of 7) and 14% were in favour of scrutiny remaining with the NCAs with a role for exchanges in certain cases (1 out of 7).
[123] It was, however, not possible to quantify those additional costs.

SME growth markets may be laid down at EU level, the main disclosure requirements would be set out in the exchanges' rulebooks, which makes the content of such documents inconsistent throughout the EU and therefore only suitable for domestic offers and listings. This is, therefore, likely to further increase the cost of scrutiny and assessment of the listing documentation by investors.

*Cost-benefits for NCAs*. Option 1 would have a major impact on NCAs, which would lose the power to *ex-ante* scrutinise and approve most prospectuses. NCAs would, however, retain the power to *ex-post* scrutinise prospectuses and remain responsible for the scrutiny and approval of prospectuses relating to public offers without admission to trading or listing (329 prospectuses only in 2021, accounting for 12% of all approved prospectuses during the same year[124]).

As NCAs would no longer scrutinise and approve (most of) prospectuses, they are likely to lose the associated fees. Consequently, NCAs may be obliged to relocate or even lay off some staff (e.g. reduce the number of prospectus supervisors). Nevertheless, NCAs would still need to keep staff to perform *ex-post* review of prospectuses and intervene, where necessary, to suspend or prohibit an offer of securities to the public or an admission to trading on a regulated market, conduct investigations and impose sanctions. NCAs would also need to adjust to the new supervisory landscape to account for a larger supervisory role played by/power of exchanges. NCAs can thus be expected to devote more resources to the supervision of exchanges, notably to ensure compliance with more stringent conflict of interest rules or prevent abuse, notably when charging excessive supervisory fees to issuers. Overall, it can be expected that NCAs would be negatively impacted by the drop in fee revenue[125], while not necessarily being able to proportionately reduce costs of supervision. It is quite likely that NCAs would need to receive more financing from the state to support their supervisory action under option 1.

*Cost-benefits for exchanges*. Option 1 would have a major impact on exchanges, which would take a lead role in the scrutiny and approval of prospectuses. This new role is expected to raise both direct costs, in terms of hiring and training staff, and indirect costs, associated with additional liability for exchanges. While exchanges would be able to charge for the scrutiny of prospectuses, it is possible that they would be unable to entirely recoup all direct and indirect costs, in particular as NCAs are likely to put in place safeguards to prevent a spike in fee levels. Furthermore, being commercial entities, exchanges would be subject to stricter supervision from NCAs, including a framework that would seek to prevent the conflict of interest and avoid abuse, which would require exchanges to reinforce their compliance departments, thus increasing the cost of running business for them. Finally, prospectuses would still be subject to ex-post review by NCAs, which creates uncertainty about whether the latter might use their powers, for example to suspend an offer of securities to the public or an admission to trading on a regulated market (which is a currently a remote possibility given that NCAs approve prospectuses). Any instance of suspended trading would have reputational implications for exchanges (and hence lead to potential future costs). Nonetheless, there may also be a long-term benefit for exchanges if, due to the alleviated rules, more companies are

[124] Out of those, 288 prospectuses - for primary issuances and 41 prospectuses - for secondary issuances (prospectuses approved in 2021 as well as the ISINs related to these 2021 approved prospectuses, independently of when the ISIN was reported). Source: 2021 ESMA data.
[125] Albeit part of the revenue would still be generated by fees for ex-post supervision.

seeking admission to trading/listing in the future. In the public consultation and the workshop with the industry, no exchanges nor their representative bodies supported the transfer of scrutiny and approval of prospectuses from NCAs to exchanges.

For issuers listing on an SME growth market, exchanges would be required to scrutinise and approve an admission document based on the rules laid down in their rulebooks. Given that SME growth markets admission documents are already used for most listings on those venues, the scrutiny and approval of admission documents by exchanges is expected to be highly efficient and should not in principle lead to further costs for exchanges.[126]

### *6.2.2. Option 2 - Shorter prospectuses with streamlined scrutiny by NCAs*

Effectiveness in meeting the specific objectives

Option 2 is considered to be very effective in meeting the specific objective of reducing the regulatory and compliance costs for companies seeking to list or already listed on public markets. Companies would benefit from cost savings due to the reduction of the complexity and length of prospectuses as well as from a more efficient, convergent and streamlined scrutiny and approval process by NCAs who would retain their powers. In particular, under option 2, issuers would benefit from:

i) the significant streamlining of the standard prospectus;

ii) the introduction of a bespoke EU admission document for offering securities and listing on SME growth markets; and

iii) the exemption that would cover most cases of secondary issuances by companies already listed.

Furthermore, the higher extent of standardisation and comparability across EU jurisdictions of the prospectus would improve its readability and make it easier for investors to analyse it and navigate through it. Finally, while significantly reducing the burden for issuers, the enhanced incorporation by reference of information in the prospectus, would only to a limited extent reduce the readability of information for investors (not all information would be included in the same document). In the future, these investors could benefit from the company data centralised on the European Single Access Point (ESAP)[127]. While the exact layout and perimeter of ESAP are currently debated by the co-legislators, this tool would be expected to allow investors to find in a single place the majority of the relevant information, hence largely mitigating any negative side-effects for investors.

*Cost-benefit analysis*[128]

*Cost-benefits for issuers*. Under option 2, issuers are expected to benefit from cost savings both due to a more streamlined scrutiny of prospectuses by NCA and to a considerably streamlined prospectus contents (and limited size). In the targeted consultation, within the group of stakeholders that responded to the dedicated question

[126] It should be noted that, in a technical workshop with exchanges on the Listing Act initiative (Annex 2), one exchange expressed the opinion that scrutinising and approving prospectuses is not the role of exchanges and two other exchanges highlighted the fact that scrutiny and approval conducted by NCAs instils trust for investors.

[127] See Annex 13 on other ongoing initiatives contributing to improving public markets' ecosystem.

[128] Like for option 1, for option 2, the estimated costs and cost savings for different types of prospectuses are based on the data provided by stakeholders (please see Tables 4, 5, 6, and 7 of Annex 4).

on the standard prospectus, the majority (53% or 18 out of 34 respondents[129]) indicated that the standard prospectus should be significantly alleviated. While some respondents (21% or 7 out 34 respondents[130]) would replace the standard prospectus with a more efficient prospectus type, some others (24% or 8 out of 34 respondents[131]) proposed different solutions (e.g. set a page limit, make the prospectus a standardised and fully harmonized document) and finally only 1 stakeholder[132] (3%) indicated that the standard prospectus should be replaced by another document (e.g. an admission document).
As regards the scrutiny and approval of the prospectus by NCAs, under this option NCAs' powers in scrutiny would be better framed, also taking into account the recommendations stemming from the ESMA peer review report[133]. The latter, amongst other findings, invites the Commission to review the notion of 'scrutiny criteria',[134] foster a common approach regarding issuers' turnaround times and NCAs' deadlines placed upon issuers during the approval process, and consider aligning the timelines and procedures for refusal of prospectuses at an EU level. In particular, as regards the first point, the more precise objective of the scrutiny and of the type of information collectable by issuers would allow to reduce the time for repeated exchanges with NCAs[135] where additional information and clarifications are sought. These measures would allow to reduce the scrutiny period, although mostly in the case of less efficient NCAs.[136] Issuers would benefit both from direct cost savings, in terms of legal fees paid to counsels to respond to numerous requests from NCAs, and from indirect cost savings from the improved ability to plan the expected scrutiny duration (and the general IPO process).[137]

On cost savings generated by the reduction in the complexity and length of prospectuses, option 2 will accrue for public offers and admission to trading on a regulated market, public offers coupled with a listing on an SME growth market, and finally for secondary issuances of securities by companies already listed. In all aforementioned cases, the possibility to draw up the prospectus in English is expected to considerably decrease the number of pages and translation costs, which are, however, difficult to estimate.[138]

Under option 2, issuers offering securities to the public and/or seeking admission to trading on a *regulated market* would benefit from a significantly streamlined standard prospectus, which would be aligned to the level of disclosure of the EU Growth

[129] Including 11 business associations (of investors, issuers, banks law firms), 4 companies/business organisations (1 trade association, 1 financial research provider, 1 operator of trading venues and 1 law firm), 1 NGO, 1 NCA, and 1 academic.
[130] Including 3 operators of a trading venue, 2 issuers, 1 law firm, and 1 academic.
[131] Including 6 operators of a trading venue, 1 association of banks, and 1 NCA.
[132] A business association.
[133] See section 4.7 of Annex 6.
[134] To better frame and limit the use of additional criteria for the scrutiny of the completeness, consistency and comprehensibility of the information contained in the prospectus that NCAs are allowed to use only where necessary for investor protection, in accordance with Article 40 of Commission Delegated Regulation (EU) 2019/980 (and some NCAs use systematically).
[135] ESMA's peer review report (see Table 8 of section 4.7 of Annex 6) indicates the average number of draft prospectuses submitted for approval to NCAs ranges from 4.13 for non-equity securities to 5.3 for an IPO (and 4.28 for an EU Growth prospectus).
[136] The measure would primarily seek convergence among NCAs towards the best performance by the most efficient NCAs (i.e. will not have the same impact on all issuers). As highlighted in section 4.7 of Annex 6, ESMA's peer review report indicated that some NCAs can be more efficient, for example by not using at all or not systematically additional scrutiny criteria, by having more efficient deadlines to ask for and respond to issuers' comments, by allowing pre-consultations with issuers, by having shorter approval procedures, efficient practices for withdrawal and refusal of prospectuses and adequate liability regime for NCAs' staff.
[137] It would, however, not be possible to quantify those benefits.
[138] Under option 2, issuers would no longer be required to produce paper copies upon request and would be able to publish prospectuses only in an electronic format. While option 1 does not foresee any changes to the contents of the prospectus (but rather to its scrutiny/approval), this feature (electronic format only) can also be included under option 1 (it is not going to decrease the information available or introduce further alleviations, which may not be compatible with the situation where the scrutiny of exchanges is left to exchanges).

prospectus, with some necessary amendments which would concern in particular the sections considered excessively burdensome by stakeholders in their feedback.[139] A number of those sections, or information items within those sections, have already been alleviated or deleted for the purpose of the EU Growth prospectus[140], which remains to be a document ensuring an appropriate level of investor protection (and accepted by the market as such). Further benefits would accrue from additional streamlining of a few additional items considered burdensome by issuers and unnecessary (in their current form) by investors (such as some categories of risk factors or the statement of capitalisation and indebtedness). For primary issuances, the EU Growth prospectus can therefore be taken as a reference in the estimation of possible cost savings under option 2.

Extrapolating from ESMA's 2021 data on prospectuses for 2021, the estimated average cost savings (per year) under option 2 could amount to EUR 56 million (cumulatively for equity and non-equity prospectuses)[141].

While introducing a page limit (300 pages) to the standard prospectuses for shares should not represent a problem for the majority of issuers, as also confirmed by ESMA's data shown in Table 3[142], it would allow to address serious outliers[143], in particular in some Member States, where the size of the prospectus is reported to reach 800 pages in some cases[144]. Furthermore, the following elements would safeguard against undue limitation of issuers' flexibility (and hence avoid an increase, rather than a decrease, in the burden for issuers): (i) a derogation for issuers with a complex financial history, and (ii) the fact that the information incorporated by reference would not be counted for the page size.

**Table 3 - Page length of prospectuses for equity securities by prospectus type[145]**

| Document type | Average | Median | Percentile 10 | Percentile 25 | Percentile 75 | Percentile 90 |
|---|---|---|---|---|---|---|
| **Standalone prospectus equity securities** (513 documents) | 157 | 121 | 47 | 64 | 212 | 343 |
| **EU Growth standalone prospectus equity securities** (140 documents) | 75 | 60 | 42 | 50 | 75 | 120 |
| **EU Recovery prospectus (shares only)** (15 documents) | 32 | 32 | 29 | 31 | 34 | 35 |

*Source: ESMA's data for 2021[146].*

Finally, in the case of issuers offering securities to the public and listing on an SME growth market, the replacement of the prospectus with a more streamlined EU admission document based on the level of disclosure in the EU Recovery prospectus and SME growth market admission documents would significantly reduce costs. The EU Recovery

[139] See Table 4 of Annex 6.
[140] See Table 6 of Annex 6.
[141] See Table 10 of Annex 4.
[142] For a standalone prospectus for equity securities in a single language, the average, median and percentile 75 are below 300 pages.
[143] As indicated by percentile 90.
[144] See Oxera report, Table 4.1 on page 68.
[145] Standalone prospectuses only (e.g. no base prospectuses) and single language only.
[146] Methodological note: data on the length of prospectus documents by document type and home member state (approval/filing date between 01/01/2021 and 31/12/2021). Each prospectus is classified as "equity" (when the associated securities are shares and/or depository receipts and/or convertible securities and/or shares in closed end fund and/or other) or "not equity" (when the associated securities are debt securities and/or ABS and/or derivatives).

prospectus is currently the most streamlined prospectus type, with a 30 page-size limit (and 2 pages for the summary), while SME growth market admission documents may range from 20 to 220 pages according to the feedback from some stakeholders (20-60 pages on Nasdaq Baltics, up to 100 pages on Nasdaq Nordics, 180-220 pages on Euronext Growth Milan). Assuming that the cost of the EU admission document[147] would be equal to the cost of an EU Recovery prospectus (on which model the former will be built), the cost savings for issuers under this option can be estimated to EUR 2 700 000[148].

The exemption from the obligation to draw up a simplified prospectus for *secondary issuances* of *securities fungible* with securities already admitted to trading would generate a sizeable cost saving for issuers. These companies would be required to publish only a statement of continuous compliance with the reporting and disclosure obligations and a short summary document with a few key pieces of information (e.g. on the use of proceeds). As these documents would only have to be filed, but not approved by NCAs, there will no longer be any cost associated with the NCA's scrutiny (legal advisory help). For the purpose of this analysis, only secondary issuances of equity securities issued by means of a simplified prospectus for secondary issuances or an EU Recovery prospectus (taking the year 2021 as reference) are considered to be fungible with equity securities already admitted to trading[149]. The yearly cost savings stemming from this exemption could therefore be estimated at EUR 7 380 000 (from which the cost of producing the compliance statement and the summary document should be deducted, although they are likely to be minimal)[150].

For the purpose of this analysis, *non-fungible securities* relate to the situation where issuers, whose equity securities are already admitted to trading on a regulated market or listed on an SME growth market, issue non-equity securities. Therefore, only non-equity securities issued by means of a simplified prospectus for secondary issuances in 2021 are taken into account in the analysis. For such non-fungible issuances, under option 2, issuers would have to draw up a lighter prospectus (largely mirroring the EU Recovery prospectus) instead of the currently required simplified prospectus for secondary issuances[151]. The cost savings of this amendment could be estimated at about EUR 1 056 000[152].

**Table 4 - Estimated potential cost savings for issuers under option 2.**

| Potential cost-savings for issuers | Amount in EUR |
|---|---|
| Estimated cost savings for primary issuances on regulated markets | EUR 55 922 500 |
| Estimated cost savings for primary issuances on SME | EUR 2 700 000 |

[147] EU admission document should not be confused with existing admission documents of exchanges.
[148] See Table 12 of Annex 4.
[149] Although it is possible that companies issued shares (or other equity) which were not fungible with the shares already in circulation (e.g. type A and type B shares), it is also possible that companies issued non-equity securities that are fungible with non-equity securities already admitted to trading. As the data that would allow to distinguish the latter type of issuances was not available at the moment of drafting of this IA, follow-on issuances of non-equity was not included in the calculation of cost savings. On balance, it is therefore unlikely that the presented estimate overstates cost savings in any sizeable manner.
[150] See Table 14 of Annex 4.
[151] As the EU Recovery Prospectus is currently only available for shares, detailed templates (schedules) for non-equity securities would have to be laid down in the legislative act.
[152] See Table 15 of Annex 4.

| | |
|---|---|
| growth markets (in particular relevant for SMEs) | |
| Estimated cost savings for secondary issuances of fungible securities | EUR 7 380 000 |
| Estimated cost savings for secondary issuances of non-fungible securities | EUR 1 056 000 |
| **Estimated total cost savings** | **EUR 67 058 500** |

*Cost-benefits for investors.* Option 2 would provide a number of benefits to investors. As regards the standard prospectus, investors would take advantage of a lighter and more streamlined document, which is easier to read and navigate. Furthermore, the standardised format (i.e. fixed order of disclosure of the prospectus sections) would facilitate the comprehensibility of prospectuses and their comparability across the EU. For shares, investors would no longer be analysing long documents that can reach up to 800 pages in certain jurisdictions[153], given that the maximum limit would be 300 pages (except in the case of issuers with a complex financial history, where it would be justified). While the increased use of incorporation by reference might render the document more complex to analyse, increasing the time spent by investors on its scrutiny (and hence the cost of its assessment), it should not be an issue for qualified investors, and retail investors are likely to focus on the summary document in any event. Furthermore, the upcoming ESAP, once agreed by the co-legislators, will allow investors to find all the information incorporated by reference in the same place, hence limiting any possible additional cost associated with scrutiny. The possibility for the issuer to draw up the prospectus in English only, while translating the summary, is considered to strike the right balance between reducing the burden for issuers, while ensuring the protection of retail investors. The investors are therefore unlikely to be negatively affected in terms of costs incurred to them by the alleviations to the contents of the prospectus, and might even be positively affected by a higher comparability and better focus of the streamlined document.

Similar considerations can be put forward in the case of the EU admission document for securities, which would be drawn up for public offers and listings on an SME growth market. This document, which takes as a model the most streamlined prospectus type (i.e. the EU Recovery prospectus), is expected to be easier to read and analyse for both retail and qualified investors, potentially reducing the (indirect) cost of scrutiny for them.[154]

Investors are not expected to be negatively affected by the prospectus exemption relating to secondary issuances of securities fungible with securities already admitted to trading. Such exemption, which will be subject to limitations (e.g. in case of companies going through considerable transformations in terms of governance or business model), would only apply to issuers with a proven (publicly available) track record on EU public markets and subject to periodic and ongoing disclosures under applicable EU law (e.g. under MAR and TD). Furthermore, investors would in any event be provided with a summary document containing the key pieces of information (e.g. use of proceeds) to support their investment decision, in addition to the information already publicly available. Finally, where the exemption does not apply, such as for the offer or admission

[153] See Table 2 of Annex 6.
[154] In both cases it would, however, be impossible to quantify the effect on investors.

to trading of non-fungible securities, investors would be provided with the EU Recovery prospectus. A more limited length of that document, would make the listing documentation more easily readable for the investor than the currently applicable simplified prospectus for secondary issuances, which would render investor protection more effective than is the case today (i.e. more understandable disclosures). Overall, benefits for investors are likely to outweigh any potential costs resulting from reduced contents of the listing documentation. The streamlining of the documentation would be guided by the principle of alleviating the burden on issuers, without impairing investor protection.

*Cost-benefits for NCAs*. Option 2 entails improvements to the scrutiny and approval process, rendering it more efficient and convergent[155] also for NCAs themselves. The possibility for NCAs to go beyond the pre-determined scrutiny criteria for the completeness, comprehensibility and consistency of the information contained in the prospectus (e.g. to check the correctness of the information, or require additional information that is not mandatory for prospectus purposes) would be limited. In the public consultation, the majority of NCAs (5 out of 7 NCAs that provided a response) stated themselves that the current process was not sufficiently efficient. Framing the flexibility to use additional scrutiny criteria[156] beyond exceptional circumstances (e.g. for a new financial instrument such as a crypto asset or in cases of possible fraud), instead of being used by NCAs as a legal hook to systematically require extra disclosures, would also limit the risk for NCAs to be challenged by investors and hence potentially reduce the costs of litigation for NCAs.[157] Additional cost savings would stem from the fact that NCAs would no longer have to scrutinise and approve prospectuses for secondary issuances of fungible securities, which would now be exempted.

*Cost-benefits for exchanges*. Option 2 does not have any major impact on exchanges. Exchanges would, however, benefit over time from a gradual increase in companies seeking admission to trading/listing on them, as a result of the regulatory alleviations and higher attractiveness of public listing. Exchanges therefore stand to benefit from the initiative in the longer-term.

**Table 5 - Cost efficiency by stakeholder type (section 6.2).**

| **Cost efficiency by stakeholder type**[158] | | | | |
|---|---|---|---|---|
| | **Issuers** | **Investors** | **NCAs** | **Exchanges** |
| *Option 1: Scrutiny by exchanges and non-passportable admission document* | ++ | - | - | - |
| *Option 2: Shorter prospectus with streamlined scrutiny by NCAs* | +++ | + | + | + |

Other economic, environmental, social and fundamental rights impacts for the two options

[155] Also taking into account the aforementioned ESMA's peer review recommendations for the Commission.
[156] Article 40 of Delegated Regulation (EU) 2019/980
[157] It is, however, not possible to quantify those cost savings.
[158] **Legend**: +++ = very positive, ++ = positive, + = slightly positive. 0 = no effect, - = slightly negative, -- = negative, --- = very negative.

It is considered that option 1 does not have any relevant impact on economic, environmental, social and fundamental rights. NCAs are, however, likely to become more reliant on state support.

Under option 2,[159] the prospectus can only be published in an electronic format, which prevents requests for paper copies. This feature of option 2 is expected to have a slightly positive impacts on the environment.

Coherence with other initiatives relating to the two options

Options 1 and 2 are fully coherent with other initiatives, especially in the context of the CMU Action plan, which aim to support companies' access to diversified sources of funding, including through public markets, and ensure the protection of investors. In addition, Option 2 can be seen as fully coherent with the ESAP initiative. Both options would also be aligned with the "digital by default" principle.

### 6.3. Options addressing the overly burdensome ongoing disclosure requirements (Post-IPO phase)

#### *6.3.1. Option 1 - Review of the definition of inside information and of the conditions for delaying its disclosure*

Effectiveness in meeting the specific objectives

Under Option 1, the *notion of inside information* would be narrowed down for disclosure purposes. It would be accompanied by a list of events triggering disclosure, better defined conditions for the use of delays and a more proportionate sanctions regime for SMEs for compliance with disclosure obligation. Jointly, these elements would enhance legal clarity on what is and what is not to be disclosed, removing the problem with disclosing too preliminary information for the issuer. This, in turn, would reduce burden for listed companies by limiting the amount of time and costs, including external advisers' fees, currently spent to ensure compliance with the disclosure obligation. This can also limit the issuers' recourse to delayed disclosure.

Issuers' and investors' representatives who participated in the workshop attributed to this option an average score of 4.1 on a scale from 1 to 5 in terms of effectiveness in bringing legal clarity with respect to disclosure obligation. In the same vein, almost half (49% or 27 out of 55) of the respondents (representatives of exchanges, issuers, banks, financial intermediaries, NCAs and academia) who replied to the questions on the appropriateness of the notion of inside information included in the targeted public consultation, considered that the ESMA guidelines would not be enough to provide the necessary clarifications. A vast majority (79%, i.e. 19 out of 24) of these respondents (aside from representatives of banks and some exchanges) supported that MAR distinguishes between a narrower notion of inside information for disclosure purposes and a broader notion for the purposes of prevention of market abuse.

Moreover, clarifications to the conditions to delay the disclosure of inside information would help make potential ambiguities of the notion less relevant in practice, and reduce the costs currently incurred by issuers in the interpretation and application of these conditions. During the industry workshop, both issuers and investors expressed a view that the clarification of the conditions to delay disclosure would provide more clarity to

[159] And potentially under option 1 (See footnote 129 for more detail).

issuers with respect to the obligation to disclose inside information (the views of representatives of exchanges were less clear-cut on this point).

Furthermore, the parallel introduction of an indicative list of events triggering public disclosure would help issuers have a more efficient disclosure practice and reduce liability risks[160]. The limitations of this option relate to the fact that the list of events would be non-exhaustive. As a result, the list would provide a clear indication of the events that issuers would be expected to disclose, removing the lack of legal clarity and associated costs for issuers in those instances, while leaving room for interpretation for events not included in the list. Therefore, on a stand-alone basis, a non-exhaustive list of events under option 1 would only be partially effective in addressing the issue of lack of clarity in MAR provisions. However, if seen jointly with a clearer and narrower definition of inside information for the purpose of disclosure and fine-tuning of the conditions for delay, as set out above, it could adequately address the issue, by complementing and illustrating the narrower definition. Option 1 can therefore be seen as effective in removing the identified obstacle to issuers, stemming from legal uncertainty of the current provisions in MAR. In addition, by maintaining the obligation to disclose inside information that is not restricted to a limited set of information, this option would ensure a high level of overall transparency on inside information for investors, allowing them to make well-informed investment decisions. It would also help NCAs maintain a high level of market surveillance and enforcement.

From the investors' perspective, a narrower and clearer notion of inside information for disclosure purposes may, to a certain extent, reduce transparency on the issuer. On the scale from 1 to 5, a large majority of investors and issuers (7 respondents out of 8) at the industry's workshop agreed that the introduction of a narrower definition of inside information for the purpose of disclosure would bring clarity for issuers with respect to the obligation to disclose inside information[161]. Nevertheless, less uncertainty over the notion would reduce the cases of over-disclosure making the existing disclosures more relevant and informative. More specifically, by avoiding the disclosure of information which is too preliminary (which may be even more harmful for investors than no disclosure at all), it would prevent investors from taking actions that could prove to be suboptimal (e.g. divesting the stock too soon). Removing premature disclosure would therefore likely decrease the opportunity cost for investors and better protect them from immature disclosures that can be misleading. Overall, a clarification around the notion of inside information foreseen under option 1 would allow investors to make better informed decisions, thus further strengthening investor protection (or rendering it more effective).

Currently, in the majority of Member States, the maximal penalty expressed in absolute amounts for disclosure-related infringements corresponds to the minimum of the maximal level of sanctions prescribed by MAR. This indicates that the majority of Member States opted for the lowest level of maximum pecuniary sanctions. The provisions of a more proportionate sanctions regime (such as a lower minimum of the maximum amount) applicable to SMEs for breaches of the disclosure regime would

[160] In the workshop, issuer and investor representatives considered the introduction of such a list of events more relevant than irrelevant (this solution received the average score of 3.1 on a scale from 1 to 5 in terms of its effectiveness).
[161] 38% gave a score of 4 out 5 in terms of bringing clarity. 50% gave a score of 5 out of 5. The remaining 13% gave 1 out of 5.

prevent NCA from imposing excessive sanctions in those cases[162] and ensure clarity for SMEs as regards the expected level of punitive measures in the case of, for example, accidental late disclosure. Overall, this option is likely to address – at least to some extent – the issue of MAR sanctions being overly dissuasive for SMEs to list (and to remain listed) and render the regulatory treatment more proportionate and less burdensome, while ensuring market integrity. In the public consultation, when asked about sanctions under the current MAR regime, a half of respondents (22 out of 44) composed of representatives of banks, exchanges, financial intermediaries, issuers and academia, shared the opinion that the current punitive regime was not proportionate to the objective sought by legislation.[163]

This option should therefore jointly be sufficiently effective in rendering the sanctions regime for breaches of disclosure obligations for SMEs under MAR more proportionate, while nevertheless ensuring that the MAR regime continues to be adequately dissuasive, and hence safeguarding market integrity in the EU.

Finally, this option would not have a significant impact on the capacity of NCAs to detect market abuses, as: i) the current broad notion of inside information would continue to apply for the purpose of prevention of market abuses; ii) sanctions for market-abuse infringements, such as insider dealing and market manipulation, would remain unchanged; iii) the obligation for issuers to disclose as soon as possible all inside information to the public would remain in place albeit clarified; iv) transparency would not be impaired, as issuers would disclose inside information at the right moment - and not earlier than necessary in order to minimise the risk of being sanctioned.

Cost-benefit analysis

*Costs-benefit for issuers:* This option would contribute to decreasing the costs of compliance for issuers by reducing the efforts required to assess whether or not a certain piece of information qualifies as inside information in each specific case/event. In companies, where such checks are routinely delegated to internal or external legal counsels, it would decrease the need to make use of such services and reduce the risk of errors. This would bring down both direct and indirect (e.g. related to liability) costs for these companies. Additional cost savings would derive from a less frequent recourse to delay. For those (residual cases) where delay would still come into play, clarification of the conditions to be met would provide more legal certainty and also reduce the need to pay for legal advice.

Option 1 could lead to a reduction in compliance costs for issuers of EUR 89 149 000, broken down into EUR 24 600 000 for SMEs and EUR 64 600 000 for non-SMEs.[164] The delayed disclosure could reduce costs for companies by EUR 11 200 000, of which EUR 1 200 000 for SMEs and EUR 10 000 000 for non-SMEs (see Annex 4 for more detail).

[162] For example, the maximum amount of sanctions for infringement of Articles 17-19 (breaches of disclosure requirements) of MAR in France is EUR 100 million.
[163] The respondents that believed that the current regime is proportionate were mainly NCAs.
[164] The estimated cost reduction is calculated, considering the average costs of compliance, the fact that about 3 200 SMEs are listed on the EU regulated markets or SME growth markets, and about 6 400 other firms are listed on the EU regulated markets or MTFs (2021), See Table 18 in Annex 4.

Finally, a more proportionate level of sanctions for breaches related to disclosure would avoid a disproportionate burden on SMEs, thus reducing the disincentive for them to list in the first place and allowing them to better diversify their sources of financing (e.g. funding through private or public markets). Furthermore, a single cap for maximum sanctions prescribed in MAR would remedy divergent levels of maximum sanctions across Member States that create an unlevel playing field for SMEs and asymmetrically affect their incentives to list across the EU. For some infringements related to disclosures, the cap of maximal sanctions varies from EUR 1 000 000 to EUR 100 000 000.[165]

*Costs-benefit for investors:* While a clearer and narrower scope of the disclosure obligation could be perceived, on the one hand, as reducing the level of available information and increasing information asymmetries, it would, on the other hand, benefit investors by removing unnecessary (or even misleading) disclosures and increasing legal certainty with respect to the information issuers would be expected to disclose. This would avoid the costs (including the opportunity costs) of suboptimal decisions made by investors based on the prematurely disclosed information. In addition, the introduction of an indicative list of events would mitigate the risk of divergent interpretations of the notion of inside information across Member States and thus ensure better alignment in the way issuers comply with the obligation to disclose inside information. This would in turn benefit investors, who could more easily compare the information they receive.

*Costs-benefit for exchanges:* From an exchange's perspective, this option would entail no changes.[166]

*Costs-benefit for NCAs*: The clarification of the notion of inside information as well as the introduction of an indicative (yet comprehensive) list of events would make the supervision of compliance with the disclosure obligation easier for NCAs and reduce the administrative burden. Moreover, option 1 would lower the administrative costs incurred by NCAs to review the notifications of delays received from issuers, as issuers would need to delay disclosure in more limited circumstances. The process to assess whether the conditions to delay disclosure have been met by issuers would also be comparatively easier and require less work by NCAs' staff. The cost savings for NCAs due to a potentially lower number of delay notifications (due to the fact that companies would no longer be under the same pressure to over-disclose) under option 1 are estimated to be EUR 77, 018 (see Annex 4 for more details).

### *6.3.2. Option 2 - Introduction of a closed list of events which qualify as inside information for the purposes of disclosure*

Effectiveness in meeting the specific objectives

The introduction of a closed list of material events for the purposes of disclosure under option 2 would reinforce legal clarity for issuers to the highest degree possible and therefore be very effective in reducing the unnecessary regulatory burden created by the lack of such clarity. As very limited room for interpretation would remain in relation to the specific material events requiring disclosure, issuers would have a reduced need to

[165] ESMA Report Enforcement and regulatory activities of European enforcers in 2020, April 2021

[166] Representatives of the exchange that responded to the public consultation noted that either more concrete guidelines from ESMA or amendments to the Level 1 text of MAR are necessary to further clarify the applicability of the definition of "inside information".

seek legal advice to ensure compliance with such obligation (if not entirely removed) and a minimised risk to inadvertently breach the disclosure obligation.

While bringing the highest level of legal certainty for issuers, Option 2 would be less effective in ensuring a high level of investor protection and market integrity. With disclosure being limited to a pre-defined sub-set of information, it would not be possible to ensure that all price-sensitive information would *de facto* be made public. Firstly, the exhaustive list of events, even if set in a delegated act (level 2 legislation), would be rather static, at least in the short-term (or would be adapted only with a time gap), thus not always including all the relevant events potentially triggering the disclosure. Secondly, it would be difficult to compile a truly comprehensive list that would effectively capture all possible instances of inside information appropriate to disclose. In such a situation, the issuer would instead be obliged to protect this inside information within the organisation (rather than timely disclose it). Such circumstances would increase the risk of insider dealing, lower investor protection and increase risks to market integrity. This is backed by the feedback to the targeted consultation, with 47% of the respondents (23 out of 49, mainly representatives of banks, NCAs, financial intermediaries and academia) considering that a system, such as the one existing in the US[167], would pose challenges to market integrity if introduced in the EU. Option 2 would also be a radical departure from the existing framework with regard to the notion of inside information, while ESMA estimated that the framework works overall relatively well. Furthermore, responses to the public consultation[168] showed that many stakeholders would not want the complete overhaul of the framework, but rather called for some guidance and clarifications.

Cost-benefit analysis

*Costs-benefit for issuers:* Having a comprehensive list of events to be disclosed would enhance legal certainty for issuers as to their disclosure duty. This will decrease the costs of compliance for issuers, removing the need to compile such lists internally and removing the risk that such lists would be incorrect, as well as removing or at least reducing the need for additional legal advice to assess whether the obligation to disclose is triggered in each individual case.

The introduction of a comprehensive list of events under option 2 would lead to a reduction in related compliance costs of EUR 118 865 000,[169] with EUR 32 738 000 for SMEs and 86 127 000 for non-SMEs.[170] The delayed disclosure could reduce costs in firms by EUR 11 200 000,[171] among which 1 200 000 for SMEs and 10 000 000 million for non-SMEs (See Annex 4 for more detail).

[167] In the US, the regime is based on an obligation for issuers to publish updates to the market concerning material changes regarding the issuer that occur between the required quarterly reports 'on a rapid and current basis'. The obligation to file a form 8-K, to update the market as to these material changes, is linked to a list of specified events that trigger the requirement for disclosure, such as the issuer filing for bankruptcy or receivership, a material modification of the rights of security holders, or significant acquisitions or dispositions. Issuers can choose to disclose material information falling outside the specified categories if they wish to do so.

[168] See Annex 2 for more details.

[169] Higher compliance cost savings under option 2 (compared to option 1) are due to more legal certainty provided by an exhaustive list of events that reduces to a larger extent the need to seek (external) legal advice.

[170] Similarly to estimated cost reduction in option 1, the estimated cost reduction in option 2 is calculated, considering the average costs of compliance (see Table 17 in Annex 4 based on data collected by a European trading venue), the fact that about 3 200 SMEs are listed on the EU regulated markets or SME growth markets, and about 6 400 other firms are listed on the EU regulated markets or MTFs in 2021 (see Table 1 in Annex 4).

[171] The cost savings from a reduced number of requests to delay disclosure to NCAs are considered to be identical under options 1 and 2 (in both cases, it is expected that requests to delay disclosures would go down equally).

*Costs-benefit for investors:* MAR provides for the protection of both existing and potential investors of the company. More specifically, MAR prohibits for anyone to take advantage of the access to inside information by outlawing the possibility to negotiate on a financial instrument, when inside information is not disclosed to the public, against the interest of other investors. Those safeguards would not be removed, as the notion of the inside information would still apply to the prohibition of inside dealing. In addition, all investors would gain more clarity on the scope of information they should get from issuers, once particular events occur. However, a fixed ("static") pre-determined list could give rise to the risk that inside information is not always disclosed, to the detriment of investors who would not be in a position to take this information into account in their decisions. It is therefore likely that investors in those circumstances could incur additional costs (including opportunity costs) and be negatively impacted as a result of a higher probability of market manipulation by those in possession of inside information (that should have been disclosed under other circumstances).

*Costs-benefit for exchanges:* Similarly to option 1, exchanges would not be expected to be affected under option 2.

*Costs-benefit for NCAs:* The introduction of the exhaustive list of events would make the supervision of MAR disclosures easier for NCAs and reduce the administrative burden. It is likely to decrease the time spent by NCA staff on supervision and subsequently reduce the cost of supervision. At the same time, with less information on events occurring outside the closed list of events, it is possible that NCAs would have to enhance their market surveillance of market trends to spot possible irregularities due to market abuse.

**Table 6 - Cost efficiency by stakeholder type (Section 6.3).**

| **Cost efficiency by stakeholder type**[172] | | | | |
|---|---|---|---|---|
| | Issuers | Investors | NCAs | Exchanges |
| *Option 1: Review of the definition of inside information and of the conditions for delaying its disclosure, as well as more proportionate sanctions for SMEs* | ++ | + | + | *0* |
| *Option 2: Introduction of a closed list of material events for the purpose of disclosure.* | +++ | -- | - | *0* |

*Other economic, environmental, social and fundamental rights impacts for the two options*

Neither option 1, nor option 2 has any relevant impact on other economic, environmental, social and fundamental rights.

*Coherence with other initiatives relating to the two options*

While option 1 would be coherent with the existing legal framework, option 2 would give rise to risks that may go against the primary objective of EU financial legislation to ensure effective investor protection and high market integrity.

[172] **Legend**: +++ = very positive, ++ = positive, + = slightly positive. 0 = no effect, - = slightly negative, -- = negative, --- = very negative.

## 7. HOW DO THE OPTIONS COMPARE?

### 7.1. Options addressing unequal opportunities for EU companies regarding governance structure, when listing, due to different rules on MVR share structures (Pre-IPO)

Option 1 ranks higher than option 2 on the effectiveness in addressing the unequal opportunities for EU companies regarding governance structure, when listing, due to different national rules on MVR share structures. Option 1 sets out in EU law only high-level principles on MVR share structures, providing for more flexibility for Member States to design a more bespoke (and hence more suitable for companies in those Member States) regime. At present, some Member States (e.g. the Nordics) have already developed very flexible MVR share frameworks that have proven to be attractive for both issuers and investors and have contributed to the high numbers of companies accessing public markets in those Member States. Option 1, will deliver on the key objectives of removing fragmentation and unequal opportunities across Member States and increasing flexibility in those Member States where MVR share structures have been banned until now, while not interfering with the existing well-functioning MVR share systems, hence limiting negative side-effects (and potentially costs) for companies in those Member States.

Despite the fact that option 2 would provide for a more comprehensive MVR share regime at EU level, it is likely to be more rigid and less adapted to specific national needs of companies, straightjacketing them into the same set of detailed rules developed at EU level. Therefore while option 2 would generate a higher degree of harmonisation regarding MVR share structures in the EU option it would also offer less – and not more - flexibility for issuers in those Member States, where flexible regimes are already in place.

Regarding cost efficiency, policy option 1 would also be more cost-efficient for stakeholders, specifically issuers, since Member States that already have MVR share structures in place would not have to amend their rules (or at least in no significant manner) and companies in those Member States – would not have to adapt. A much more prescriptive option 2 is likely to lead to much higher (adjustment) costs for both issuers across the EU. While overall investors' interests might be better safeguarded at EU level under option 2, in reality it may be unfit for some Member States, where investors do not appear to be negatively affected under the current (flexible) MVR share arrangements in some Member States due to high levels of minority investor protection.

Option 1 is therefore preferred over option 2 due to its higher effectiveness in achieving the objective and a slightly higher cost efficiency.

### 7.2. Options relating to overly burdensome regulatory listing requirements (IPO phase)

Option 1 and 2 differ in terms of their effectiveness, as regards the specific objectives of, on the one hand, reducing regulatory compliance costs for companies issuing securities on public markets and, on the other hand, ensuring adequate information for investors. Their respective effectiveness differs for different categories of stakeholders.

*Length and complexity of prospectuses*. Concerning the issue of the length and complexity of the prospectus, option 2 is considered to be overall more effective than option 1.

On the format and content of the standard prospectus for an offer of securities to the public or an admission to trading on a regulated market, option 1 would broadly maintain the *status quo*. In contrast, option 2 would significantly streamline the standard prospectus, allow to draw it up in English and further standardise its format. Therefore, only option 2 - and not option 1 - would address the concern of the majority of stakeholders in the public consultation[173] that the standard prospectus in its current form does not strike an appropriate balance between effective investor protection and the proportionate administrative burden for issuers. On balance, option 2 is considered to be more effective in reducing the burden for issuers and enhancing comprehensibility and readability of the prospectus for investors. Option 2 is also more cost efficient than option 1.

For issuers, mainly SMEs, offering securities to the public and listing on an SME growth market, option 1 could be considered highly effective for domestic issuances, as it would exempt from the obligation to publish a prospectus (which would be replaced by the admission document). However, option 1 would lack effectiveness as far as cross-border public offers and listings are concerned, as the admission document, vetted by exchanges, would not be passportable (i.e. issuers would still have to produce an old-form prospectus if they wanted to go cross-border). Furthermore, given the lighter prospectus regime for MTFs/SME growth markets that exists currently, it is already relatively easy for issuers to avail themselves of a prospectus exemption (e.g. an offer solely addressed to qualified investors).[174] Option 2 can, therefore, be considered more effective overall (i.e. for both domestic and cross-border issuances), as, compared to the already existing possibility for issuers to opt for a local admission document (and not produce a prospectus), it would create a short(er)-form passportable EU admission document. Option 2 would also be more cost efficient, decreasing the cost of producing a passportable EU admission document compared, for example, to a more extensive in contents SME growth prospectus that would still need to be produced under option 1 for cross-border public offers and listings on SME growth markets.

Finally, for secondary issuances of securities fungible with securities already admitted to trading, option 2 is considered to be more ambitious, effective and cost-efficient than option 1. In fact, option 1 would replace, in all cases, the simplified prospectus for secondary issuances with a more streamlined EU Recovery prospectus. Option 2 would take a step further and introduce a prospectus exemption for secondary issuances of securities fungible with securities already admitted to trading, while requiring the EU Recovery prospectus only for secondary issuances for non-fungible issuances (and other cases not covered by the exemption).

*Scrutiny and approval of the prospectus*. Option 1 confers the scrutiny and approval of prospectuses to exchanges, while option 2 aims to streamline and make more convergent the scrutiny practices and approval procedures of NCAs. While exchanges might be expected to use a more "business-friendly" approach than NCAs in scrutinising and approving prospectuses, it is unclear whether the additional costs (e.g. staffing) and liability of exchanges might lead to the same inefficiencies (and lack of convergence) which, according to stakeholders, affect the scrutiny and approval of prospectuses performed by (some) NCAs and render them inefficient. Furthermore, option 1 would

[173] 35 stakeholders, accounting for 59.3%.
[174] See section 6.1.1 and 6.1.2 of this IA for more detail.

entail expensive structural changes for both exchanges and NCAs (which may become more reliant on state subsidies), and should be accompanied by regulatory safeguards to prevent the conflict of interest to protect issuers from excessive scrutiny fees. Finally, few stakeholders that expressed an opinion in that regard, highlighted that the NCAs' scrutiny and approval is the preferred option as it provides investors with confidence in investing. Option 2 is therefore considered to be overall the preferred option both in terms of rendering the scrutiny process more effective and more cost efficient (due to high liability for exchanges, risk of higher scrutiny fees charged to issuers and increased state support for NCAs).

### 7.3. Options addressing the overly burdensome ongoing disclosure requirements (Post-IPO)

Both options 1 and 2 are deemed effective in addressing the lack of clarity of the notion of inside information and the excessive scope of disclosures when interpreting this notion.

A closed list of material events under option 2 would bring a higher level of legal clarity to issuers than option 1, largely removing – and not only partially mitigating - the risk for issuers to be sanctioned for not disclosing the relevant information due to wrong legal interpretation. Option 2 is therefore likely to be more effective in addressing the specific objectives related to the unnecessary regulatory burden. At the same time, this option would limit the accountability of issuers and introduce additional risk of insider dealing practices as described in section 6. This could potentially weaken the market abuse framework. Option 1 is therefore likely to be much more effective in delivering on the specific objective of investor protection and market integrity than option 2. In addition, option 2 involves practical difficulties related to the design of the exhaustive list covering all possible scenarios and to its static (at least in the short-term) nature. An open indicative list, complemented by clarifications related to delayed disclosures under option 1, would not suffer from those weaknesses. In addition, a more proportionate regime for sanctions imposed on SMEs under option 1 would also allow to better calibrate the MAR regime for smaller companies, thus (indirectly) further reducing the regulatory burden.

In terms of costs, both options are expected to significantly decrease issuers' expenses, with a slight advantage for option 2. However, this is outweighed by the additional costs for investors and supervisors, due to the potential weakening of the market abuse framework that option 2 entails.

On balance, option 1 is therefore deemed to be both more effective and more cost efficient than option 2, striking the right balance between the interests of issuers, investor protection and market integrity. This option would satisfy the key objective of ensuring better legal clarity without jeopardising the other specific objectives of the initiative.

## 8. PREFERRED OPTION

### 8.1. Overall impact of preferred options

The selection of the preferred option(s) to achieve an objective has been done with the aim to maximise the effectiveness in addressing the specific objective related to a problem, while limiting the costs and potential negative side-effects on other specific objectives.

The preferred options will contribute to the CMU agenda and its objective to diversify the funding of EU companies and ensure the development and further integration of capital markets in the EU. The regulatory measures proposed in this initiative are expected to have an impact on all companies in the EU, but in particular on SMEs which are more exposed to the (excessive) regulatory burden than larger companies with a higher cost absorption potential.

Option 1 is the preferred option to remove unequal opportunities for EU companies when listing, due to fragmented national rules on MVR shares, and to increase flexibility for founders when listing across the EU (pre-IPO stage). Option 1 is likely to lead to more incentives for issuers to list on public markets across Member States where these structures are not allowed while not impacting issuers in Member States with well-functioning regimes. It would seek to implement the EU-level principles of targeted harmonisation of national legislation on MVR shares, allowing for its use across the whole EU.[175] The preferred option to address the fragmentation of EU legal regimes on MVR share structures seeks to provide companies with further incentives to seek listing on public markets, while safeguarding the interests of investors, in coherence with the objectives of EU legislation in the area of company law, corporate governance and shareholder engagement (e.g. Shareholder Rights Directive and Directive on Sustainable Corporate Governance). Under the preferred option, investors would therefore enjoy a minimum degree of protection across the EU when investing in companies with MVR shares. Any identified corporate governance risks could be further addressed by targeting the intervention to a specific subset of companies, e.g. issuers listing on SME growth markets.

Option 2 is the preferred option to address the overly burdensome listing requirements in the EU (IPO phase). Option 2 significantly streamlines the contents of a prospectus and provides significant cost and burden reduction for issuers. Moreover, this option combines the positive aspects of a streamlined prospectus – shorter and more standardised - with a more efficient and convergent scrutiny and approval process by NCAs. Investors will also benefit from lighter and more streamlined prospectuses which will be easier to read and to navigate through (in compliance with the specific objective on investor protection). Furthermore, the electronic format will enable accessing and navigating the prospectus on an electronic support tool, which is nowadays more commonly used by investors. This will also be in line with the results of the public consultation where 93% (50 out of 54) of all respondents agreed with the need to publish prospectus only in an electronic format. Under the preferred option, NCAs' scrutiny - albeit streamlined - will be maintained, to safeguard a high degree of investor protection and to reinforce trust of investors into the capital markets. SMEs will in particular benefit from a short-form EU admission document tailored to their needs which will also be passportable.

While introducing considerable alleviations for issuers, option 2 also ensures that the level of transparency for investors is not negatively affected. In case of incorporation by reference, issuers will be required to provide access to referenced documents via an electronic link, so that information can be easily accessed. The proposed prospectus exemption for secondary issuances of securities fungible with securities already admitted

[175] The option would also seek to ensure that Member States strike a proper balance between the interests of founders and minority investor protection, as well as reflect sustainability or other relevant policy considerations when designing those safeguards.

to trading will nevertheless be subject to the requirement to publish and file with NCAs a statement of compliance with the existing disclosure and reporting obligations and a short summary document detailing the use of proceeds and other relevant information not yet disclosed publicly.

The possibility to use only English for drawing up the prospectus will be counterbalanced with the requirement to have the summary (which contains the essential information to take an investment decision and is in many cases the only document that retail investors consult) in the language(s) of the Member State where the public offer is made.[176] As disclosure of and access to all the relevant information are maintained, none of the proposed measures will create the need for investors to perform any additional due diligence, and a high level of investor protection will be safeguarded.

Option 1 is the preferred option to address the overly burdensome ongoing disclosure requirements (Post-IPO phase). It will be both more effective and more cost efficient in achieving the specific objective of lower regulatory and compliance costs for already listed companies, while preserving a sufficient level of market integrity and accountability of market participants. The preferred option, centred on the inclusion of a non-exhaustive indicative list of material events, aims at providing clarification as to price-sensitive events, which have reached a stage of maturity that makes them suitable for disclosure. At the same time, such a *non*-exhaustive list does not remove the need for issuers to make sure that they disclose also other, potentially price-sensitive events (including the ones that cannot be easily predictable in advance and hence included in a list). It thus ensures that all relevant events are disclosed, hence maintaining the necessary high level of market integrity. Finally, the preferred option will be accompanied by a reinforcement of the supervisors' monitoring system for order data (cross-market order book surveillance, described in Annex 11) which, through the standardisation of order data reporting formats and the facilitation of exchanges of such data between national authorities, will enrich the market abuse supervisory toolbox, thereby ensuring greater market integrity and enhancing investor confidence. In addition, targeted amendments to the sanctioning regime under MAR will create a more proportionate level of sanctions for smaller issuers (SMEs), when found in breach of disclosure-related rules. The preferred option strikes the right balance between a cost reduction, on the one hand, and the primary need to safeguard market integrity and investor protection, on the other.

## 8.2. The scale of magnitude of the expected impacts of the accompanying measures

### Prospectus Regulation

In terms of the scale of magnitude, the accompanying measures under the Prospectus Regulation[177] set out in Annex 10 of this impact assessment are expected to have an impact that ranges from marginal to limited.

1. ***Simplify and alleviate the universal registration document (URD) regime.*** As the URD is built on the registration document which is part of the standard prospectus for equity

[176] In the public consultation, this was the second most popular answer (34% i.e. 20 out of 59 respondents) when respondents were questioned about the prospectus language rules (mainly banking associations, some investors, and some NCAs). The most popular answer (36% 21 out of 59 respondents) was to allow the entire prospectus to be drawn up in English only (mainly exchanges, issuers, and some Investors and NCAs).

[177] See Annex 10, section 2.

securities, by streamlining the latter the URD will automatically become a more efficient document. Under the proposal, it would be possible to draw up the document in English and grant the status of frequent issuer after one year of approval. Given that URDs approved in 2020 and 2021 were respectively 56 and 35, and mainly in one jurisdiction, the expected impact of this measure is considered to be marginal.

2. ***Harmonise the upper prospectus exemption threshold for small offers of securities to the public (no national discretion) and remove lower threshold.*** The harmonised threshold across the Union should be set taking as reference the average threshold proposed by stakeholders (EUR 12 million) and considering that most of EEA Member States are already converging towards the upper threshold (about half have EUR 8 million and another quarter - EUR 5 million). It is considered that raising the threshold for exemption (and removing the national discretion below it) would not affect large issuers in a significant manner whose public offers are generally much higher. Small issuers, including SMEs, however, are likely to benefit from the measure, as in certain cases they would no longer have to produce a prospectus, lowering substantially their regulatory costs and incentivising them to list on public markets. Furthermore, the lack of clarity of the current provision resulted in some Member States exempting every single offer of securities that an issuer makes below the applicable threshold. The proposal should clarify that the new harmonised exemption threshold refers to the total aggregated consideration of all offers of securities to the public that an issuer has made in the 12 months preceding the start date of a new offer (to be aligned to ESMA's proposal in its response to the targeted consultation). In the MS that are currently exempting any issuer's offer below the applicable threshold, this clarification is expected to reduce the overall number of offers exempted, even if the harmonised threshold is increased. As described in Annex 10 section 2, the analysis carried out in the impact assessment accompanying the proposal for a Prospectus Regulation[178], indicated that at least 3% of approved prospectuses in 2013-2014 would have fallen out of the scope if an exemption threshold were set at EUR 10 million; this percentage would increase to at least 6% with a threshold set at EUR 20 million. The expected impact of this measure is therefore considered to be limited (although positive), also considering that this exemption would only apply to public offers of securities but not to securities admitted to trading on a regulated market.

3. ***Reduce the current minimum six day-period between the publication of a prospectus and the end of an offer of shares***. The expected impact of this measure, which aims to facilitating swift book-building processes (especially in fast moving markets) and increase the attractiveness of the inclusion of retail investors in the IPOs, is considered to be limited (although positive).

4. ***Make the CMRP amendments to the supplement regime permanent***. As these measures are currently in place, there is no additional cost for stakeholders (including Member States and public authorities) associated with this action. ESMA's proposal to specify that financial intermediaries are required, where applicable, to contact investors only by electronic means (given the short timeline to do so) is expected to have a marginal (positive) impact (reduction of burden for financial intermediaries and more sustainable processes overall).

[178] SWD(2015) 255 final (pages 21 and 45), available at: EUR-Lex - 52015SC0255 - EN - EUR-Lex (europa.eu)

5. ***Introduce a reference to environmental, social or governance (ESG) matters in the empowerment for the Commission to adopt delegated acts to lay down the format and content of the prospectus***. This measure aims to improve consistency and comparability of information included in prospectuses and fight greenwashing. It is expected to have a marginal impact for equity issuers, who will only be required to incorporate by reference the sustainability-related information published, where applicable, under the upcoming Corporate Sustainability Reporting Directive (amending the Accounting Directive). This measure is expected to have a limited impact (i.e. higher cost) on issuers of non-equity securities that advertise as taking into account the ESG factors or contributing to the ESG objectives: such issuers will be required to disclose ESG-related information, which should be targeted and light touch and should not constitute an excessive burden for issuers, which the Commission should set out in a new annex to Delegated Regulation (EU) 2019/980. The measure will, however, provide better information on the ESG factors to investors, thus enabling them to better assess and compare investment opportunities on that basis.

6. ***Amend the currently unworkable equivalence regime.*** The objective is to render operational the existing rules on equivalence (Article 29 of the Prospectus Regulation). Given that Article 28 of the Prospectus Regulation already allows third country issuers to offer their securities to the public in the EU or seek admission to trading of their securities on EU regulated markets by drawing up a prospectus in accordance with the Prospectus Regulation, the expected impact of this measure is considered to be marginal.

**Market Abuse Regulation**

***Simplify and clarify the rules on market soundings.*** The expected impacts of a simplified and optional regime are considered together, noting that any quantification is difficult due to data limitations as regards previous soundings and recordkeeping practices. Envisaged changes are largely of a streamlining and clarifying nature, leading to negligible (positive) impact on the cost of compliance and market integrity compared to the status-quo. By clarifying that the sounding regime is optional (constituting a "safe harbor"), the regulatory burden should be reduced, both at the level of the industry as well as the supervisor. The clarifications remove over compliance by participants who previously filed market soundings, despite no presence of inside information.

***Extend the alleviations on insiders lists to all types of markets.*** This measure will decrease the burden of drawing up such lists, including for issuers on regulated markets, with in particular the difficulty to collect personal data.

***Create a mechanism for the exchange of cross-market order book among authorities.*** The impact of this measure will be limited, as some Member States would be able to build on the work already done under the ongoing pilot project run by several national competent authorities. According to the preliminary estimates, an initial total overall set-up cost of the tool would be around EUR 300 000 – EUR 400 000, that could be funded by the contributing Member States. Nevertheless, Member States, in particular those taking part in the ongoing project, would be able to benefit from synergies with the existing infrastructure (for transaction reporting), thus brining this cost down. The total annual maintenance cost is estimated at about EUR 150 000 – EUR 200 000.

## 8.3. Coherence of the preferred options

The preferred options are coherent with the existing legal frameworks. The proposed alleviations should avoid a detrimental impact on market integrity and investor protection.

More specifically, MAR already highlights, as one of its objectives, the reduction of regulatory complexity and firms' compliance costs, especially for firms operating on a cross-border basis, while avoiding any detrimental impact on market integrity. Similarly, the Prospectus Regulation sets out that the aim of the regulation is to ensure investor protection and market efficiency, while enhancing the internal market for capital.

The adjustments provided for in the preferred options under the Prospectus Regulation and MAR to facilitate access to capital markets for companies in the EU, while preserving the objectives of investor protection and market integrity, are, therefore, fully in line with the primary objectives of these regulations.

All of the amendments are in line with the objectives of the CMU Action Plan and in particular its Action 2 to simplify the listing rules for public markets.

**Impact on competitiveness**

Currently EU public markets are underdeveloped when compared with those in the UK or in the US which are the direct competitors in terms of attracting companies to list. This initiative is expected to increase the competitiveness of EU public market by reducing the regulatory burden throughout the listing process and increasing the flexibility for issuers considering listing which will ultimately make EU public markets more attractive. Specifically, the proposal on MVR share structures seeks to provide all EU companies with the flexibility that is already available in the US and UK (as well as in Asia). Nevertheless, as multiple factors affect the company's decision to list, many of which this initiative cannot address, some challenges regarding the competitiveness of EU public markets are likely to remain.

**Impact on Sustainable Development Goals (SDGs)**

This initiative is expected to directly or indirectly contribute to the achievement of SDG 8 (Decent work and economic growth) and SDG 9 (Industry, innovation, and infrastructure). Annex 3 provides more detail.

**Environmental impacts, do no significant harm, including climate consistency check**

The initiative is not expected to have any significant direct environmental impacts.[179] A significant number of companies listed on public markets, however, may engage in the development and innovation process of new environment-friendly technologies. A better access to finance will allow these companies to grow at a more rapid pace and allocate more financial resources to respective R&D programmes.

**Social impacts**

The initiative is not expected to have a direct social impact. However, there can be a positive indirect impact. Although the (indirect) social impact cannot be quantified, it is likely to be positive.

[179] The only exception being the amendment to remove a possibility to request a prospectus in a paper format.

Provided that the preferred options achieve their objectives to contribute to easing of the access to public markets, EU companies would be able to benefit from a more diversified and larger pool of funding sources, allowing them to innovate, grow and employ more staff.

As the initiative targets in particular SMEs (with some measures directly addressed at them)[180], the (indirect) impact on employment is likely to be particularly relevant. Today SMEs provide for employment of around 100 million people, account for more than half of Europe's GDP and play a key role in adding value in every sector of the economy[181]. Significantly, they make up 99.8% of EU enterprises[182].

Provided that the initiative achieves its objectives to contributing to a more conducive environment for SMEs' listing and to an improved access to finance for SMEs, these companies will be able to grow at a faster pace, with positive implications for employment. As such, it is expected that the measures, as part of a wider package to facilitate SMEs' access to capital market finance, will positively impact the EU labour market and increase economic cohesion.

**External impacts**

The initiative is not expected to have any significant direct impacts on third countries. If the initiative (in conjunction with other CMU measures) is successful in increasing the overall attractiveness of EU public markets, it may lead (over time) to better integrated, deeper and more liquid EU capital markets, strengthening the EU's global position and positively impacting the EU's open strategic autonomy.

**Impact on fundamental rights**

The preferred options respect the rights and principles set out in the Charter, in particular those in Article 16 (freedom to conduct a business). The free movement of persons, services and establishment constituting one of the basic rights and freedoms protected by the Treaty on the European Union and the Treaty on the Functioning of the European Union is relevant for this measure.

**Impact on SMEs**

This initiative is considered relevant for SMEs, as companies in the scope of the initiative include SMEs listing or listed on a trading venue. Current listing requirements lead to high costs of compliance for SMEs, potentially reducing the relative benefits of listing for especially SMEs. This initiative would help reduce these costs and make listing on public markets more attractive as an alternative source of financing. Overall, the initiative is expected to bring about annual costs savings of approximately EUR 167 million for issuers, including SMEs.

For more details, please refer to Annex 3.

[180] Such as a more proportionate sanctions regime under MAR or a more streamlined EU admission document for public offer/listing on SME growth markets.
[181] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2020) 103 final - An SME Strategy for a sustainable and digital Europe, p. 1.
[182] Eurostat, 2018 Key Figures (europa.eu).

**Policy options table**

| | | MVR shares | | Prospectus | | MAR | |
|---|---|---|---|---|---|---|---|
| | | Policy option 1: Minimum harmonisation of national legislation to allow for the general principle of MVR shares adopted across the EU (scope possibly limited to a specific subset of companies) | Policy option 2: Maximum harmonisation of national legislation to allow for the principle of MVR shares adopted across the EU (scope possibly limited to a specific subset of companies) | Policy option 1: Scrutiny by exchanges and non-passportable admission document | Policy option 2: Shorter prospectuses with streamlined scrutiny by NCAs | Policy option 1: Enhancing legal clarity with a fine-tuned definition of inside information, non-exhaustive list of events and more proportionate sanctions for SMEs | Policy option 2: Enhancing legal clarity with a closed list of events |
| **Effectiveness** | Reduce regulatory and compliance costs | + | + | ++ | +++ | + | ++ |
| | Ensure investor protection and market integrity | ≈ | ≈ | - | + | + | - |
| | Provide more incentives for issuers to list | ++ | + | ≈ | + | + | + |
| **Efficiency (cost effectiveness)** | | + | ≈ | - | + | + | 0 |

*Green columns represent the preferred policy option. Magnitude of impact as compared with the baseline scenario (the baseline is indicated as 0): +++ strongly positive; + + positive; + slightly positive; – – strongly negative; – negative; - slightly negative; ≈ marginal/neutral; n/a not applicable*

### 8.4.REFIT (simplification and improved efficiency)

This initiative aims to reduce regulatory costs for issuers on regulated markets as well as SME growth markets, while ensuring a high level of investor protection and market integrity. This is particularly the case for the amendments envisioned with regard to the Prospectus Regulation, Market Abuse Regulation and Listing Directive[183].

The initiative takes into account the evidence behind the opinion of the Fit for Future Platform on facilitating SMEs' access to capital and in particular on simplification of the procedures for the admission to trading of securities of SMEs and other listing obligations. The evidence produced by the Platform informed this impact assessment by confirming that, while past alleviations to the Prospectus Regulation and MiFID II have eased the access to public markets for SMEs, the access remains to be constrained with bank loans still representing the main source of financing in the Union. Furthermore, the Platform's call to focus on costs associated with listing requirements and on costs of regulatory compliance for the already listed companies allowed to better define the outlines of the preferred option in this impact assessment.

The table in Chapter 2 of Annex 3 summarises the regulatory cost reductions of the preferred options and quantifies these reductions to the extent possible. Estimates are with respect to the baseline of the unchanged legislation. With a view to the Commission's pursuit of OIOO, it is expected that the initiative will provide overall net administrative cost savings of EUR 167 million annually. The initiative specifically aims at streamlining the current requirements and it is expected that there would be only minor adjustment costs arising from its implementation for issuers and NCAs (see Annex 3 for more details).

## 9. HOW WILL ACTUAL IMPACTS BE MONITORED AND EVALUATED?

The proposal is expected to follow normal implementation procedures. Ex-post evaluation of all new legislative measures is a top priority for the Commission. The Commission shall review the outputs, results and impacts of this initiative once the legal instrument becomes effective. An evaluation is envisaged 5 years after the implementation of the measure and in accordance with the Commission's better regulation guidelines. The Commission presents below a series of metrics that will be compared *ex-ante* and *ex-post* the adoption of the changes included in the initiative. These metrics include:

1. General impacts:
   I. Number of IPOs, and proceeds raised on EU capital markets ;
   II. Number of SME IPOs and proceeds raised on EU capital markets
   III. Number of EU company IPOs outside the EU, with and without MVR share structures;
   IV. Number of secondary issuances;
   V. Number of delistings in EU capital markets;

[183] See Annex 7 for more details.

VI. Market funding ratio of EU companies.

2. Specific impacts:

I. Number and average length of a streamlined prospectus approved for equity securities and non-equity securities on regulated markets (modelled on the EU Growth prospectus);

II. Number and average length of the EU admission documents approved on SME growth markets;

III. Number and average length of new short-form prospectuses (modelled on the EU Recovery prospectus) for secondary issuances of non-fungible securities;

IV. Number of compliance statements and summary documents filed with NCAs in case of an exemption for secondary issuance of fungible securities;

V. Average number of follow-on requests by NCAs to the issuer to submit additional information after the submission of a draft prospectus;

VI. Number and size of IPOs using MVR share structures in the EU;

VII. Number and size of tech company IPOs and family owned company IPOs, including those using MVR share structures;

VIII. Number of requested delays for disclosure of inside information to NCAs;

IX. Number and size of imposed sanctions on SMEs for disclosure breaches by NCAs.

The objective of the evaluation will be to assess, among other things, how effective and efficient the initiative has been in terms of achieving the objectives presented in this IA and to decide whether new measures or amendments are needed. It should be noted that most indicators will provide an indirect measure of the general objective to increase the attractiveness for corporates to list. While the indicators will provide insights as to the effectiveness of the initiative, there are a range of other outside factors that are expected to impact the listing behaviour of EU companies much more strongly than this initiative. These include in particular the stage of the economic cycle, market shocks and the relative attractiveness of debt (including monetary policy, tax treatment etc.). The evaluation will attempt to account for these factors by drawing data and insights from various data sources, including qualitative feedback from stakeholders.

ESMA, Member States, exchanges and issuers (companies) could provide the Commission with the information necessary for the preparation of the evaluation. More concretely, FESE and exchanges could provide most of the general impact indicators and the specific impact indicators linked to MVR shares, such as IPOs by tech companies and family-owned company. The data for other specific impact indicators, notably related to the number and average length of different types of prospectuses, the number of requested delays for disclosure of MAR relevant information and the number and size of imposed sanctions could be requested from ESMA (and NCAs).

Other indicators will be more difficult to establish. The Commission will rely on engaging with stakeholders in consultations and workshops as part of the regular better regulation cycle to gather further data and qualitative input. In addition, it may be necessary to hire and external contractor to collect further data and qualitative input. This concerns in particular data which will not be available directly and will require

estimation and qualitative input of market participants and supervisors, such as data on costs of regulatory compliance.

# ANNEX 1: PROCEDURAL INFORMATION

## 1. Lead DG, Decide Planning/CWP references

This Impact Assessment was prepared by Directorate B "Horizontal policies" and Directorate C "Financial markets" of the Directorate-General for Financial Stability, Financial Services and Capital Markets Union" (DG FISMA).

The Decide Planning reference of the file entitled "Review of the listing rules applicable to companies issuing securities in the EU" is PLAN/2021/1136.

The amendments to existing legislation supported by this Impact Assessment have been announced in the CMU Action Plan. Moreover, on 15 September 2021 President Von der Leyen announced in her letter of intent[184] addressed to the Parliament and the Presidency of the Council a legislative proposal to facilitate SMEs' access to capital, which has been included in the 2022 Commission work programme[185].

## 2. Organisation and timing

Several services of the Commission with an interest in the assessment of this initiative have been associated in the development of this analysis.

Three Inter-Service Steering Group (ISSG) meetings, consisting of representatives from various Directorates-General of the Commission, were held in 2021 and 2022.

The first meeting took place on 28 October and gathered representatives from DG COMP, ECFIN, EMPL, ENER, ENV, GROW, JUST, REFORM, REGIO, RTD, TAXUD, TRADE, LS and the Secretariat General (SG).

The second meeting was held on 7 April 2022, with representatives from DG CLIMA, COMP, CNECT, ECFIN, ENER, GROW, JUST, REFORM, REGIO, RTD, TAXUD, TRADE, LS and the (SG).

The third meeting was held on 19 May 2022. Representatives from DG, COMP, ECFIN, ENER, ENV, GROW, JUST, REGIO, RTD, TRADE, LS and the (SG) participated. This was the last meeting of the ISSG before the submission to the Regulatory Scrutiny Board on 8 June 2022.

## 3. Consultation of the RSB

A draft of the impact assessment was submitted to the Regulatory Scrutiny Board (RSB) on 10 June 2022 and presented during a dedicated meeting on 6 July 2022. The

[184] See p. 4: state_of_the_union_2021_letter_of_intent_en.pdf (europa.eu).
[185] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission work programme 2022 Making Europe stronger together COM (2021) 645 final cwp2022_en.pdf (europa.eu).

Regulatory Scrutiny Board delivered a positive opinion with reservations on the draft on 8 July 2022. The comments formulated by the Board were addressed and integrated in the final version of the impact assessment.

| Issue identified by the Board | Action taken |
|---|---|
| The report should better put the initiative into context. It should explain that the decision to list is affected by a multitude of factors and the Listing Act proposal rather than being a panacea instead is limited in scope and confined to a targeted set of measures aimed at further simplifying the Prospectus Regulation and the Market Abuse Regulation to make listing and remaining listed more attractive. | In Chapter 1.1, it was further clarified that the decision to list and to remain listed is affected by a multitude of factors, most of which are outside the regulators' reach. These factors include geopolitical instability, Brexit, Covid and low interest rates, as well as the features of the ecosystem that determine the cost of services relevant for listing (underwriting services, due diligence, legal advice, etc.). It has now been made clearer in the Impact Assessment that the initiative does not claim to address any of those elements directly and cannot be considered a silver bullet that – on its own – will change remarkably the situation. However, the impact assessment evaluates a targeted set of measures aiming to reduce the regulatory burden, where it is considered to be excessive, increase flexibility for issuers and build the necessary conditions for structural improvements to occur over time. The targeted regulatory changes envisaged for the Prospectus and Market Abuse regulations, as delineated in Chapter 8.1, would thus aim at improving the regulatory regime and generally encouraging the development of a more favourable listing ecosystem, contributing to the wider CMU objective of improving access to financing by companies. |
| The report should state more clearly upfront that the proposed targeted legislative changes are unlikely to fully revive EU public capital markets on their own. It should set out the existing legislation targeting other aspects of this. It should present a clear logic for how the initiative will articulate with related recent and parallel initiatives to solve the underlying problems, including the recent initiative on insolvency law. | In addition to the above explanation, in Chapter 1.1. as well as Annexes 13 and 14, it was noted that this proposal should be analysed in conjunction with other proposed initiatives. The proposed amendments are part of a broader package of measures outlined in the CMU Action Plan, which aim to address other issues currently preventing companies from raising capital on public markets. The Listing Act focuses on alleviating the regulatory requirements that can deter a company from deciding to list or to remain listed ('supply-side'). However, other factors may deter issuers from listing, such as a narrow investor base, especially for SMEs, and a more favourable tax treatment of debt over equity.<br>These elements are addressed by other ongoing initiatives, which include the creation of a consolidated tape through the review of MiFIR, the creation of an EU Single Access Point (ESAP), as well as the proposal to reduce the debt-equity bias for investors (DEBRA). Furthermore, a series of Commission initiatives will further seek to strengthen the investor base for listed equity. This includes the EU SME IPO Fund, the CRR and Solvency II reviews and, lastly, the Retail Investment Strategy.<br>It was also clarified that many of these initiatives are currently in the legislative phase and that, as the final contours of the political agreement are not known yet, it would be impossible to measure |

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|---|---|
| | their individual or combined impact, as well as the extent to which they will contribute to a more favourable listing environment in the EU (including the number of potential additional IPOs). |
| The report should present the evidence on the problem and justification for intervention in a balanced way, taking into account all available information both from issuer and investor perspectives. | A new sub-chapter 2.2.4 was added to better present stakeholder's views on the problem and justification to act. Both favourable and dissenting opinions on the potential measures are presented concerning the actions considered in the pre-IPO phase (MVR share structures), the IPO phase (Prospectus) and the post-IPO stage (MAR), breaking down the responses received to the public consultation by stakeholder type. The stakeholder views are also now more balanced throughout the impact assessment, for example throughout Chapter 6 (impacts of the policy options). |
| It should present the concrete evidence that demonstrates regulatory failure in the Market Abuse and Prospectus regulations. In particular, it should better explain the rationale for proposing changes to the Market Abuse Regulation related to inside information given that the European Securities and Markets Authority concluded that the notion of inside information should be left unchanged, and their guidance would suffice to provide the necessary clarification. | In Chapter 2.2.2, the impact assessment now presents a more detailed explanation of why the Prospectus regulation needs to be amended. It clarified both that data and responses from stakeholders confirmed that the current rules that lead to excessive disclosure contribute to both very lengthy and also very divergent prospectuses across Member States, and that the current rules do not sufficiently frame supervisory scrutiny by NCAs, which leads to further differences in NCAs' treatment of prospectuses.<br>In Chapter 2.2.3, the impact assessment now clarifies better the rationale behind the proposals to review the Market Abuse Regulation. It presented evidence (also contained in Annex 8) on the wide divergences across Member States in the number of disclosures of inside information, which is illustrative of the important differences in interpretation. Evidence was also presented around the divergent approaches surrounding the use of the mechanism for delaying the disclosure of inside information across Member States.<br>Finally, the impact assessment now explains, in Chapter 2.2.3, that while ESMA in its Final Report on the MAR Review concluded that the notion of inside information should be left unchanged and that ESMA's guidance would suffice to provide the necessary clarification, the slight majority of the stakeholders (52%) that expressed an opinion on this public consultation's question considered that ESMA's guidance would not be fully sufficient. Similarly, both the CMU HLF and the TESG concluded that changes to the level 1 text would be needed in order to instil full legal clarity and reduce compliance costs for issuers. Annex 2 and 8 contain more details on this. In particular, Annex 8 summarises the assessment carried out by the Commission in relation to the most relevant MAR provisions for which ESMA's conclusions are not in line with the feedback received from experts and stakeholders. |

| | |
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| The report should be clearer on the available evidence on the effects of MVR share structures on listing decisions and investors willingness to invest in these shares (potential trade-offs). It should acknowledge the uncertainties in the conclusions reached in the analysis | The main text of the impact assessment, in Chapter 2.2.1, now further clarifies why loyalty shares and other alternative share structures (other than MVR share structures) do not constitute viable options and were hence discarded at an early stage: loyalty shares are enhanced control mechanisms designed to foster long-term shareholding among existing investors rather than for founders and issuers to maintain control of their company when listing (i.e. when issuing new equity).<br>Moreover, the impact assessment (Chapter 2.2.1) now explains that it is difficult to show a direct positive correlation between MVR share structures and the number of IPOs, as the decision to list is complex and is influenced by many factors: controlling for the idiosyncratic factors would require a large data set that covers macro, financial and firm-specific variables, which, unfortunately, is not available in this case. It would thus be impossible to draw any meaningful statistical inferences based on the available data. By way of an imperfect proxy, it can however, be observed that there were 276 IPOs in 2021 in the jurisdictions that allowed MVR share structures (representing 38% of the EU GDP) and only 103 IPOs in those that did not (representing 62% of EU GDP). In the US, the popularity of MVR share structures has grown noticeably in the last years, reaching 33% of all IPOs in 2021. Nevertheless, it would not be possible to ascertain that those 98 companies that listed in the US in 2021 with MVR share structures would not have listed if these share structures had not been allowed in the US (or would have listed elsewhere). It can, however, be assumed with a reasonable degree of certainty, based on the above mentioned research and surveys of issuers, that the ability to list with MVR share structures was an important consideration in the overall decision to list. |
| Given the uncertainties related to the effects on incentives both for issuers and investors, the report should explain the risk that the expected increase in Initial Public Offerings may not fully materialise. | The impact assessment now further details in Chapter 6 the analysis carried out to identify the magnitude of costs involved in listing and staying listed. However, it also clarifies that there is no good empirical basis to translate the cost savings expected from this initiative into a number for the increase in future IPOs. This is because the decision to list is complex, and this Impact Assessment refrains from putting forward any estimate of how many IPOs an individual (or joint) envisaged cost saving(s) would lead to (with one notable exception, where such an exercise appears justifiable (see section 6.1.1.)). It is made clear, however, that the result should be considered as a mere illustration of the possible magnitude of the effect, rather than its exact estimate.<br><br>Nevertheless, the impact assessment now makes it clear that while the initiative will not address all obstacles to listing, it will remove those related to the EU regulation from the list of factors that are holding back the development of more active equity markets in the EU. |

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| It should discuss how the preferred options would affect investor protection and market integrity. It should explain why the proposed reduction of reporting requirements will not lower the level of necessary safeguards requested under the Market Abuse Regulation, the Markets in Financial Instruments Directive II and the Prospectus Regulation and how this will affect investor confidence. | In Chapter 6, the impact assessment now elaborates on how the preferred options affect investor protection and market integrity. When considering options, it looks at how each of those options would maintain an appropriate balance between adequate and effective investor protection, safeguarding market integrity and reducing the administrative burden for issuers.<br>Regarding Prospectus and MAR, the impact assessment explains now in more detail in Chapter 8.1 the impact of the proposed changes on investor protection and confidence. On Prospectus, it underlined that disclosure of and access to all relevant information are maintained, to ensure that none of the proposed measures will create the need for investors to perform any additional due diligence and that a high level of investor protection will be safeguarded. On MAR, the impact assessment explained that the proposed alleviations to reduce costs and the administrative burden for issuers were carefully calibrated to avoid a detrimental impact on market integrity and investor protection, which are the core objectives of MAR. No negative impacts on investor protection or investor confidence were identified in the case of MiFID II, due to a limited nature of considered changes. |
| It should discuss the risk of the proposed initiatives resulting in unintended legal loopholes. | Chapter 8.1 was expanded to better present the result of the assessment of the overall impact of the preferred option, including the risk of creating unintended loopholes for each phase of the IPO. Unintended legal loopholes arising from the proposed changes to the Prospectus Regulation were carefully assessed and addressed. Incorporation by reference and broader an exemption from the obligation to draw up a prospectus are counteracted by other requirements to safeguard the high level of investor protection (e.g. on the access to information or additional documents that would need to be made public).In the case of the post-IPO phase (MAR), it is explained why by opting for a non-exhaustive list of events the possibilities of leaving out certain events is voided therefore averting any potential loopholes. |
| The way that stakeholder views are reported gives the impression that the views are only taken into account when they support the argument. The report should provide a more balanced presentation of the different views expressed by different categories of stakeholders on the problem definition, the options and their impacts. Dissenting views should also be presented clearly to allow the reader to gain a balanced impression of the level and sources of support for the initiative. | As noted above, the impact assessment was complemented by a new dedicated section (Chapter 2.2.4) on “Stakeholders’ views on problem drivers”, where more precise figures on stakeholders’ views are presented, breaking them down by stakeholder type and including also minority opinions.<br>In addition, section 6 was extended to better lay out stakeholders’ views in the context of the impact of the policy options on MVR share structures, Prospectus and MAR. Finally, Annex 2 was further expanded to cover the views of stakeholders in more detail. |

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| Annexes 10 and 11 provide an extensive list of accompanying measures that have not been impact assessed. The analysis should give some scale of magnitude on the expected impacts these accompanying measures may have in achieving the objectives at minimum cost. | The impact assessment now further elaborates on the accompanying measures in annexes 10 and 11, which included measures related to MAR, Prospectus and MVR share structures.<br>Here are some examples of how RSB's comments for specific accompanying measures were addressed:<br><br>Market soundings: the impact assessment now explains that the effects of a simplified and optional regime had been considered together, taking into account that quantifications would prove difficult. By gearing the safe-harbour clause towards the most sensitive market sounding cases, the regulatory costs would decrease, without compromising market integrity. Overall, the envisaged changes would be of a streamlining nature, leading to negligible impacts on the cost of compliance and market integrity compared to the status-quo.<br>URD: the impact assessment now clarifies that the current URD regime is not functioning correctly. It is explained how the measures that would be introduced would not have any impact on market integrity and investor protection. By streamlining and allowing the use of English to elaborate the URD, it is expected that there will be a minor positive change in the use of this type of a document compared to the current situation.<br>Cross market order book framework (Annex 11): More information was gathered from ESMA and an NCA on the potential costs and interests of regulators in this measure and its potential impacts. |

## 4. Evidence, sources and quality

For the purpose of the impact assessment, the Commission services collected a significant amount of data directly from securities exchanges, issuers and SME associations as well as ESMA. Moreover, TESG (in force between October 2020 and May 2021) provided some evidence as well as the input from the market itself. In addition, the Commission contracted a study on Primary and Secondary Equity Markets in the EU from Oxera in November 2020, which provides a very detailed overview of the market supported by useful data.

The data collected include statistics on the activity of companies listing on EU public markets and characteristics of documents used to do so. Furthermore, the data collected from stakeholders informed of the monitoring activity of national regulators on market abuse. Summaries of these data can be found in Annexes 2 and 4.

DG FISMA also organised two technical meetings with industry stakeholders. These meetings were held on 5 and 8 April 2022 (See Annex 2 for more details on those technical meetings).

The impact assessment was conducted based on extensive qualitative and quantitative evidence from the public and targeted consultations on the 'Listing act': making public

capital markets more attractive for EU companies and facilitating access to capital for SMEs' (which run between 19 November 2021 and 25 February). Moreover, it was based on a number of ESMA's Reports: MAR Review report[186] as well as the Consultation paper on MAR review report[187], Report on EEA prospectus activity and sanctions in 2020[188], Report on trends, risks and vulnerabilities no. 1 2022 – structural market indicators[189], MiFID II Review report on the functioning of the regime for SME Growth Markets[190], in addition to specific data requests (see Annex 4 for more details).

Other sources used included extensive academic literature and research, notably from various industry associations (AFME, EuropeanIssuers, FESE, ICMA, World Federation of Exchanges, etc).

[186] ESMA MAR Review report, 23 September 2020, ESMA publishes outcomes of MAR Review (europa.eu).
[187] Consultation paper on MAR review report, October 2019 mar_review_-_cp.pdf (europa.eu).
[188] ESMA report on EEA prospectus activity and sanctions in 2020, July 2021 esma32-382-1153_prospectus_activity_and_sanctions_report_2020.pdf (europa.eu).
[189] ESMA report on trends, risks and vulnerabilities no. 1 2022 – structural market indicators xls esma50-165-2058_trv_1-22_risk_monitor.pdf (europa.eu)
[190] ESMA MiFID II Review report on the functioning of the regime for SME Growth Markets, March 2021 final_report_on_sme_gms_-_mifid_ii.pdf (europa.eu).

# ANNEX 2: STAKEHOLDER CONSULTATION

Throughout the Commission's mandates, companies' and especially SMEs' access to public markets has been continuously evaluated. Issues relating to regulatory burden on companies when accessing public markets were raised in the context of the CMU HLF, TESG and the 2020 CMU Action Plan. To obtain further evidence on these issues, a Call for Evidence as well as public and a targeted consultations on the listing act were launched in November 2021. The consultations remained open for a period of 14 weeks (between 19 November 2021 and 25 February).

The Commission services also organised two technical meetings/workshops with industry stakeholders in April 2022.

## 1. Public and targeted consultations on the listing act: making public capital markets more attractive for EU companies and facilitating access to capital for SMEs

The consultation focused on four main areas with specific questions on the existing regulatory framework: (1) Prospectus Regulation; (2) Market Abuse Regulation; (3) MiFID II and (4) other possible areas of improvement. The public section of the consultation included general questions regarding the overall attractiveness of listing on EU markets and the potential hindrances caused by the current regulatory framework.

The Commission received 109 responses, sent by stakeholders from 22 Member States, the US, the UK and Switzerland[191].

The type of organisations most widely represented were company/business organisations, which accounted for 35% of the total, followed by business associations (32%) and public authorities (16.5%). The sector of activity with the strongest representation were operators of trading venues (20%), followed by investment banks (10%) and corporate issuers (9%).

### *General Questions*

The questionnaire enquired about respondents' views on whether EU legislation has been successful in achieving certain objectives. While the overwhelming majority of respondents (70%, or 59 respondents) stated that EU legislation has been successful in providing an adequate level of investor protection, respondents' views were split on whether EU legislation has been successful in i) ensuring adequate access to finance through EU capital markets; ii) attracting an adequate base of professional investors, and iii) providing a clear legal framework. A majority of the respondents believed that EU legislation has not been successful in attracting an adequate base of retail investors and in integrating EU capital markets (48%, or 41 respondents and 40%, or 33 respondents respectively).

[191]In particular, responses came from 15 public authorities (4 ministries of finance, 10 NCAs, 1 national agency); 3 chambers of commerce, 17 exchanges and 2 operators of market infrastructure other than trading venues; 40 industry associations, 4 NGOs, 4 consultancies/law firms, 4 academic institution and 5 private citizens. Those stakeholders come from 22 Member States: AT, BE, DE, DK, EE, EL, ES, FI, FR, HR, HU, IT, LI, LV, LU, MT, NL, PL, PT, RO, SK and SE.

Respondents were then asked on the relevance of a group of specific factors in explaining the lack of attractiveness of EU capital markets. As regards regulated markets, respondents identified the compliance costs linked to regulatory requirements as well as the lack of liquidity of securities as the most important factors (72%, or 66 respondents and 53%, or 44 respondents, respectively, considered them as important - this includes the vast majority of issuers, exchanges, investors and some NCAs), followed by the lack of flexibility for issuers due to regulatory constraints around certain shareholding structures and listing options and the lack of attractiveness of SMEs' securities (which were considered important by 47%, or 39 respondents and 46%, or 39 respondents respectively). As regards SME growth markets, respondents expressed the same views to those related to regulated markets except for the lack of liquidity of securities, which was deemed as an important factor by 58% (45 respondents).

When asked about the most the most important costs faced by issuers in the IPO process, respondents mentioned fees and commissions charged by banks for the coordination, book building, under-writing, placing, marketing and the roadshow (36%, or 25 respondents, stated it is "very important" and 23%, or 16 respondents, stated it is "rather important"). Another cost that was cited as "very important" were the fees paid to legal advisers for the tasks linked to the preparation of the IPO (24%, or 17 respondents replied "very important" and 30%, or 21 respondents, answered "rather important").

When asked about the most important costs of remaining listed, respondents pointed to fees to auditors, to ensure compliance with the listing regulation (19%, or 12 respondents replied "very important" and 33%, or 21 respondents answered "rather important"). Respondents also pointed to significant corporate governance costs (8%, or 5 respondents stated that this cost is "very important" and 27%, or 17 respondents replied "rather important") and ongoing fees to legal advisors (18%, or 11 respondents replied "very important" and 24%, or 15 respondents answered "rather important").

Respondents were further asked if the rules related to listing and the rules related to remaining listed created a burden disproportionate with the investor protection objectives that these rules are meant to achieve. The majority of respondents answered that both listing and post-listing rules create a disproportionate burden (52%, or 42 respondents and 57%, or 45 respondents respectively).

A large majority of 39 respondents (62%) agreed that allowing issuers to use MVR shares when going public would increase the propensity of EU companies to list. This included issuers, exchanges, NCAs and financial intermediaries. A majority of stakeholders also agreed that clarifying the conditions around dual listing (51%, or 25 respondents) and lowering the minimum free float requirements (48%, or 27 respondents) would increase the propensity of issuers to list.

Finally, when asked about the main reasons behind the low level of investments in SME shares and bonds, a large majority of 34 respondents (73%) cited the lack of visibility of SMEs, which results in low liquidity for these securities, as the most important factor, followed by the lack of tax incentives to invest in SME securities (64%, or 27 respondents).

***Questions on the Prospectus Regulation***

Overall, a large amount of respondents admitted that the average cost of the prospectus is difficult to estimate. These respondents stated that the cost depends on various factors,

including legal fees, audit costs, complexity of the business. The general range given by respondents was between EUR 1 000 and EUR 1 000 000.[192] Respondents gave different responses regarding what they find most cumbersome and costly when drawing up the prospectus.[193] Most respondents claimed that they did not have the relevant data to calculate how much costs they are saving with the EU growth prospectus compared with using a standard prospectus. In a similar vein, most respondents answered that they did not have sufficient data to estimate the cost of an EU Recovery prospectus (only few indications of costs were provided).

The majority of respondents (35 stakeholders accounting for 59%[194]) considered that the standard prospectus in its current form does not strike an appropriate balance between effective investor protection and the proportionate administrative burden for issuers and that it should be significantly alleviated. This was in particular the view of exchanges, banking associations and issuers. Amongst those who believed that the prospectus regime strikes an appropriate balance were ESMA and some NCAs. Many stakeholders highlighted that prospectuses are too lengthy for investors. Some respondents suggested to replace a prospectus by a more streamlined and efficient type of a document. The majority of respondents (18 stakeholders, or 53%[195]) believed that the prospectus should be further alleviated rather than replaced outright.

48% (20 respondents[196]) believed that the prospectus regime for non-equity securities has been successful in facilitating fundraising through capital markets, while only 19% (8 respondents) noted that such regime has not been successful. Some respondents, however, suggested limited improvements to the wholesale non-equity prospectus regime, notably in the case where a lot of information is already available in published financial reports (reinforcing the case for more intensive incorporation by reference).

19 respondents (48%[197]) supported the alignment of the prospectus for retail non-equity securities with the prospectus for wholesale non-equity securities (against 25%, or 10 respondents that would disagree, and the rest that expressed no opinion). Some suggested making a distinction depending on whether the issuer is well known and a large amount of information is publicly available. Some respondents considered that retail investors needed more comprehensive information. For most respondents, the accessibility for retail investors is of most importance. Opinions of NCAs on this subject differed.

Many respondents, mainly NCAs, representatives of exchanges, issuers, institutional investors, academics and financial intermediaries (21 respondents accounting for 44%[198]), did not believe that the EU Growth prospectus strikes a proper balance between investor protection and the reduction of administrative burdens for SMEs (while only 13% (respondents) believe it does, and the rest expressed no opinion). A majority of those who responded to this question stated that the EU Growth prospectus should remain the prospectus for SMEs but should be alleviated.

[192] However, for the purposes of the IA, the estimation provided by Deutsche Börse (and validated by Euronext in a bilateral email exchange), encompassing all types of prospectuses were taken as reference. Those estimation range from EUR 20 000 to EUR 300 000 (See Tables 4 and 5 of Annex 4).
[193] See Table 4 of Annex 6.
[194] See section 4.1 of Annex 6 for more details.
[195] See section 4.1 of Annex 6 for more details.
[196] See section 4.1 of Annex 6 for more details.
[197] See section 4.1 of Annex 6 for more details.
[198] See section 4.3 of Annex 6 for more details.

Regarding how the prospectus should be prepared and presented, a vast majority made up of 50 respondents (93%[199]) believed that it should only be provided in an electronic format (as long as it is published in accordance with Article 21 of the Prospectus Regulation). Furthermore, 36%[200] (21 respondents) agreed that the prospectus should be drawn up only in English as the language customary in the sphere of international finance and an additional 34% (20 respondents) agreed on the same statement except that the summary should be exempted from this rule).

Regarding secondary issuances, respondents' views were split. Despite a slight majority composed of 31 respondents (51%[201]) considered that the prospectus requirement should not be lifted for secondary issuances, a significant minority of 26 respondents (43%) considered that issuers listed continuously for at least 18 months on a regulated market or an SME growth market, should not be required to publish a prospectus for subsequent issuances (of fungible securities already covered by a published prospectus).

Regarding the EU Recovery prospectus, there were only few responses with most of the respondents indicating that they have not yet seen a major uptake in the use of the EU Recovery prospectus, and some stakeholders pointing out that the application of the CMRP is very recent (March 2021). As shown in Figure 19 of Annex 6, the largest share of stakeholders who responded to the question were in favour of making the EU Recovery prospectus permanent. They also supported its introduction on a permanent basis for secondary issuances of all types of securities (both equity and non-equity securities).

A majority of 23 respondents (54%[202]) did not think that there is alignment/convergence in the way NCAs assess the completeness, comprehensibility and consistency of draft prospectuses that are submitted to them for approval. The majority of 26 respondents (58%[203]) noted that the minimum period of 6 working days between the publication of the prospectus and the end of an offer of shares should be relaxed in order to facilitate swift book-building processes. Views were evenly split among respondents on whether the timeliness for approval of the prospectus are adequate as prescribed in Article 20 of the Prospectus Regulation.

Respondents could not agree on why there is a small uptake of the URD among issuers across the EU. Respondents generally saw the URD contents requirements as too burdensome, with excessive costs associated to regularly updating, supplementing and filing the URD, a small time period required to benefit from the status of frequent issuer, and the URD supervisory process being too lengthy. A majority (16 respondents, or 52%[204]) believed that, since the URD can only be used by companies already listed, its contents should be aligned to the level of disclosures for secondary issuances (instead of primary issuances as currently is the case) to increase its uptake by both equity and non-equity issuers. Many respondents (17 stakeholders accounting for 49%) believed that issuers should be granted the possibility to draw up the URD only in English for passporting purposes, notwithstanding the specific language requirements of the relevant home Member State (20%, or 7 respondents would disagree, and the rest expressed no

[199] See section 4.1 of Annex 6 for more details.
[200] See section 4.1 of Annex 6 for more details.
[201] See section 4.4 of Annex 6 for more details.
[202] See section 4.7 of Annex 6 for more details.
[203] See section 4.1 of Annex 6 for more details.
[204] See section 4.5 of Annex 6 for more details.

opinion). As regards the way how the URD regime could be further simplified, respondents noted that the URD should not duplicate the information already disclosed.

The majority of respondents (21 respondents accounting for 53%[205]) considered that the temporary regime for supplements laid down in Articles 23(2a) and 23(3a) of the Prospectus Regulation provided additional clarity and flexibility to both financial intermediaries and investors and should be made permanent.

As regards the equivalence regime under Article 29 of the Prospectus Regulation, the number of stakeholders who considered that it should be amended (12 respondents accounting for 385%[206]) outnumbers the share stakeholders that believed otherwise (5 respondents accounting for 16%).

Finally, the majority of stakeholders (27 respondents accounting for 56%[207]) considered that Member States should not be allowed to exercise discretion over the exemption threshold set out in Article 3(2) of the Prospectus Regulation with a view to tailoring it to national specificities of their markets (see section 4.7 of Annex 6 for more details).

***Questions on the Market Abuse Regulation***

When asked if ESMA's clarifications on the notion of inside information would be sufficient, respondents' views were split. However, a slight majority of those who expressed an opinion believed that ESMA's guidelines would not be sufficient to provide the necessary clarifications around the notion of inside information.[208] Those respondents (which included representatives of banks, trading venues, issuers, financial intermediaries and NCAs) expressed concerns that ESMA's guidance would not be effective in removing legal uncertainty. They stated that the notion of inside information is too broadly defined and that too much information has to be published. According to them, a rethink of the notion of inside information is required, which can only be carried out in the context of the Level 1 regulation.

Respondents were further asked whether MAR should distinguish between a notion of inside information for the purposes of prevention of insider dealing and a notion of inside information triggering the disclosure obligation. A majority of respondents who expressed an opinion believed that a distinction between the two notions would be appropriate.[209] Moreover, a majority of respondents who expressed an opinion noted that it should be clarified that inside information relating to a multi-stage process need only be made public once the end stage is reached, unless a leakage has occurred.[210]

The majority of respondents did not share the opinion that relying on a concept (definition) of material events to clarify the notion of inside information would be useful. They were concerned that such an amendment would only shift uncertainty from the notion of inside information towards the concept of material events. They furthermore highlighted that such a change would affect market integrity because it would add

[205] See section 4.8 of Annex 6 for more details.
[206] See section 4.9 of Annex 6 for more details.
[207] See section 4.6 of Annex 6 for more details.
[208] For 52 respondents who expressed opinion on that matter, 25 thought that ESMA's guidelines would be sufficient and 27 were of the opposite opinion.
[209] 19 respondents for 23 respondents who expressed a view in that regard.
[210] 16 respondents for 21 respondents who expressed a view in that regard.

complexity and require time to adapt the established case law, thus ensuing (at least temporary) legal uncertainty and raising compliance costs.

Half of respondents who expressed an opinion (25 stakeholders accounting for 50%) considered that the revision of ESMA's guidelines on delayed disclosure under MAR would be sufficient to provide the necessary clarifications around the conditions to delay disclosure. They argued that ESMA guidelines are a flexible tool that may be easily and quickly amended if the guidelines eventually prove to be inadequate (contrary to EU legislation that follows a lengthy adoption process). The respondents who did not believe that ESMA's guidelines on delayed disclosure would be sufficient argued that difficulties of interpretation stem from notions set out in Level 1 and thus should not be addressed by supervisory guidance. They also noted that the current conditions allowing a company to delay the disclosure of inside information appear to be overly restrictive and contribute to legal uncertainty for issuers. Specifically, the condition requiring that "the delay is not likely to mislead the public" is deemed as difficult to assess.

Respondents were asked if issuers of plain vanilla bonds should have the same disclosure obligations as issuers of equity instruments or if it would suffice to limit the disclosure obligation only to information regarding their ability to repay their debt. The majority of respondents were in favour of the second option and stated that information regarding the ability to repay the debt was sufficient given that bonds are priced differently in comparison to equity products.

The overwhelming majority of 39 respondents (72%) were in favour of an increased threshold for the reporting of managers' transactions under Article 19(8) MAR. They stated that such an increase would not harm market integrity. The respondents however maintained that managers' transactions should be publicly disclosed by NCAs.

Regarding insider lists, there was consensus among respondents that the requirement needs to be simplified for all issuers to ensure that only the most essential information for identification purposes is included.

When asked if respondents considered that the ESMA's limited proposals to amend the market sounding procedure are sufficient, while providing a balanced solution to the need to simplify the burden and maintaining the market integrity, the majority of respondents disagreed (28 stakeholders accounting for 62%). Furthermore, while respondents were in favour of the TESG proposal to exempt private equity placements from market sounding rules, they did not consider the extension of this rule only to SME growth markets as useful.

When asked about sanctions under the current MAR regime, the majority of respondents (22 respondents accounting for 51%), including representatives of banks, trading venues, issuers and financial intermediaries, shared the opinion that the current punitive regime is not proportionate to the objective sought by legislation. They stated that there is no differentiation based on the size of an issuer and the market size and that it is not clear which infringements can fall under criminal sanctions. Respondents were concerned that a possible jail sentence may be excessive, especially for unintentional violations (i.e. related to disclosures).

Respondents seemed divided in their opinion on whether the maximum administrative pecuniary sanctions are a detrimental factor when making a decision to list. A majority of the respondents that responded to the question (63% of SME issuers and 53% of other

issuers), however, noted that the administrative pecuniary sanctions is an important factor on a company's decision to list and it has a higher impact in case of companies concerning potential listing on an SME growth market (i.e. of higher relevance for smaller issuers).

The majority of respondents expressed a preference for a decrease of maximum administrative pecuniary sanctions for infringements of Articles 17, 18 and 19 for SME growth markets and of Article 17 for other markets. They were also in favour of decreasing the maximum administrative pecuniary sanctions for infringements of Article 30(1)(a) other than the ones defined in Articles 16, 17, 18 and 19 for issuers on SME growth markets.

Almost 40% of respondents that responded to the question found that the total annual turnover according to the last available accounts approved by the management body as an inadequate criterion for imposing sanctions that should be replaced. Respondents also were in favour of removing the possibility of applying criminal sanctions in the case of non-compliance with the requirements set out in Articles 16, 17, 18, 19 and 30(1)(b) and highlighted that these infringements are mostly administrative in nature and the breach would not have a direct impact on market integrity.

***Questions on MiFID II***

The majority of respondents (21 respondents accounting for 60%) saw merit in including in Level 1 the conditions under which an operator of an MTF may register a segment of the MTF as an SME growth market. They highlighted that this would enhance legal clarity. They added that such an amendment could also incentivise more MTFs to register SME GM segments.

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. Respondents pointed out that if the dual listing was not possible upon request of the issuer, it would constitute discrimination of such issuers against issuers whose financial instruments are traded on other MTFs. Moreover, the rationale for the Article 33(7) was to limit dual listing in order to concentrate the liquidity of SMEs and reduce fragmentation, given SMEs' lower liquidity, and so it should be the issuers' choice whether to opt for a dual list or not (and not that of a third party as currently seems to be the case).

A small majority of 26 respondents (51%) viewed the new research regime introduced by the CMRP as positive to support SMEs' access to capital markets. Most of those respondents pointed out that the impact of the CMRP is however very limited. Some pointed out that research coverage for SMEs is considered uneconomic for asset managers and research providers and that this appears as a long-term trend. Nevertheless, business associations, in particular, and NCAs pointed out it is still too early to tell what the overall impact of the new regime is.

The overwhelming majority of 35 respondents (73%) would see merit in alleviating the MiFID II regime on research even further. While some suggested to lift the exemption threshold in order to fully cover the small and mid-cap segment, several business associations considered that going back to fully bundled execution and company research pricing is the only solution to boost research for SMEs (which dropped to an almost non-existent level). Some also considered that the MiFID II regime was wrongly designed for

companies of any size. They claimed that MiFID II regime has indirectly become an incentive to allocate a larger part of research services value in the hands of a few big players (i.e. leading to consolidation in the industry).

A majority of 19 respondents (61%) recommended to fully exempt from the unbundling rule research on fixed income, as the reform has not produced any impact on the spreads, nor led to more research by independent providers. However, 3 respondents (10%) were also strongly opposed to the full re-bundling, arguing that this would create an unacceptable non-level playing field between research provided by investment firms and other research producers - research has to be independent regardless of the fact that the entity issuing it may run other activities or may belong to a group. Many respondents (18 stakeholders accounting for 55%) suggested to encourage research sponsored by issuers and argued that this is the sole way to develop research on SMEs (both equity and fixed-income products). They, however, suggested safeguards to increase its acceptability by investors, such as by making it subject to a code of conduct rules and clearly labelling it as issuer-sponsored research (and not as a marketing communication).

***Questions on other possible areas of improvement***

***Questions on SPACs***

As regards SPACs, the answers to the consultation revealed divergent views as to what should be considered for the development of EU SPACs and if an intervention would be necessary.

While the vast majority of 33 respondents (75%) viewed SPACs as an effective and efficient alternative to traditional IPOs that could facilitate more listings on public markets in the EU, a few argued nonetheless that SPACs are difficult to understand and would be an instrument that could harm the traditional IPO market. According to other respondents, SPACs, on the contrary, could be the only way to attract a certain type of private companies, especially SMEs, to public markets. Some respondents claimed, however, that it is too early to tell what the future role of SPACs will be.

A majority of 24 respondents (59%) believed that SPACs, via an IPO or on the secondary market, should be open to retail investors. Various respondents argued, on the contrary, that investing in SPACs is highly complex and presents substantial risks, in particular for retail investors. One regulator considered that investors should be made aware of those risks, and saw SPACs as being only useful to a limited group of investors.

Most respondents that expressed concerns with SPACs pointed to a general lack of transparency, in particular with respect to the dilutive effects of the warrants subscribed by sponsors and/or initial shareholders. Those respondents also saw potential concerns with an emerging gap between the interest of the SPACs' sponsors and investors. The views were evenly split (12 in favour and 12 against, with 11 respondents providing no opinion) as to the need of a clear framework for the deposit and management of the securities and proceeds held in escrow by a SPAC. Some agreed that it is safer to put proceeds on an escrow account to minimize the risk for investors. Various respondents, however, did not view the need for further rules beyond the transparency requirements.

If many respondents pleaded in favour of harmonisation across Member States to avoid SPACs becoming unpopular in the EU, some respondents, however, believed that the current rules should be maintained as they are. A number of respondents argued that

overregulation, as well as limiting the retail investment, beyond product governance rules, would be detrimental to SPACs' development in the EU.

As regards SPACs putting sustainability as a selling point, a majority of 23 respondents (62%) did not believe that SPACs should be subject to specific/different disclosures and/or standards. Various respondents, however, stated that in order to avoid greenwashing or other misleading behaviour, it is key that each NCA ensures a thorough scrutiny process during the prospectus approval phase.

***Questions on the Listing Directive***

A large majority of 24 respondents (59%) considered that the Listing Directive needs to be amended. The opinions of respondents were divided on whether the Listing Directive should be incorporated in another piece of legislation, amended as a Directive or amended and transformed in a Regulation, or repealed. Over 33% of respondents (accounting for 10 stakeholders) believed that the definitions laid down in Article 1 of the Listing Directive are outdated, with an almost 47% of the respondents (accounting for 14 stakeholders) not being able to answer the question and with only six respondents (20%) stating that the definitions are not outdated.

Most respondents (19 stakeholders accounting for 54%) considered that the broad flexibility that the Listing Directive leaves to Member States and NCAs on the application of the rules for the admission to the official listing of shares and debt securities is appropriate in light of local market conditions. The majority of respondents (67%, or 18 respondents) who expressed their opinion considered the expected market capitalisation (Article 43(1) of the Listing Directive), (68%, or 22 respondents) the disclosure pre-IPO (Article 44 of the Listing Directive) and (72%, or 22 respondents) the free float requirement (Article 48(5) of the Listing Directive) as very or rather relevant. A vast majority of respondents, however, considered necessary to maintain the national discretion to depart from the recommended thresholds for free float. Some respondents reasoned that flexibility is needed to adjust the requirements according to the size of the market or issuer (to have the possibility to lower the free float threshold). Some respondents argued that national discretion would not be necessary if an appropriate minimum threshold is set at EU level.

***Questions on MVR shares***

Some respondents stressed that one of the key reasons for the wave of hi-tech, high growth issuers choosing to list in third countries (such as the US or the UK) is the flexibility that these jurisdictions grant to issuers with respect to MVR shares.[211] Similarly, some respondents[212] highlighted that a number of EU companies have recently transferred their statutory seats from countries with limited possibilities for issuing MVR shares (e.g. Italy, Germany and Spain) to the Netherlands, a country that adopted a permissible and flexible approach to MVR share structures.[213] Lastly, 16 respondents (64%) saw merit in stipulating in EU law that issuers across the EU may be able to list on any EU trading venues following the MVR share structure.

[211] Stakeholders supporting this view include investment banks, securities market associations, finance ministries' representatives and private equity associations.
[212] This view was expressed by two stakeholders from the Netherlands.
[213] So far there are a few companies which moved to the Netherlands to list there because of the attractiveness of the MVR share structure. However, there is no available data to corroborate this.

The majority of respondents (83%[214]) considered that, where allowed, the use of shares with multiple voting rights has effectively encouraged more firms to seek listing on public markets. When asked about the impact that MVR shares have on the attractiveness of a company for investors, the majority of the respondents to this question (predominantly issuers and exchanges) considered that the impact is not negative[215]. These respondents noted that MVR shares do not decrease investors' appetite, provided that certain safeguards are in place while highlighting that transparency is key to making sure investors can make fully informed investment decisions. Some of the respondents who viewed the attractiveness negatively (including two NCAs and some investors' associations) expressed their concern about the disappearance of the 'one share – one vote' principle and one respondent noted, in particular, that MVR share schemes may undermine existing accountability mechanisms in corporate governance law, such as shareholders' ability to elect directors, and lead to management's entrenchment. However, even those respondents that viewed the impact slightly negatively or negatively, noted that MVR shares are beneficial in certain situations (particularly for high-growth, innovative, founder-led companies looking to list) and noted that any changes put forward should strike an appropriate balance. This balance should cater for both adequate governance protection, such as limiting the decisions that can be taken with additional voting rights, while also allowing founder-led companies to raise funds on public market and maintaining the founder's long term vision for the company. They thus highlighted that any flexibility around MVR share structures should be approached in a way that safeguards governance standards (e.g. mandatory sunset clauses, non-transferability, automatic cancellation/conversion on exit etc.).

## 2. Technical workshop with industry stakeholders

Two virtual technical workshops were organised at the beginning of April 2022 with industry stakeholders to further refine the policy options that the Commission was considering.

**Meeting with Exchanges (05.04.2022)**

Prospectus Regulation

The participants' views on the page limit were split. Some saw benefits in a 300-page limit while others would prefer the focus to be on further harmonisation (standardisation). As regards scrutiny and approval, exchanges' representatives were in favour of keeping the current system as they believed it works well. Exchanges were not in favour of being put in charge of approval and scrutiny. Some considered NCAs' approval as the seal of quality necessary for investors. There was also support for extending the use of the EU Recovery prospectus for transfers from SME growth markets to regulated markets and for rendering it permanent for non-fungible issuances. Exchanges were also largely in favour of exempting follow-on issuances of fungible securities from the requirement to draw up a prospectus.

Market Abuse Regulation

[214] i.e. 34 out of 41 respondents

[215] 22% (equivalent to 9 respondents) opted for positive or slightly positive, 29% (equivalent to 12 respondents) opted for neutral while 36% of respondents (equivalent to 15 respondents, mostly investors and NCAs) opted for negative or slightly negative.

The exchanges' representatives did not express a definitive view regarding the notion of inside information. They supported further clarification but did not agree on whether this would need to be defined at level 1 (i.e. via an amendment of the regulation) or level 3 (i.e. via ESMA's guidance). As regards sanctions, some highlighted that the current regime should be made more proportionate. They supported the recommendations of TESG and CMU HLF to alleviate the sanctions for breaches of Articles 17, 18, 19 and 30.

Listing Directive/ MVR share structures

Most exchanges were in favour of repealing the Listing Directive as long as certain elements (free float and minimum foreseeable market capitalisation) are incorporated in the MiFID II regime. Some were also in favour of lowering the minimum free float to 10%. One exchange expressed a view that the concept of "admission to the official listing" is important and should be kept. This exchange opposed the repeal of the Directive for that reason.

As to the MVR share structures, exchanges were generally in favour, supporting harmonisation at EU level.[216]

**Meeting with Issuers and Investors (08.04.2022)**

Prospectus Regulation

Instead of an introduction of a page limit for prospectuses, respondents were rather in favour of further streamlining its contents. The views were divided regarding the scrutiny and approval of prospectuses. Some participants highlighted NCAs' scrutiny as important to ensure investors' trust, while others argued it does not bring any added value, being a mere rubber-stamping exercise. As regards risk factors, some issuers' representatives argued that there is merit in disclosing only those risk factors that are directly related to the company. They argued that, for example, the risk factor related to macroeconomic factors is not relevant for the investor's assessment of the company. There was general support for replacing the prospectus for issuers listing on SME growth market with a passportable EU admission document.

Regarding secondary issuances, stakeholders were in favour of removing the need for a prospectus for follow-on issuances of fungible securities. Some suggested that the prospectus should be replaced by another document that is passportable but many called for further flexibility. Several stakeholders were also in favour of improving the regime for transferring from SME growth markets to regulated markets.

Market Abuse Regulation

Participants' views on the introduction of a twofold definition of inside information were split. Some participants outright supported it, noting its potential to preserve market integrity while enhancing legal clarity with respect to the disclosure obligation. Other participants were not in favour of reviewing the notion of inside information and would rather support a clarification through ESMA guidelines.

Several stakeholders agreed to extend the exemption for the market sounding regime (currently applicable to bonds) to private placements of equity and some highlighted that

[216] 83% (5 out of 6 exchanges) were in favour of the EU-level harmonisation.

the regime should be optional (despite the latest ESMA's report findings). On sanctions, many stakeholders found them disproportionate. Some called for sanctions only to be administrative and not criminal, while others emphasised that they should not be based on the turnover of companies.

Listing Directive/ MVR share structures

On the Listing Directive, the stakeholders that expressed a view saw merit in deleting the provision on free float.

Regarding MVR share structures, an issuers' representative highlighted that they would be in favour of more flexibility regarding the use of MVR share structures. An investors' representative stated that they believed the adoption of MVR share structures by issuers is perceived negatively by investors. However, they further added that, if the Commission were to put forward a regime at EU level, a limitation through a sunset provision would be key.

# ANNEX 3: WHO IS AFFECTED AND HOW?

## 1. Practical implications of the initiative

The initiative and options presented in this IA aim to address cost inefficiencies and rigidities in the requirements and conditions for public listings. The preferred options herein strike a balance between cost saving objectives and objectives related to upholding market integrity and investor protection. Proportionality for smaller listed companies is a further prime consideration.

For founders' and family-owned companies, the possibility to be admitted to trading with MVR share structures in any Member State would greatly increase the appeal to list. Adjustments to the Prospectus Regulation would reduce the complexity, length and cost of prospectuses as well as lead to a more efficient, convergent and streamlined scrutiny and approval process. Changes to MAR would make requirements regarding the disclosure (and delay of disclosure) of inside information clearer and easier to comply with. Furthermore, smaller issuers would also benefit from the application of a more proportionate sanctions regime. Overall, the initiative is expected to bring about annual costs savings of approximately EUR 167 million for issuers, including SMEs. Direct cost savings result in particular from the streamlining of the Prospectus requirements and the clarification of the notion of inside information.

It is expected that there would be further cost reductions benefitting NCAs as the simplification and clarification of requirements will equally increase efficiencies in the related supervisory activities. Investors would also benefit from the envisaged regulatory changes, specifically from the reduction in the complexity and length of prospectuses (making them easier to read and understand), as well as the clarifications to the notion of inside information (making it clearer which information and when would have to be disclosed by issuers and hence easier to act upon). However, there is insufficient insight on the exact costs savings that can be expected.

There would, in principle, be no direct impacts on exchanges. However, in the long run, the increased attractiveness of listing and remaining listed due to the regulatory changes would increase the number of listed companies on their venues, therefore increasing their revenues.

Finally, the proposed measures would only lead to minor one-off costs for issuers and NCAs. In the case of NCAs the minor one-off costs would be linked to adapting the scrutiny and approval process to the new (alleviated for issuers) regime. In the case of issuers, the one-off costs would be linked to adapting internal procedures to identify inside information and deciding when to delay the disclosure of said information. Companies willing to list with MVR share structures, would incur minimum one-off cost to ensure that a listing is structured in accordance with the new rules (and more specifically, with the investor protection safeguards in place).

## 2. Summary of benefits and costs

The below table provides a summary of the expected benefits arising from the preferred aggregate option (i.e. all preferred options looked at together).

| *I. Overview of Benefits (total for all provisions) – Preferred Option* | | |
|---|---|---|
| ***Description*** | ***Amount*** | ***Comments*** |
| ***Direct benefits*** | | |
| **Issuers** would benefit from cost savings due to the reduction in the complexity and length of prospectuses as well as a more efficient, convergent and streamlined scrutiny and approval process by NCAs [Prospectus Regulation]. | EUR 67 million (cumulatively for equity and non-equity issuers) | The contents of the prospectus for issuers on regulated market would be shortened and streamlined. In the case of SME growth markets, the prospectus would be replaced with a simpler EU admission documents. Issuers would also be exempted from the obligation to draw up a prospectus in certain cases, where a lot of information about the company and securities is already available to public (i.e. issuers with a track record on regulated markets or SME growth markets). Furthermore, the prospectus would be further standardised (i.e. its sections would be subject to a fixed order of disclosure), it would be published in an electronic format only (i.e. no paper copies on request) and it would be allowed to draw it up in English only (except for the summary).<br><br>Issuers would also benefit from a more efficient and streamlined scrutiny process, both in terms reduced legal fees paid to counsels to respond to numerous requests from NCAs, and from the ability to better plan the expected scrutiny duration (and the general IPO process). These savings, however, would be difficult to estimate. The estimate for the overall cost savings is therefore likely to underestimate the total cost savings stemming from the measure.<br><br>The quantification of benefits is based on annual cost savings (for more details, see Chapter 6.2.2. of the Impact Assessment and Annex 4). |
| **NCAs** would benefit from lower cost of scrutiny of prospectuses, as in the case of secondary issuances of fungible securities, NCAs would no longer be required to approve the prospectus (issuers would only need to file with the NCA a statement of ongoing compliance and a short summary document, neither of which would require ex-ante scrutiny). [Prospectus Regulation] | N/A | It was not possible to estimate the cost savings for NCAs that would no longer be required to scrutinise secondary issuance prospectuses for securities fungible with the securities already admitted to trading, as ESMA/NCAs were not able to provide an estimate of their cost associated with the scrutiny. Based on the annual issuance figures[217], this cost saving would correspond to about 150 less prospectuses requiring scrutiny and approval than today (e.g. in 2021 there were 138 simplified prospectuses for secondary issuances of equity securities and 16 EU Recovery prospectuses for shares that would be in scope of the exemption[218])<br><br>This figure assumes that all secondary issuances of equity |

[217] ESMA's data for 2021.
[218] See Table 9 of Annex 4.

| | | |
|---|---|---|
| | | would be fungible with the primary issuance of securities for an already listed company (i.e. with equity in circulation). This is a conservative estimate that does not take into account cost savings from follow-on issuances of non-equity. |
| **Issuers** would benefit from a clearer and narrower notion of inside information accompanied by a non-exhaustive indicative list of events and by clarifications to the conditions to delay disclosure of inside information. [Market Abuse Regulation] | EUR 100 million | Targeted amendments to the rules on the disclosure of inside information would reduce burden for listed issuers by: (i) limiting the amount of time and costs, including external advisers' fees, currently spent to ensure compliance with the disclosure obligation; (ii) limiting the recourse to delayed disclosure only to exceptional circumstances. The list would provide a clear indication of events that issuers would be expected to disclose, removing the lack of legal clarity and associated with it cost for issuers in those instances. Moreover, clarifications on the conditions to delay the disclosure of inside information would help make ambiguities of the notion less relevant in practice, and reduce the costs currently incurred by issuers in the interpretation and application of these conditions.<br><br>The estimate is based on the assumed annual cost savings from less legal advice/legal assessment necessary in relation to the notion of inside information, on the one hand, and reduced cost of disclosure (as only mature information would need to be disclosed under a narrower notion). For more details, see Chapter 6.3.1. of the IA and Annex 4. |
| ***Indirect benefits*** | | |
| **Companies/founders** (prospective issuers) would be given the option to go public while retaining control of their business through the issuance of MVR shares across the EU and enjoy the benefits of public markets. | EUR 737 million per year [or 11 additional IPOs per year] | A minimum harmonisation of MVR share structures would be beneficial for issuers established in a Member State that currently bans these structures, as it would allow them to retain control of their company (and continue shaping the business in accordance with their respective original ideas and aspirations) while raising a larger amount of funds and enjoying the benefits associated with listing. It would, in particular, reduce (if not fully remove) opportunity costs currently incurred by issuers that remain private to avoid losing control. It would also eliminate the additional costs incurred by issuers that choose to list in another country in order to benefit from this flexibility.<br><br>It was possible to estimate the opportunity cost incurred by companies that are currently not listed (and hence cannot enjoy the growth associated with a public listing) but could have been listed in those Member States that currently prohibit MVR share structures, if those structures were allowed there. For more details, see Chapter 6.1.1 and Annex 4. |
| **Investors** would benefit from enhanced comprehensibility, comparability and readability of the prospectus and from more targeted and more informative | N/A | Investors are expected to also benefit from a lighter and more streamlined prospectus document, which is easier to read and navigate through. Furthermore, the standardised format for prospectuses on regulated markets (i.e. fixed order of disclosure of the prospectus sections) would |

| | | |
|---|---|---|
| disclosures under MAR [Prospectus Regulation and MAR] | | facilitate their comprehensibility and comparability across the EU. In addition, as only mature inside information would be disclosed under a narrowed notion, investors would be able to benefit from more informative disclosures (and less of them), which would further contribute to better decision making by these investors.<br><br>These indirect benefits for investors would not be possible to quantify as there is insufficient data to provide an estimate with reasonable accuracy. |
| **NCAs** would benefit from the improvements to the scrutiny and approval process for standard (IPO) prospectuses, which would be rendered more efficient and streamlined. Furthermore, NCAs would benefit from simpler process of examining notifications on delays of inside information and possibly lower number of such notifications. [Prospectus Regulation and MAR] | EUR 77 018 | By streamlining the scrutiny and approval process, the NCAs would benefit from a faster, more efficient process. The NCAs' powers in scrutiny would be better framed whereby the more precise objective of the scrutiny and of the type of information collectable by issuers would allow to reduce the scrutiny period.<br><br>The timeline for NCAs to provide notification on the decision regarding the approval of an EU Recovery prospectus is reduced from 10 to 7 days as laid down in Article 20(6a) of the Prospectus Regulation. Similar reductions on the scrutiny and approval process are therefore expected in case of non-fungible securities, for which the EU Recovery prospectus will replace the simplified prospectus for secondary issuances.<br><br>The indirect benefits for NCAs resulting from a lower number of delay notifications were estimated at EUR 77 018 (See Annex 4 for further details). It was, however, not possible to estimate other indirect benefits for NCAs (notably those stemming from an improved scrutiny process). |
| **Smaller issuers** would face a more proportionate level of potential sanctions, thus reducing liability risks [MAR] | N/A | A more proportionate level of sanctions for breaches related to disclosure would avoid a disproportionate burden on SMEs, thus reducing the disincentive for them to list in the first place and allowing them to better diversify their sources of financing (e.g. funding through private or public markets).<br><br>These indirect benefits for smaller issuers would not be possible to quantify as there is insufficient data to provide an estimate with reasonable accuracy. |
| **Exchanges and market operators** would benefit in the long run from increased levels of public issuances of equity and debt compared to the baseline scenario [all measures cumulatively] | N/A | It is expected that exchanges would gradually experience an increase in companies seeking admission to trading/listing, as a result of the regulatory alleviations and higher attractiveness of public listing. Exchanges therefore stand to benefit from the initiative in the longer-term.<br><br>These indirect benefits for exchanges would not be possible to quantify as there is insufficient data to provide an estimate with reasonable accuracy. |
| ***Administrative cost savings related to the 'one-in one-out' approach*** | | |
| Streamlined prospectus documentation and more efficient and convergent NCAs' approval | EUR 67 million (cumulatively for equity and non-equity issuers) | The quantification is based on annual cost savings for issuers (for more details, see Chapter 6.2.2. of the IA and Annex 4). It is expected that the largest share of these cost |

| | | |
|---|---|---|
| procedure | | savings would be administrative cost savings. |
| NCAs would no longer be required to approve the prospectus for secondary issuances of fungible securities [Prospectus Regulation] | N/A | See the table above. |
| Clarification of the notion of inside information and of the conditions for delay disclosure [MAR] | EUR 100 million | A clearer notion of inside information will reduce the administrative efforts needed, both on the side of market participants and NCAs. It will provide on-going benefits for companies already listed. The quantification is based on annual cost savings for issuers (for more details, see Annex 4). It is expected that the largest share of these costs savings would be administrative cost savings. |
| Repeal of the Listing Directive (see Annex 7) | N/A | Given the largely outdated nature of the Listing Directive, and the fact that most of its provisions have already been replaced by other EU legislation, it is expected that the repeal of the Listing Directive would generate only marginal cost-savings for issuers. Furthermore, the few provisions in the Listing Directive that may still be relevant, or relevant in at least some Member States (e.g. free float, foreseeable market capitalisation, admission to the official listing), would be incorporated in the MiFID II framework, thus continuing to apply to issuers. |

The table below provides a summary of the expected costs arising from the preferred aggregate option (i.e. all preferred options taken together). As this initiative aims to reduce regulatory costs (mainly for issuers, but also in part for investors and NCAs), it is expected that the preferred aggregate option would raise costs only in very few instances and in those instances the costs would be only marginal. However, it would not be possible to quantify these costs, as there is insufficient data to provide an estimate with reasonable accuracy.

| ***II. Overview of costs – Preferred option*** | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | Citizens/Consumers | | Businesses | | Administrations (NCAs) | |
| | | One-off | Recurrent | One-off | Recurrent | One-off | Recurrent |
| Minimum harmonisation of MVR share structures | Direct costs | None | None | Minimum cost for companies to ensure that a listing is structured in accordance with the new rules (and more specifically, with the investor | None | None | None |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | protection safeguards in place). | | | |
| | Indirect costs | None | None | None | None | None | None |
| Replacement of the EU Growth prospectus with a EU admission documents on SME growth markets | Direct costs | None | None | None | None | Minor one-off costs for NCAs given required changes to internal scrutiny and approval procedures. | None (recurrent costs will be lower than status quo as the overall approval procedure would be made more efficient and streamlined) |
| | Indirect costs | None | None | None | None | None | None |
| Streamlined scrutiny and approval procedure of prospectuses by NCAs | Direct costs | None | None | None | None | Minor one-off costs on NCAs given required adjustments to internal scrutiny and approval procedures. | None (recurrent costs will be lower than status quo as the overall approval procedure would be made more efficient and streamlined) |
| | Indirect costs | None | None | None | None | None | None |
| Clarification of the notion of inside information and of the conditions for delay disclosure | Direct costs | None | None | Issuers would need to adjust internal procedures to identify inside information and to decide when to delay disclosure. This will give rise to marginal one-off costs | None | None | NCAs would benefit from less complex notifications on delays and possibly lower number of such notifications, due to the fact that there would be a narrower and clearer notion of inside information for disclosure purposes. If we assume a 20% reduction in costs related to the examination |

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| | | | | | | | of delay notifications, an estimated cost reduction for NCAs would amount to EUR 77 018. (See Annex 4 for more details) |
| | Indirect costs | None | None | None | None | None | None |
| ***Costs related to the 'one-in one-out' approach*** | | | | | | | |
| **Total** | Direct adjustment costs | None | None | Minor adjustment costs for issuers to adapt to new definition of inside information | None | Minor adjustment costs for NCAs | None |
| | Indirect adjustment costs | None | None | None | None | None | None |
| | Administrative costs (for offsetting) | None | None | None | None | None | None |

| ***III. Overview of relevant Sustainable Development Goals – Preferred Option(s)*** | | |
|---|---|---|
| ***Relevant SDG*** | ***Expected progress towards the Goal*** | ***Comments*** |
| SDG 8 - decent work and economic growth | Contributes to the growth of SMEs by providing easier access to funding through public markets. Newly listed companies are a key motor of new investment and job creation. Easier access to public markets creates incentives for entrepreneurs to diversify in times of economic turmoil, leading to a more resilient economy. | Contributes directly to Target 8.3 "Promote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage the formalization and growth of micro-, small- and medium-sized enterprises, including through access to financial services" and Target 8.10 " Strengthen the capacity of domestic financial institutions to encourage and expand access to banking, insurance and financial services for all" as well as indirectly to Target 8.2 "Achieve higher levels of economic productivity through diversification, technological upgrading and innovation" |

| | | |
|---|---|---|
| SDG 9 – industry, innovation, and infrastructure | Easier access to public markets would increase access of smaller (industrial) companies to new funding opportunities. This would provide them with alternative sources of financing and ensure their ability to grow and innovate, including in the areas of key strategic importance for the EU. | Contributes indirectly to Target 9.3 "Increase the access of small-scale industrial and other enterprises to financial services, including affordable credit, and their integration into value chains and markets" |

## 3. SME Test

### Identification of affected businesses

SMEs are within the scope of this legislative initiative and would be impacted directly and indirectly. It is relevant for all SMEs that currently use market-based funding (e.g. are already listed) and those that consider tapping public markets for their financing in the future. Although there are no official statistics on the number of SMEs that fall under the definition of an average market capitalisation of less than EUR 200 million on the basis of end-year quotes for the previous three calendar years, the data received from the industry points at almost 1500 SMEs already being listed on regulated markets. More than 1700 additional firms are listed on SME growth markets, and while not all of them are SMEs, their share is at least 50%, implying that at least 850 additional enterprises are impacted by this initiative. 3000 further firms are listed on multilateral trading facilities venues other than SME growth markets (which are a subcategory of multilateral trading facilities). While there are no data about how many of them are SMEs, there are reasons to believe that the share of SMEs could be as high as on SME growth markets (i.e. at least 50%), which would imply about 1500 additional entities.[219] These numbers are, however, dwarfed by the number of more than 22 million SMEs in the EU that currently do not have their shares listed. Although many SMEs currently do not consider financing through public markets, about 90 EU-27 SMEs on average went through an IPO each year over 2015-2020, with almost 300 in 2021 alone. The 2020 EC Scoreboard identified about 700,000 SMEs as innovative and characterised by high growth potential. These companies are in particular likely to be interested in accessing public markets that would ensure a flexible and, once listed, efficient way of raising funds for their growth.

Despite being relevant for SMEs, the focus of this initiative is broader than SMEs or SME growth markets (e.g. it also concerns requirements on regulated markets). The requirements applicable to issuers on public markets ensure that investors are given sufficient, timely and accurate information, both at the time of listing and on a continuous basis while companies are listed, so that they can make well-informed investment decisions. For companies, especially SMEs, these requirements may imply in certain cases high administrative costs, thereby potentially reducing the relative benefits of listing. However, these requirements also carry important benefits (and potentially reduce the cost of capital for companies) by fostering market confidence in publicly listed companies (that are subject to high regulatory requirements) and by facilitating risk pricing by investors of listed securities (through accessing timely and accurate investor

[219] The average capitalisation of firms on MTFs is smaller than that on SME growth markets on two stock exchanges with a large number of firms listed on MTFs.

information). This initiative aims to facilitate the access to public market financing for all companies, while in particular establishing a more proportionate regime for SMEs. The initiative would take into account the compliance burden of SMEs, as well as the (relatively) higher importance for the overall market integrity of regulatory compliance by larger firms. The amendments to Prospectus Regulation and Market Abuse Regulation would cover all companies (including SMEs) admitted to trading on any trading venue, as well as companies (including SMEs) considering a listing. In addition, amendments to the sanctions provisions under MAR would be done with a view to providing a more proportionate sanctions system specifically for SMEs (and exclusively for breaches of disclosure-related provisions). The new Directive on MVR share structures will target only companies listed on SME growth markets (where, in line with the MiFID legal requirement, at least 50% of all companies have to be SMEs.)

**Consultation of SME Stakeholders**

Over the recent years, companies', and especially SMEs', access to public markets has been continuously evaluated. Issues relating to regulatory burden on companies when accessing public markets were raised in the context of the CMU HLF, TESG and the 2020 CMU Action Plan. In its discussion on listing rules, the HLF focused specifically on SMEs. The mandate of the TESG was to review the functioning of SME growth markets with respect to their initial purpose which was to create a regulatory environment that is proportionate to SMEs needs. Both expert groups had a number of representatives of SMEs as well as of SME growth markets, including EuropeanIssuers, SMEUnited and BME Growth.

ESMA consulted stakeholders in the preparation of its report on the functioning of SME growth markets in 2020. To obtain further evidence on these issues, a Call for Evidence as well as public and a targeted consultations on the listing act were launched in November 2021. National business associations representing the interests of SMEs submitted their replies to the consultation. The Commission services also organised two technical meetings/workshops with industry stakeholders in April 2022, to which associations representing SME interests were invited and participated. All the feedback received was taken into account when considering the best course of action for the legislative proposal.

**Assessment of the impact on SMEs**

This initiative aims to make listing more attractive as an alternative source of financing also for SMEs. While the scope of this initiative is broader than SMEs and SME growth markets, SMEs would benefit from lower costs of issuing financial instruments on public markets, from lower compliance costs when being listed on public markets and overall from the introduction of more proportionate rules specifically foreseen for SMEs.

The possibility to use MVR share structures would enable SMEs established in a Member State that currently bans these structures to raise larger amount of funds on more attractive terms for founders. They would be able to enjoy the benefits associated with listing without excessively diluting their ownership.

More concretely, SMEs would benefit from lower issuance costs stemming from the intended alleviation of prospectus requirements. Companies offering securities to the

public and listing on SME growth markets would have to draw up a shorter and simpler EU Growth issuance document, which would be subject to a page limit. In the case of secondary issuances, issuers of securities fungible with securities already listed on an SME growth market would be exempted from the requirement to draw up a dedicated admission document.

A narrower notion of inside information for disclosure purposes would reduce the ongoing costs of being listed, triggering less but more relevant disclosures. SMEs would also benefit from a more proportionate sanctions regime for compliance with the disclosure obligations. Provided that the initiative achieves its objectives of contributing to a more conducive environment for SMEs' listing and to an improved access to finance for SMEs, these companies will be able to grow at a faster pace, with positive implications for GDP and employment.

**Minimising negative impacts on SMEs**

SMEs face a disadvantage relative to large firms in using market funding. To mitigate for this disadvantage, the EU created a dedicate regime for SME growth markets with regulatory requirements proportionate specifically to SMEs. The preferred options in this impact assessment would facilitate the use of market funding by companies and especially SMEs. They would reduce SMEs' costs of drawing up prospectuses, their costs of complying with MAR and provide enhanced opportunities in some Member States to raise equity through the adoption of MVR share structures. The changes to the rules on prospectuses and market abuse are already designed to account for the specific situation of SMEs that aim to tap public funding markets and therefore do not require further measures to compensate for the overall disadvantage of SMEs in doing so. The advantages they bring to large firms, which have relative cost advantages over SMEs in drawing up prospectuses and complying with ongoing MAR requirements due to their size and availability of resources, are not likely to curtail opportunities for SMEs to tap funding on public markets. The possibility to issue adopt MVR share structures would allow entrepreneurs to keep control when tapping equity markets, which is particularly relevant for start-ups and family-run SMEs. The EU intervention in this area thus focuses specifically on SME growth markets.

# ANNEX 4: ANALYTICAL METHODS

This annex explains the economic analysis carried out for the IA. The first section reports on data sources and their limitations, since issues related to data coverage and quality constrained the analysis that could be undertaken in the various fields relevant to the IA. The second section demonstrates to what extent the European corporate sector makes use of market funding and in particular of funding through listed shares. The third to fifth sections focus on the determinants for the use of market funding that this initiative aims to address: the (indirect) issuance costs determined by the loss of corporate control as a potential obstacle for companies to seek listing on public markets in section 3, the costs of producing a prospectus in section 4, and the costs of being listed due to the need to comply with the MAR rules in section 5. The analysis aims to identify the magnitude of costs involved and to provide scenarios to what extent regulatory alleviations could reduce these costs and improve incentives for firms to make more use of market funding.

## 1. Data sources and data limitations

This IA builds on various data sources. The 2020 study by Oxera[220], which provides numerous statistics and a comprehensive analysis of primary and secondary EU equity markets, was a key input for the analysis performed in this impact assessment. In addition, statistics from public and commercial databases, and data provided by stakeholders were used. The Commission sent targeted requests for data to ESMA, to trading venues (via FESE), to issuers (via EuropeanIssuers), and to SMEs (via SME United). These targeted requests yielded information on the breakdown of prospectuses, the size of the various market segments, and observations on selected cost elements. The impact assessment further considered the recommendations and analysis by the CMU HLF, TESG, and by ESMA in its reports on prospectuses approved[221] and market abuse[222], and ESMA Peer Review of the scrutiny and approval procedures of prospectuses by authorities of 21 July 2022[223]. The public consultation held from October 2021 to February 2022 and workshops with stakeholders in March and April 2022 provided further insights into stakeholders' positions with regard to certain targeted issues. Some stakeholders substantiated their positions, for example, in the public consultation with data, which was also used for the analysis.

Despite the efforts taken to collect all relevant data from different data sources, the data collection procedure suffered from the three main limitations.

- *First*, official EU statistics on the structure of capital markets and listed products is incomplete. For example, for each Member State, the ECB publishes issuance data on bonds,

[220] Oxera, 'Primary and secondary equity markets in the EU', *Final Report*, November 2020, https://op.europa.eu/en/publication-detail/-/publication/54e82687-27bb-11eb-9d7e-01aa75ed71a1/language-en/format-PDF/source-193781844.

[221] The ESMA report on EEA prospectus activity and sanctions in 2020 is the latest report published by ESMA. Due to the recent implementation of the new storage mechanism, the yearly report containing statistics on prospectuses approved and notified in the Union and a trend analysis, which ESMA is required to publish in accordance with Article 47 of the Prospectus Regulation is not available at the time of finalising this impact assessment. For the year 2021, on request by the Commission services, ESMA provided data on prospectus activity, mostly extracted from the storage mechanism.

[222] ESMA's report on the Review of the Market Abuse Regulation of 24 September 2020, available at https://www.esma.europa.eu/press-news/esma-news/esma-publishes-outcomes-mar-review.

[223] ESMA Peer Review of the scrutiny and approval procedures of prospectuses by authorities of 21 July 2022 (ESMA42-111-70). Available at: esma42-111-7170_final_report_-_prospectus_peer_review.pdf (europa.eu).

but not on listed shares. ESMA started releasing annual statistical reports on EU securities markets in 2020 and structural market indicators only in February 2022.[224]

- *Secondly*, collection of data from secondary sources caused issues in terms of data manipulation (consistency of data, aggregation of data and data cleaning). For instance, data on IPOs published by FESE is compiled from its member exchanges, but not all exchanges reported the number and value of follow-on issuances of shares. As another case in point, it is challenging to report the number of listed firms per country because listing venues do not report issuers by nationality and multi-country venues do not provide country-specific data for each country they cover.[225] Hence, aggregates can only be calculated from ISIN codes at instrument level. Finally, some data points are subject to quality issues, double entries or have missing data. When data comes from different sources, differences in definitions and concepts create inconsistencies and (partial) overlap of data, for example double listing of firms on different venues turned out difficult to control for. The matching of data from different sources required intense manual checks to improve data quality.
- *Thirdly*, data was not always available to investigate certain issues. For example, there is little information about the costs of regulatory compliance and the breakdown of issuance costs as firms might have little interest to reveal this information (or do not consistently record it – in particular, as far as indirect costs are concerned). Stakeholders often provided information on costs of issuance by stating cost ranges rather than precise cost estimates, but even then figures varied substantially. As a result of the above limitations, the results in the impact assessments have to be interpreted with caution.

Table 1 presents an overview of the market structure on EU-27 exchanges in 2021 sourced from data provided by FESE for this IA. It shows the breakdown of equity and bond instruments, the value of outstanding amounts, the magnitude of new issuers (IPOs) and follow-on issuances across regulated markets, SME growth markets and other multilateral trading facilities (MTFs). Some exchanges did not report follow-on equity issuances and although many exchanges reported data also for previous years, data gaps and breaks caused by mergers of exchanges prevented the calculation of time series.

[224] See esma50-164-4665_smis.pdf (europa.eu)

[225] The WFE does not provide such data for Member States in which multi-country exchanges act. Euronext provided such a breakdown to the Commission, but not Nasdaq.

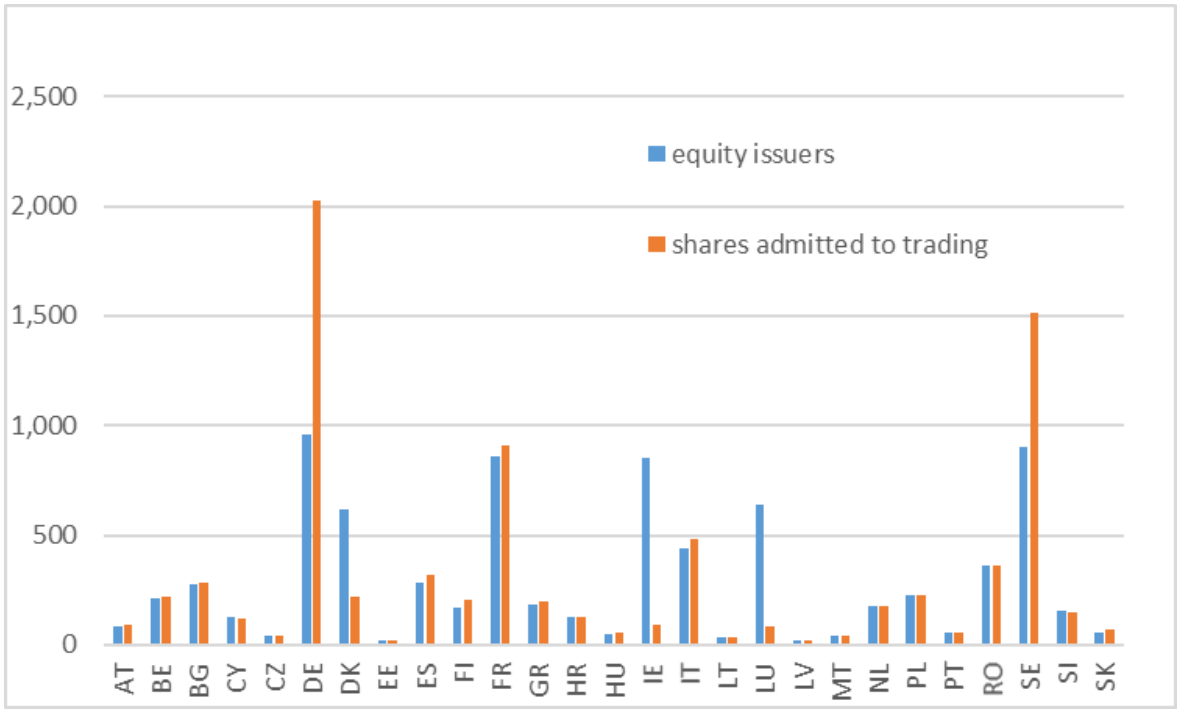
**Table 1 - Market structures on EU-27 exchanges, 2021**

| | Regulated Markets | thereof SMEs | SME growth market | MTF | Total |
|---|---|---|---|---|---|
| **Equity** | | | | | |
| Total number of listed companies | 4 371 | 1 464 | 1 740 | 3 771 | 9 882 |
| Total capitalisation of listed companies (EUR million) | 13 555 343 | 38 289 | 163 718 | 86 587 074 | 100 306 135 |
| Number of IPOs | 269 | 62 | 336 | 36 | 641 |
| Total value of IPO Proceeds - Investment Flows (EUR million) | 44 004 | 7 911 | 7 774 | 265 | 52 043 |
| Number of follow on equity issuances | 496 | 311 | 331 | 38 | 865 |
| Total value of follow on equity issuances (EUR million) | 110 691 | 12 173 | 4 283 | 125 | 115 099 |
| Dual listings | 43 | | 36 | 224 | 303 |
| **Bonds** | | | | | |
| Outstanding number of issuers at years-end | 3 796 | | 162 | 3 648 | 7 606 |
| Outstanding number of bond issuances at years-end | 46 969 | | 344 | 51 912 | 99 225 |
| Outstanding total issue size of bonds issuances (EUR million, values at year-end) | 14 437 502 | | 46 094 | 4 501 817 | 18 985 414 |
| Number of new bond issuers during the year (i.e. number of companies that have issued their inaugural bond) | 122 | | 47 | 156 | 325 |
| Number of new bond issuances during the year | 11 835 | | 113 | 22 804 | 34 752 |
| Total issue size of new bond issuances during the year (EUR million) | 2 677 943 | | 8 432 | 60 189 296 | 62 875 672 |

Note: some exchanges were not able to report number on follow-on equity issuances.
Source: FESE from exchanges.

Figure 1 complements the information on equity issuers and number of shares per Member State taken from ESMA's structural indicators for financial markets. It shows that most equity issuers are domiciled in Germany, Sweden, France, Ireland and Luxembourg. The number of equity issuers and the number of shares admitted to trading tend to correlate in most, but not in all Member States, mostly due to there being issuers with more than one type of shares issued, but not admitted to trading. This difference between issuance and trading is informative of the difficulty in interpreting equity data. ESMA also reports comparable number on bonds: 3 980 bond issuers versus 7 934 equity issuers in the EU-27 in 2020 with 63 707 bonds admitted to trading versus 8128 shares. ESMA's structural data report does not provide a breakdown of the share of bonds issued by public and private bodies. Whereas the public sector hardly issues any shares, it is a frequent issuer of bonds in almost all Member State.

**Figure 1. Number of equity issuers and shares admitted to trading across the EU Member States, 2020**



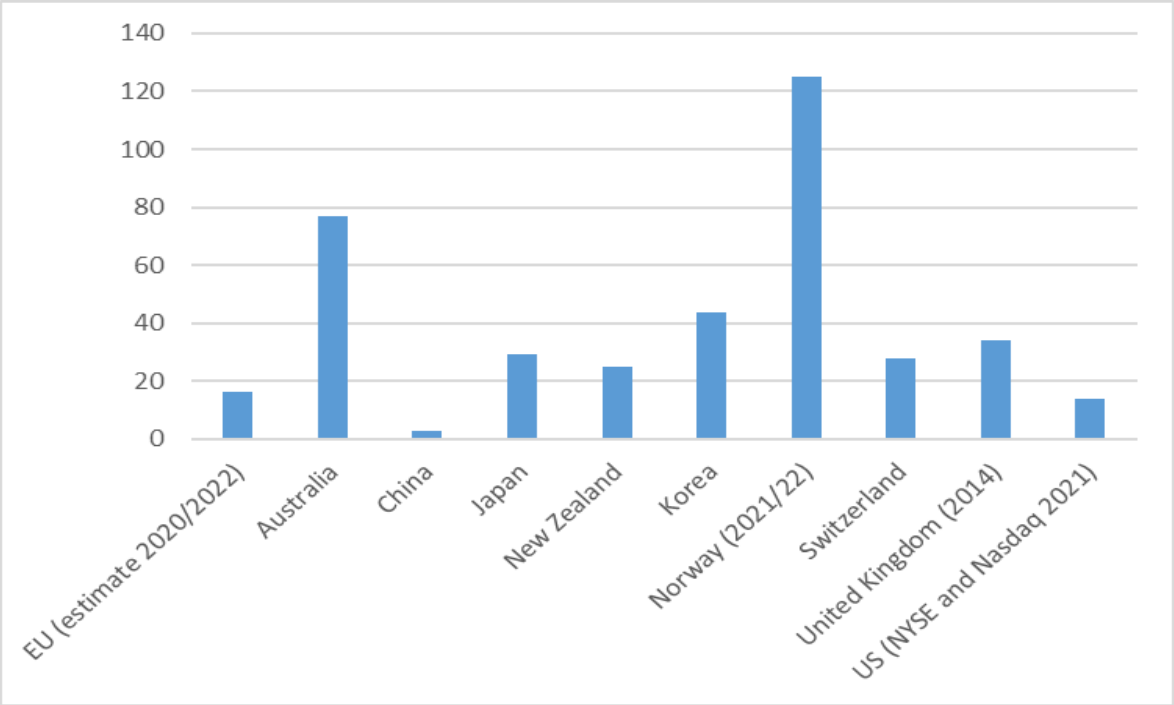

*Source: ESMA.*

## 2. The use of equity funding by corporations

**Many firms in the EU do not rely on market funding** (see also sections 1.3 and 2.3 of this IA's main body). Only a small proportion of EU firms is listed on public markets and the number of listed firms scaled by the population of the country is lower in the EU than in some of other developed countries (see Figure 2). There are about 14 listed firms per 1 million inhabitants in the EU, compared to 27 in Switzerland, 30 in Norway and estimated 34 in the United Kingdom.[226] While the ratio of listed firms to inhabitants in the EU is comparable to that in the US, the US dwarves the EU in terms of market capitalisation. This suggests that stock markets have been better able to help firms grow more in the US than in the EU, proving the suboptimal scale/performance of EU public markets.

[226] The latest number of listed firms in the UK shown in World Bank Development Indicators dates from 2014. The number of inhabitants is used as benchmark because the number of total firms is not available for many countries.

**Figure 2. Number of listed companies per 1 million inhabitants, 2019**

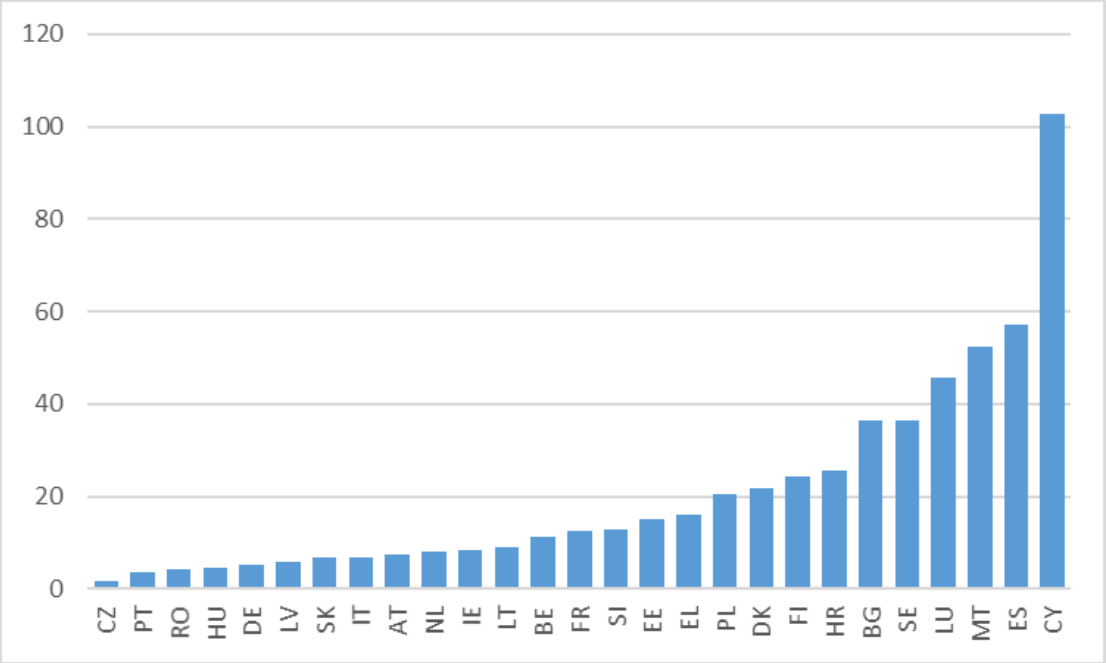



*Source: World Bank, FED St Louis (both with data by the World Federation of Exchanges) and FISMA calculations, using FESE, Euronext, NASDAQ and Eurostat data.*

The EU average hides substantial differences across the Member States (see Figure 3). The number of listed firms per inhabitant is considerably below the EU average (and the US numbers) in Germany and Italy, while being substantially higher in Spain[227] and the Nordic countries. Numbers for LU, MT, BG and CY are inflated by equity issuers that are small financial corporations. This exercise required calculations with data from different sources since the data based on the World Federation of Exchanges (WFE) reported by the World Bank does not include data for those Member States that share a stock exchange. To obtain country specific data, regional data was obtained from Euronext via FESE and from the NASDAQ website. The combination of data from the various sources required that data from different reporting years had to be used. This data underreports numbers because it does not cover some firms that go listed on foreign exchanges.[228]

[227] A relatively large number of IPOs in Spain over recent years were from the real estate sector, which suggests that an industry-specific factor may be accountable for the high number of listed firms in Spain.
[228] The WFE has a global IPO data base that however does not cover some well-known European firms that went public in the USA.

**Figure 3. Number of listed companies per 1 million inhabitants in the EU Member States 2019-2022**




*Source: FISMA calculations with data from WFE, FESE, Euronext, NASDAQ, Eurostat.*

Many more EU firms could be tapping stock markets. While the majority of the enterprise population in the EU consists of micro and very small enterprises, there are overall less than 8000 firms with listed shares.[229] Oxera (2020) estimated that 6000 additional firms in the EU would fulfil the criteria to go public.[230] Figure 4 shows that most of them are owned by individuals or families.[231] Bongini et al (2019) use a sophisticated empirical model to identify firm and country-specific determinants of firms' market funding and determine the share of firms from the population of firms that would fall under these conditions (see Figure 5).[232] Even when country-specific determinants are controlled for, the share of large firms that could use market funding is substantial. Firm-specific determinants are size, leverage and turnover growth. Country-specific determinants relate to financial market developments (stock market development and banking system development) and legal conditions (rule of law, time to resolve disputes, property rights index, etc.).

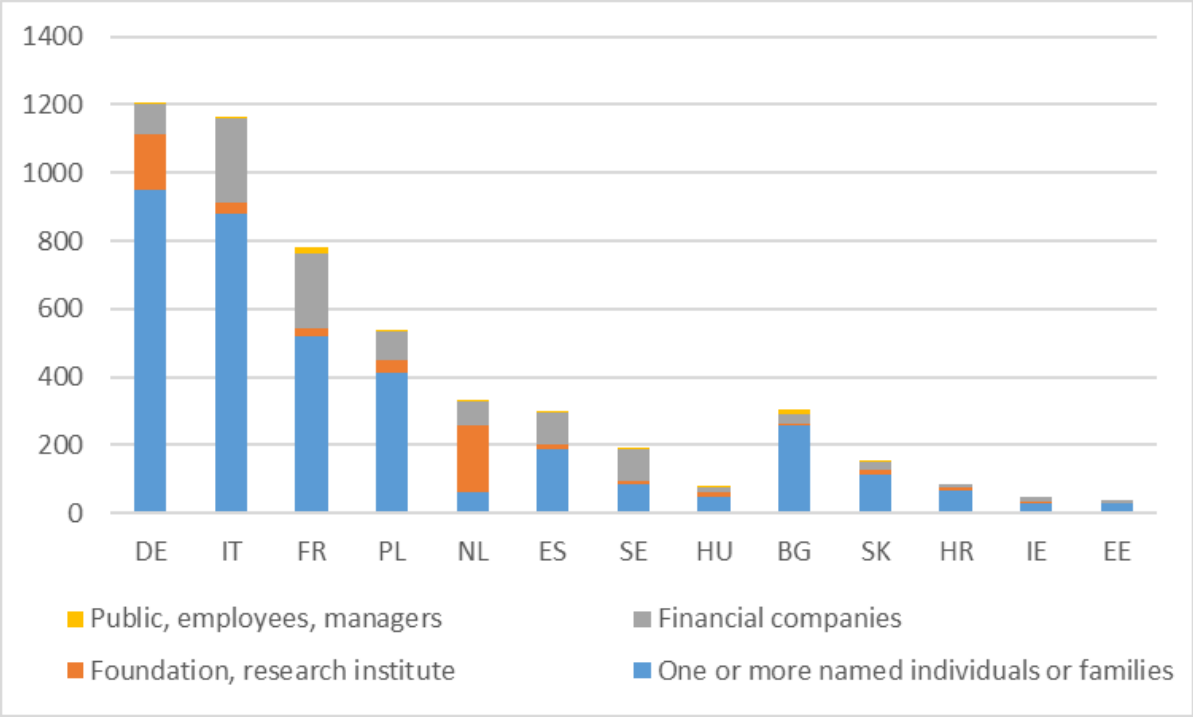
[229] ESMA (2021) reported 7934 issuers in the EU-27 in its "Structural indicators for financial markets (2021). The counting of listed firms for the chart above yielded a number of 7203 issuers of listed shares from EU Member States. The data compilation from European exchanges points to 8500 equity issuers, which include dual listings and issuers from third countries.

[230] The conclusion is based on criteria related to employment, size, turnover, and assets. Firms in certain sectors like agriculture, health or education are not considered. This number is lower than shown in Oxera (2020) because UK firms were excluded.

[231] Although in some Member States unlisted firms are largely owned by foundations or financial companies.

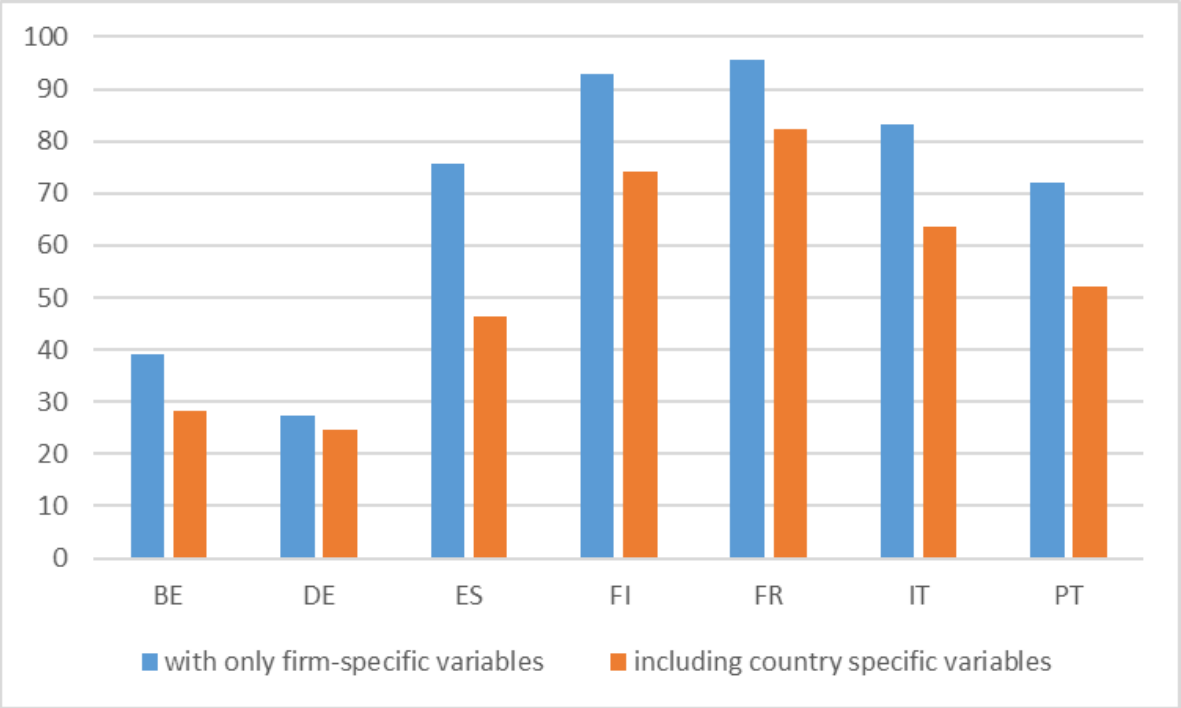
[232] Bongini, P. et al., 'SME access to market-based finance across Eurozone countries, Small Business Economics, Vol. 56, 2019, pp. 1667-1697.

**Figure 4. Market potential 1 - Number of large unlisted firms in the EU Member States, broken down by type of ultimate owners**




*Source: Oxera (2020) with Orbis data.*

**Figure 5. Market potential 2 - Share of large firms that are market suitable according to the MSI index**




*Source: Bongini et al (2019) with BvD Amadeus data.*

## 3. The value of keeping control of the firm: role of MVR share structures

Annex 5 presents the role of MVR shares as a funding instrument that allows issuers to safeguard their influence on the management of the firm. This section complements the analysis in Annex 5 by reviewing the empirical support available to quantify the impact of the policy options in the main body. That said, the assessment is complicated by the fact that there is neither detailed statistics showing the actual use of MVR share structures across Member States (Sweden being the exception) nor has this topic gained a lot of attention by empirical researchers. While the proportion of IPOs with MVR share structures has increased from 12% to 32% in the US between 2016 and 2021, it is not possible to show a comparable figure for the EU-27. Academic research on MVR share structures focuses on the implications for corporate governance, i.e. incentives for managers and owners visible in share valuations and in particular their involvement in takeovers.[233] While the experience from the US suggests that in particular technology firms are using the opportunity to issue MVR shares, there is not yet an in-depth study on what this tells about the determinants of MVR shares as funding and corporate control instrument.

Research analysis by the EIB[234] helps study the quantitative value of voting rights. For this study, firms were asked under which conditions they would choose bank lending versus share issuance under alternative scenarios of ordinary shares and shares without voting rights. In the analysis, firms attributed a value of 150 basis points to the possibility to maintain corporate control by issuing shares without voting rights. This result is based on regression analysis that uses the data from the survey and translates indications under which conditions firms would use bank lending or equity funding into capital costs.

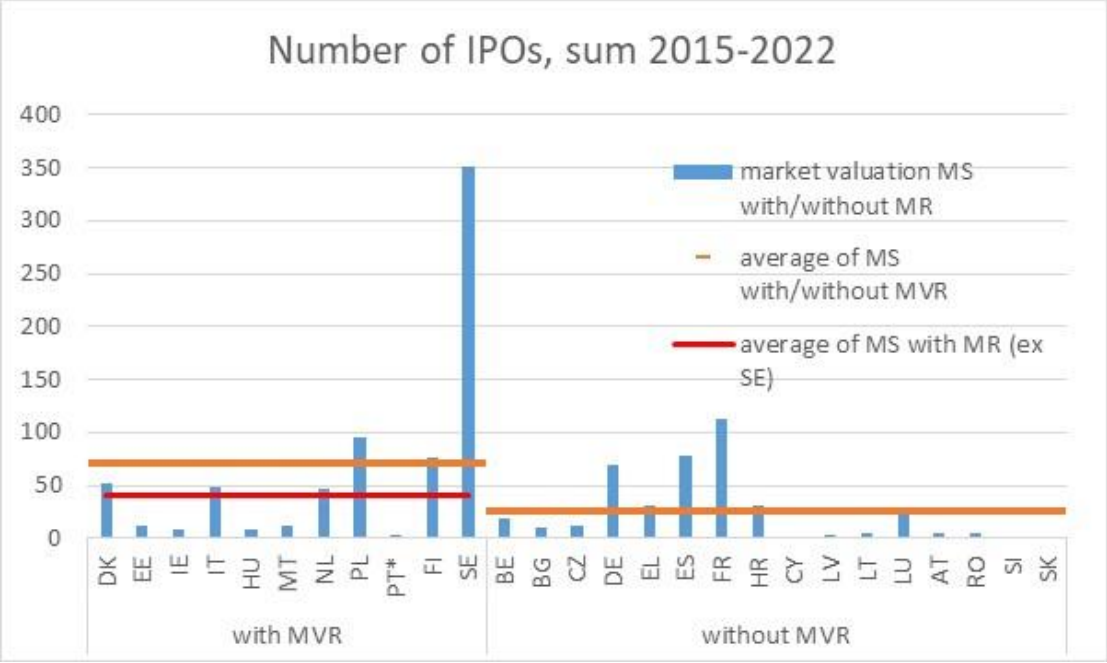
It is also possible to use regression analysis directly, which has the advantage that the result does not depend on some of the assumptions underlying the scenario analysis. The estimated coefficient can be interpreted as a probability that an equity issuance takes place when it is possible to issue shares without voting rights attached to them.[235] The coefficient of the estimate suggests that the possibility to issue shares without voting rights increases the likelihood of share issuance by 21% relative to the issuance of ordinary shares.[236] It needs to be noted that the possibility to reduce voting rights attached to new issuances is not, however, equal to preventing any loss in control by the owner. However, it is a powerful means to contain the loss of control.

The absence of data on the share of firms that used MVR share structures when issuing shares prevents an in-depth analysis.[237] As a substitute for such analysis, Figure 6 compares IPO numbers in the Member States that permit MVR share structures with those that do not permit their use. It shows that the value of listed shares and the number of IPOs is on average higher in those Member States that allow for MVR share structures compared to those that do not. Although these averages are strongly determined by the outliers, they are illustrative of lower issuing activity when MVR share structures are not permitted. Having said that, it

[233] See Annex 5 for more details. See also Pajuste, A., 'Determinants and Consequences of the Unification of Dual-Class Shares', ECB Working Paper No 465, 2005 for an analysis of why firms gave up MVR share structures two decades ago.
[234] See Brutscher and Hols (2019), 'The European corporate equity puzzle', Comparative Economic Studies, Vol. 62, pp. 69-104, October 2019.
[235] This can be taken as an (imperfect) proxy of issuing based on a MVR share structure.
[236] See Tables 4 and 5 in Brutscher and Hols (2019).
[237] Also the detailed IPO data from FESE used for this exercise do not specify whether the equity issuance entailed ordinary shares or MVR shares.

would be close to impossible to draw any direct causal links between the existence of a possibility to issue MVR shares and a higher number of IPOs in a given Member State, given the complex nature of a listing decision, which takes into account a wide number of various parameters.

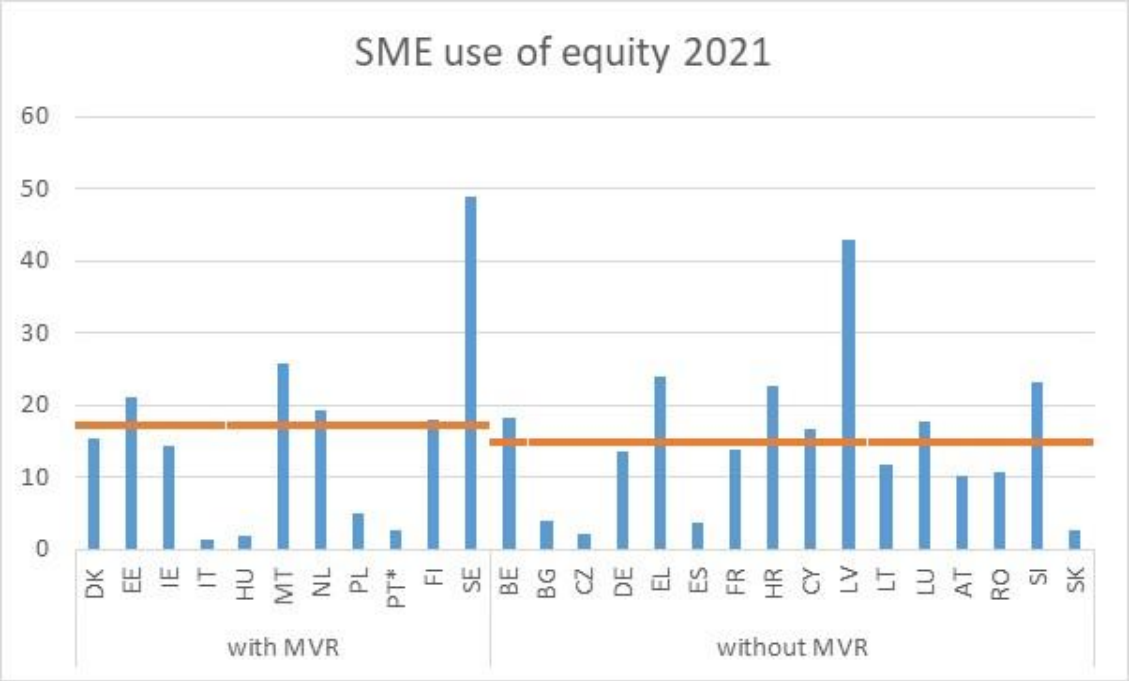
**Figure 6. Number of IPOs per Member State, sum 2015-2022**




* MVR share structures are possible in PT only since 2022. PT was therefore not included in the calculation of the average.

*FISMA calculations with FESE data.*

**Figure 7. Listed shares as NFC liabilities in % of GDP average 2015-2020**




*FISMA calculations with Eurostat data.*

The opportunity costs of the ban on MVR share structures could be defined as the missing growth opportunities for firms that decide to refrain from listing because their owners do not want to cede corporate control. The analysis in Didier et al. (2016) documents that listed firms tend to have stronger growth in assets, sales and employment.[238] This is evident in the descriptive statistics and also in the detailed analysis. The latter shows that the growth difference is particularly pronounced in the year of issuance and the subsequent two years.

**Table 2 - Firm characteristics in Didier et al, 2016, Averages 2013-2011 in USD calculated as median across countries of the median firm per country.**

| | Non-issuers | Equity issuers | Difference |
|---|---|---|---|
| Total assets | 99 823 | 255 701 | 156.2% |
| Sales | 73 700 | 114 015 | 54.7% |
| Number of employees | 327 | 470 | 43.7% |
| Firm age | 26 | 19 | -26.9% |
| Number of firms | 27 185 | 16 198 | -40.4% |
| Asset growth | 4.3% | 10.5% | 6.2%pts |
| Sales growth | 5.5% | 9.5% | 4.0%-pts |
| Employment growth | 0.9% | 5.0% | 4.1%-pts |

*Issuing firms were defined as a firm with at least one capital raising issuance between 2003 and 2011.*

The absence of a suitable data base and of empirical estimates does not allow for a proper quantification of the impact of the introduction of MVR share structures on IPO numbers.

[238] See Didier, Tatjana; Levine, Ross, and Schmukler, Sergio, L. (2016) Capital market financing, firm growth, and firm size distribution, ESRB Working Paper No 4, March 2016. The research covers developed and emerging countries.

It was, however, possible to produce a best-effort estimate, building on the available data and applying assumptions derived from economic literature on the subject.

The following assumptions have been made:

- There would be 21% more IPOs in Member States if they introduce MVR share structures (consistent with the EIB study).
- This increase would be applied to an average number of IPOs per year (56) and the average amount raised per year (EUR 972 million) recorded in the EU Member States that do not permit MVR share structures over the period from 2015 to 2021.[239]
- Assets would grow at a speed 6.2 percentage points higher in listed firms than in firms that did not issue equity (Table 3, Didier et al.)

Applying the above assumptions would generate 11 additional IPOs in the respective Member States, resulting in EUR 737 million of higher EU market valuation.

## 4. Issuance costs and costs for producing a prospectus

A reason why firms do not make use of market funding is that the use of market instruments is associated with high upfront costs. This section presents analysis on the magnitude of these costs and elaborates to what extent changes to prospectus requirements could reduce these costs.

### 4.1. Estimates of issuance costs required for an IPO

In a recent EIF survey, 27% of private equity investors and 22% of venture capital investors reported IPO costs an obstacle to the use of listed shares as a funding instrument.[240] A benchmark for the cost considerations behind a company's reluctance to use public markets instead of bank loans was obtained in a seminal experiment by EIB researchers, already quoted above.[241] It found that, on average, firms would require an 8.8% lower capital cost to finance their investment projects via listed shares instead of taking a bank loan. The empirical analysis, based on a sample of almost 1 000 firms in the EU[242], further found that 72% of this 8.8% difference can be explained by three specific determinants, namely the more favourable tax treatment of debt versus equity, the reluctance to cede corporate control and positive growth expectations. Hence 2.5% (28% of the 8.8% capital costs) is attributable to other factors, including the transaction costs incurred during the listing process. The first factor is subject to a different Commission initiative that aims to reduce the tax bias against equity in Member States tax systems (See Annex 11 for more details) and the reluctance to cede corporate control was analysed above. Growth expectations depend on the business cycle and the firms' business model. This section looks at the costs of the issuance process.

***IPO costs exceed the 2.5% threshold by a wide margin, especially for smaller issuances.*** Data on IPO costs is scarce. Those few that try to quantify them point to a range of 3-10% of the issuing amount, depending on the size of the issuance (see Table 3). In some countries, issuing costs are indicated in the prospectus, and for a sample checked for this exercise, they

[239] 2019 and 2021 were deemed as rather atypical years, largely due to Covid-19 (e.g. 2019 reported a very low number of IPOs, while 2021 reported a very high number of IPOs).
[240] Botsari, A. et al., 'Scale-up Financing and IPOs: Evidence from Three Surveys', EIF Research and Market Analysis Working Paper 2021/69, January 2021.
[241] See Brutscher and Hols (2019), 'The European corporate equity puzzle', Comparative Economic Studies, Vol. 62, pp. 69-104, October 2019.
[242] The study is conducted on the back of the EIB investment and investment finance survey (EIBIS).

also vary between 3 and 10% of the amount issued.[243] The analysis in Oxera (2020) data shows that issuance costs rise with the issuance amount (see Figure 8). When trying to identify the determinants of issuance costs empirically by means of regression analysis with a sample of global issuances from a commercial data provider for this IA, the issuance amount turned out as a significant determinant of issuance costs. The issuance amount, however explained only a small share of the variation of costs across issuances as indicated by a very small R2. Country and industry dummies were not significant in many cases.[244]

[243] Almost all German IPOs in 2021 reported their issuing costs.
[244] Although it was possible to identify data on issuance costs for 3 000 issuances out of a sample of 50 000 equity issuances, less than 80 were from the EU. The data was therefore not used for a more detailed analysis.

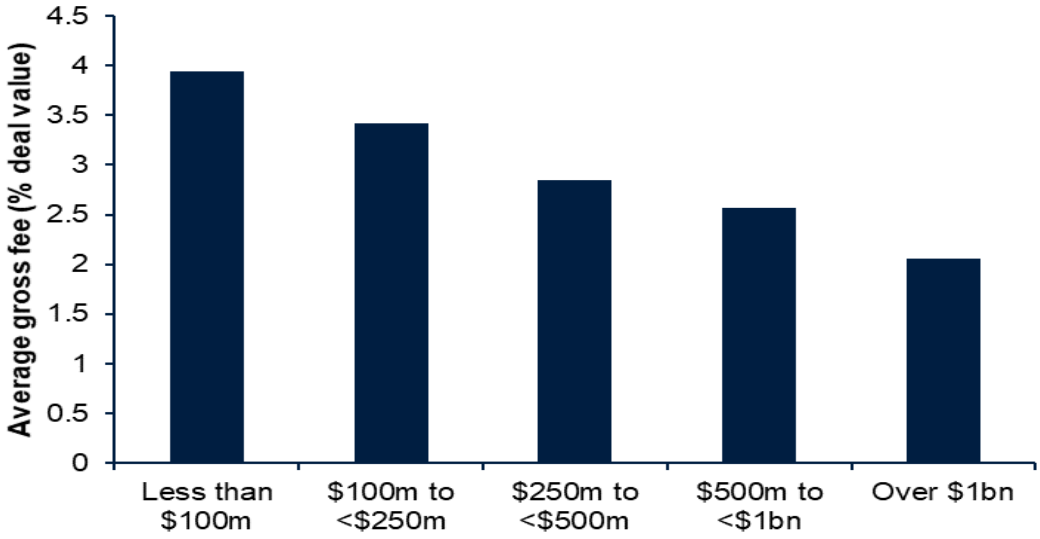
**Table 3 - Estimates of IPO costs**[245]

| Source | IPO costs relative to issuance size | Comment |
|---|---|---|
| FESE (2020) | EUR 300 000 to 450 000 for a EUR 3 000 000 IPO, 150 000 to 250 000 for a 25 000 000 IPO, 375 000 to 600 000 for a 75 000 000 IPO, 600 000 to 1 500 000 for a 200 000 000 IPO | Data assembled for an IPO task force for issuances in the EU |
| PWC (2017) | USD 7 300 000 for a USD 25 000 000-100 000 000 IPO, 14 600 000 for 100 000 000-250 000 000, 22 100 000 for 250 000 000-500 000 000, 26 500 000 for 500 000 000 to 1 000 000 000 | Data assembled by consultants for issuances in the US |
| Oliver Wyman (2014) | USD 80 000 -100 000 | Data assembled by consultants to list on an SME platform |
| Wegmann (2013) | 9-12% (EUR 2 700 000 to 3 600 000) for a EUR 30 000 000 IPO, 6-8% if larger 500 000 000 | Data assembled for investor relations agencies |
| A EU CEEC trading venue | Average about 5 % of proceeds for the last local IPO transaction | |

Note: The underlying papers do not specify how the numbers where obtained and how the samples were constructed.

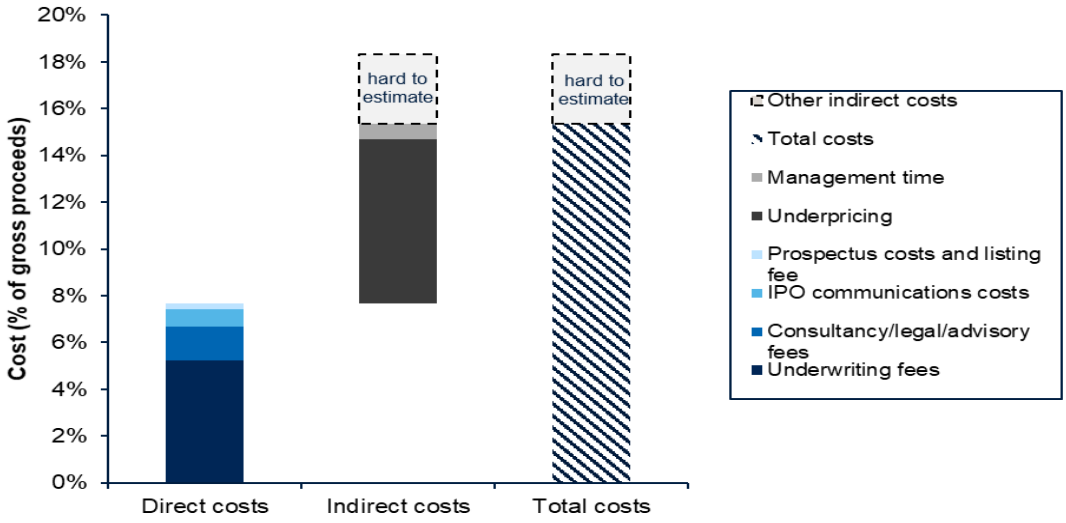
**Figure 8. Fees per deal size**

[245] FESE, 'European IPO Report 2020', IPO Task force, November 2020, https://www.fese.eu/app/uploads/2020/03/European-IPO-Report-2020.pdf; PWC, 'Considering an IPO to fuel your company's future?', PWC Deals, November 2017, www.pwc.com/us/iposervices; Oliver Wyman, 'Towards better capital markets solutions for SME financing 'Oliver Wyman Financial Services, 2014, https://www.oliverwyman.de/content/dam/oliver-wyman/global/en/files/insights/financial-services/2014/July/FINAL3_BetterCapitalMarketMechanismsSMEs.pdf; Wegemann, J., 'Kosten eines IPOs', IpoBOX, 2013, https://www.ipobox-online.de/erlose-und-kosten-bei-einem-ipo/5-2-kosten-eines-ipos.




*Source: Oxera (2020) with Dealogic data.*

**Figure 9. Direct and indirect costs of an IPO**




*Source: Oxera (2020).*

## 4.2. Costs of producing a prospectus

The costs of producing a prospectus is only a small part of the overall issuance costs. Oxera argued that the single most important items are underpricing and underwriting fees (Figure 9). That is, a price discount to ensure the issuance finds buyers and fees for the services and reputation risk that the underwriting agent respectively carries. According to the Oxera (2020) study, the sum of prospectus costs and listing fees account for 0.3% of total IPO costs. Wegmann (2013) quantified the costs for lawyers to draft the prospectus for a German firm as EUR 75 000 to 120 000, in addition to EUR 100 000 for translation and printing, in

addition to EUR 5 000 fees charged by the national supervisor. A compilation of costs covered in Italian prospectuses for the move to regulated markets ranges from EUR 500 000 to EUR 2 000 000. A European trading venue pointed out two important determinants of prospectus costs: the strength of the internal team preparing the IPO and the complexity of the corporate structure. It observed that prospectus costs range from EUR 10 000 for companies with a strong internal team and a simpler corporate structure to approximately EUR 500 000 for very complex transactions and issuers. Another exchange cautioned that prospectus costs are dwarfed by other cost elements that have a similar function, namely to provide legal clarity to investors and inform them trustfully about the offer. Examples included legal fees for at least EUR 80 000 and EUR 400 000 for the structuring and preparation of the legal documentation. When an international placement is envisaged, an international offer memorandum adds about EUR 200 000 according to a reply to the public consultation.

The numbers reported in the literature are consistent with the outcome of the consultation that was carried out for this impact assessment. Table 4 shows the range of prospectus costs communicated to the Commission by respondents to the public consultations. The ranges by type of prospectus and financial instrument are sizeable.

**Table 4 - Stakeholders' indications about prospectus costs (in EUR unless indicated otherwise)**

| | | **Type of prospectus and securities** | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Stakeholder** | **Field of activity or sector** | **Standard** | | **Base** | **EU Growth** | | **Simplified for secondary issuances** | | **EU Recovery** |
| | | **Equity** | **Non-equity** | **Non-equity** | **Equity** | **Non-equity** | **Equity** | **Non-equity** | **Non-Equity** |
| **Warsaw Stock Exchange, PL** | Operator of a trading venue | 279 000* | | | | | | | |
| **Athens Stock Exchange, EL** | Operator of a trading venue | 4% - 6% | 2% - 4% | | | | | | 2% |
| **Deutsche Börse Group, DE** | Operator of a trading venue | SMEs:<br>50 000-80 000<br>Other:<br>140 000-300 000 | SMEs:<br>40 000- 70 000<br>Other:<br>50 000-100 000 | | 40 000-60 000 | 30 000-50 000 | 40 000-60 000 | 30 000-50 000 | 20 000-40 000 |
| **BNP Paribas, FR** | Investment bank | 400 000 to 600 000 direct cost | 10 000 to 50 000 | 300 000 to 500 000 | N/A | N/A | N/A | N/A | N/A |
| **Deutsches Aktieninstitut, DE** | Association | | | 100 000** | | | | | |
| **Swedish Securities** | Association | 100 000- | 25 000- 30 | 25 000- | 100 000- | N/A | 100 000- | N/A | N/A |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| **Markets Association (SSMA), SE** | | 300 000 | 000 | 30 000 | 150 000 | | 200 000 | | |
| **International Capital Market Association (ICMA), CH** | Association | | 10 000 - 800 000 | 10 000- 800 000 | | | | | |
| **Kapitalmarkt KMU+, DE** | Association | Min 200 000 | Min 100 000 | | Min 120 000 | Min 80 000 | Min 150 000 | Min 80 000 | Min 80 000 |
| **Business Hospital, RO** | Financial research provider | 2 000 | 1 000 | 1 500 | 3 000 | 2 000 | 1 000 | 1 000 | 2 000 |
| **Atrys Health, ES** | Other (Healthcare) | 1 000 000 | | | 50 000 | | 1 000 000 | | |

** Average cost of prospectus including consulting / offering costs, ** of which EUR 50 000 for the dealer's counsel and EUR 30 000 for the issuers counsel and EUR 20 000 internal costs*

Table 5 shows the range of prospectus costs estimated by a large trading venue in the EU. The ranges expand further if information from replies by other stakeholders to the consultation is added (see Table4). Independent from the source, the data shows that the introduction of the EU Growth prospectus allowed a considerable decline in costs, which may explain why the share of smaller IPOs has increased. The EU Recovery prospectus allows to cut costs for secondary issuances further.

**Table 5 - Costs of producing a prospectus in EUR across types of securities and prospectuses**

| ***Prospectus type*** | ***Equity securities*** | | ***Non-equity securities*** | |
|---|---|---|---|---|
| | ***SMEs*** | ***other*** | ***SMEs*** | ***other*** |
| Standard prospectus | 50 000- 80 000 | 140 000- 300 000 | 40 000- 70 000 | 50 000- 100 000 |
| EU Growth prospectus | 40 000- 60 000 | | 30 000- 50 000 | |
| Simplified prospectus for secondary issuances | 40 000- 60 000 | | 30 000- 50 000 | |
| EU Recovery prospectus (available for shares only) | 20 000- 40 000 | | N/A | |

*Source: Deutsche Boerse, reply to public consultation. Figures also validated by Euronext in a bilateral email exchange.*

**Table 6 - Average costs of producing a prospectus in EUR across types of securities and prospectuses**

| ***Prospectus type*** | ***Equity securities*** | | ***Non-equity securities*** | |
|---|---|---|---|---|
| | ***SMEs*** | ***other*** | ***SMEs*** | ***other*** |

| | | | | |
|---|---|---|---|---|
| Standard prospectus | 65 000 | 220 000 | 55 000 | 75 000 |
| EU growth prospectus | 50 000 | | 40 000 | |
| Simplified prospectus for secondary issuances | 50 000 | | 40 000 | |
| EU Recovery prospectus (available for shares only) | 30 000 | | N/A | |

*Source: this table is based on calculations made using the figures reported in Table 5.*

**Table 7 - Average percentage savings per prospectus type**

| ***Prospectus type*** | ***Percentage cost savings*** |
|---|---|
| EU Growth prospectus vs. Standard prospectus (SMEs) (equity and non-equity securities combined) | 25% |
| EU Recovery prospectus (shares only) vs. EU Growth prospectus for equity securities | 40% |
| EU Recovery prospectus (shares only) vs. Simplified prospectus for secondary issuances of equity securities | 40% |

*Source: this table is based on calculations made on figures provided in Table 6.*

Although the costs for producing the prospectus are only a small share of IPO costs, their indirect cost seem to be more substantial. Prospectuses define the information a firm is liable for. They allow the disclosure of information to the public, which reduces liability risks for the management. This disclosure, however, costs management time and gives rise to costs of legal advice. There is, however, little information about such costs of prospectus. Wegmann (2013) argued that the cost for a legal opinion even for smaller issuances would amount to EUR 100 000, with due diligence consultants charging up to EUR 50 000 – EUR 100 000. He also estimates that an IPO consumes 50% of CEO and 36% of CFO time over 6 months. Oxera (2020) estimated that fees for legal, advisory and consultancy services amount to 1.4% of the IPO proceeds. This might be considered an upper ceiling for indirect costs of the prospectus. Oxera (2020) also estimated that IPO communication costs are twice as high as prospectus costs (see Figure 9).

Lower prospectus costs can incentivise some firms to go public**.** The patchy data about prospectus costs and the relatively low number of observations of IPOs, however, prevent any numerical estimate about how lower prospectus costs would translate into more IPOs or higher issuance volumes. Absent the possibility of a quantification,[246] the introduction of the SME growth markets and associated alleviations to prospectus rule can be taken as a natural experiment to substantiate estimates of cost savings. For example, the success of the SME growth market in boosting issuances in Sweden may be taken as an indication of the issuers' preference for lower-cost prospectuses.

[246] Quantification is difficult for the following reasons. Country-variation is much smaller than the heterogeneity of issuers and issuances, implying that having more (larger) issuers with complex structures and larger issuances in one Member State has an impact on that country's aggregates that would make it difficult to disentangle the effects for any cross-country comparisons.

**Table 8 - Prospectuses approved for IPOs and secondary issuances on SME growth markets in 2021**[247]

| Type of offer or admission to trading | Approved prospectuses in 2021 (EEA) |
|---|---|
| Initial admission to trading on an SME growth market with offer to the public | 135 |
| Secondary issuance on an SME growth market | 72 |

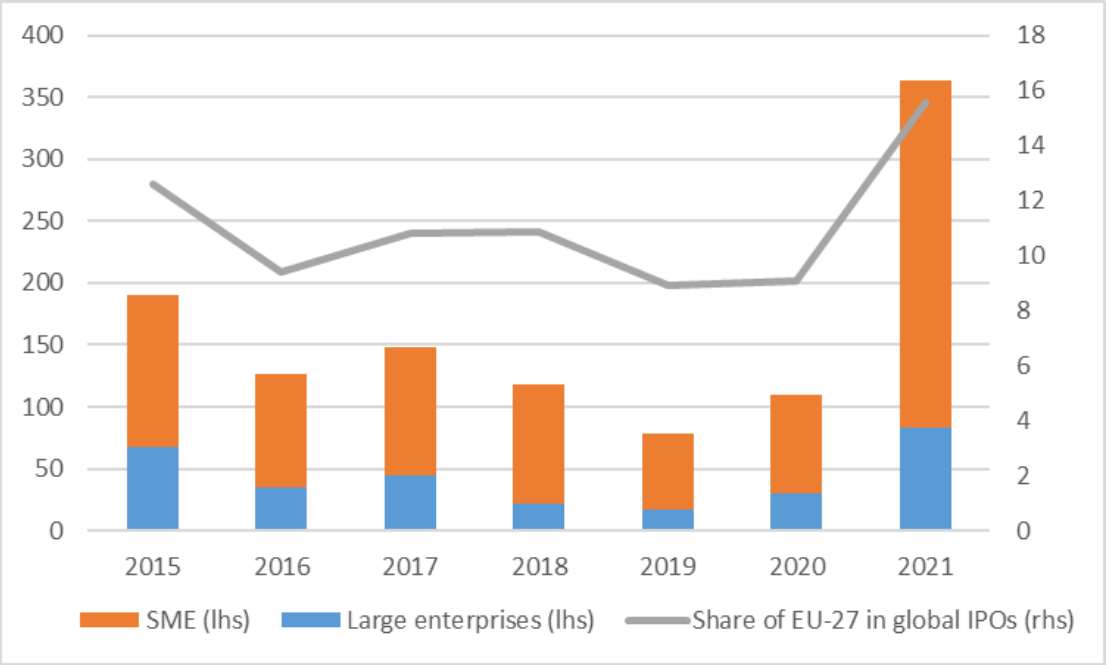
*Source: ESMA's data for 2021.*

The proportion of IPOs by SMEs increased significantly after the introduction of SME growth markets under MiFID II (a special category of MTFs designated specifically (but not only) for SMEs). The introduction of the measure coincided with a global weakening of IPO activity and both the absolute number of IPOs as well as their share in global IPO numbers declined, so it is difficult to disentangle the impact of the introduction of SME growth markets. When looking at annual issuance numbers, the proportion of IPOs of EU-27 SMEs, i.e. firms with an initial market capitalisation of below EUR 200 million, rose from about 70% in 2017 to 80% in 2018 and 2019. In 2021, the number of IPOs by EU firms and by SMEs in particular outpaced the global IPO trend (see Figure 10).

While most issuance activity of SMEs took place in Sweden, the numbers also rose in many other EU Member States. Member States that did not witness an increase in IPOs were limited to Austria, Belgium, Greece, Croatia, Lithuania, Romania, Slovenia and Slovakia. With a further decline in issuance costs, more firms could be attracted.

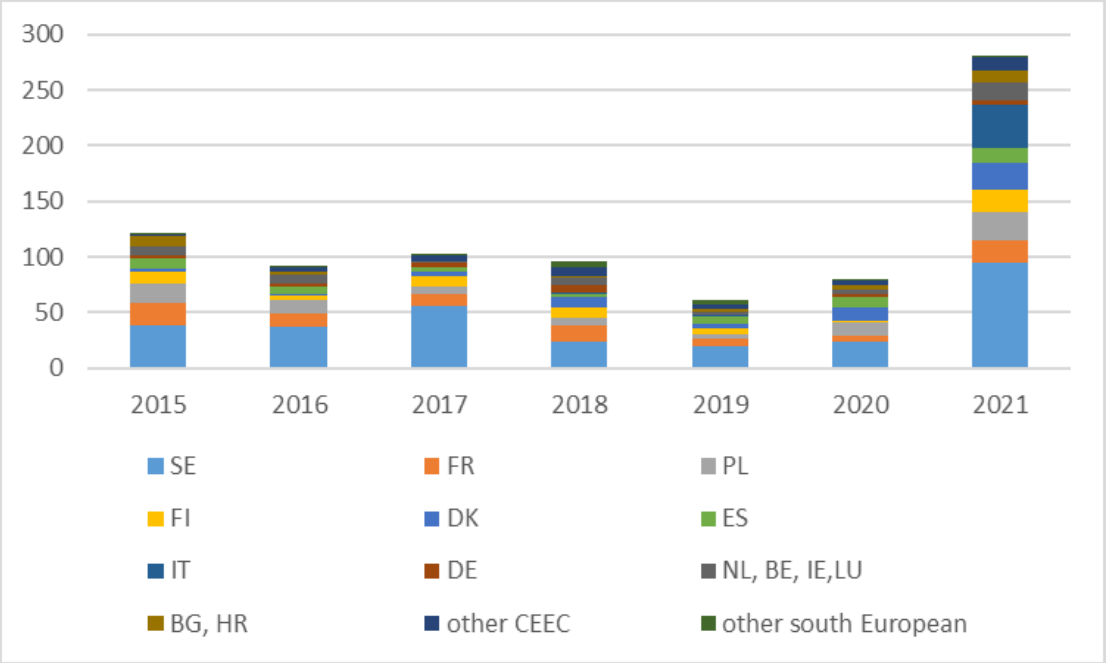
[247] Methodological note: prospectuses approved in 2021 as well as the ISINs related to these 2021 approved prospectuses, independently of when the ISIN was reported. Type of offer or admission to trading is a field associated to the ISIN field, which is only reported for the documents with securities information: Standalone, Base Prospectus with Final Terms, Securities Note and Final Terms.

**Figure 10. IPOs of EU firms (number of large firms and SMEs on the left-hand scale, share in global IPOs in % on the right hand scale)**




Source: FISMA calculations using FESE and WFE data. SMEs defined as IPOs with a market capitalisation of below EUR 200 million on the first trading day.

**Figure 11. Number of IPOs of SMEs**



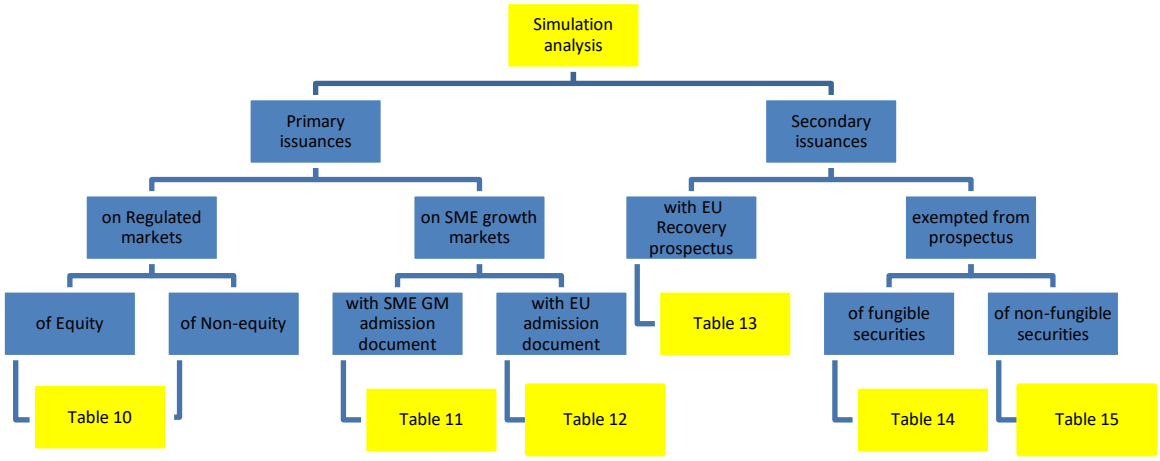

Source: FISMA calculations based on FESE data. SME IPOs are defined as IPOs with a market capitalisation of below EUR 200 million on the first trading day.

## 4.3. Cost savings from the use of different types of prospectuses or documents as well as from exemptions

This section shows the results of a simulation of potential cost savings if those issuers that had to draw up a prospectus would have the opportunity to use a different type of prospectus than they actually did. This simulation analysis is done for different type of instruments (equity and non-equity), issuance types (primary and follow-on) and market segments (regulated markets, SME growth markets) in line with the proposed options in the main body of this IA. Simulations use the data on possible average cost savings reported in Table 7, indicative estimates of market experts set out in Table 6 and the number of prospectuses for different types of securities and issuances approved by NCAs in 2021.

Despite its basic methodology and reliance on subjective assumptions made by experts (who may suffer from cognitive bias), this simulation analysis seems to be the best available method to derive at least the orders of magnitude for possible cost savings.[248]

**Figure 12. Overview of scenarios for issuing on different markets, issuance types and prospectuses**




## 4.4. Primary issuances: offers of securities to the public or admission to trading on regulated markets

According to ESMA's data, the number of standard prospectuses for offers of securities to the public or for admission to trading on a regulated market approved in 2021 was 382 for the category of equity securities and 1 862 for the category of non-equity securities respectively (calculated by deducting the number of EU Growth prospectuses, simplified prospectuses for secondary issuances and EU Recovery prospectuses from the total number prospectuses approved), as shown in Table 9.

[248] For those reasons, this simulation analysis could only be taken as an indication of a possible impact but not as a precise calculation hereof and should be treated as such.

**Table 9 - Standard prospectuses approved in 2021 by securities type[249].**

| | Equity securities | Non-equity securities |
|---|---|---|
| Total number of prospectuses | 717 | 1 975 |
| Total number of EU Growth prospectuses | 181 | 47 |
| Total number of simplified prospectuses for secondary issuances | 138 | 66 |
| Total number of EU Recovery prospectuses | 16 | N/A |
| Total number of standard prospectuses A - (B + C + D) | **382** | **1 862** |

*Source: ESMA's data for 2021*

## Option 2[250]

Issuers offering securities to the public and/or seeking admission to trading on a regulated market would benefit from significant savings if the standard prospectus would be streamlined and aligned to at least the level of disclosure of the EU Growth prospectus (e.g. further benefits would accrue due to the deletion or additional streamlining of few additional items considered burdensome by issuers and unnecessary in their current form). Applying the estimation of 25% for cost savings from the use of an EU Growth prospectus versus the use of a standard prospectus (Table 7), the estimated average cost savings (per year) could amount to about EUR 21 million for equity securities and EUR 35 million for non-equity securities (about EUR 56 million in total), as indicated in Table 10.

**Table 10 - Primary issuances on regulated markets (Option 2)**

| | Equity securities | Non-equity securities |
|---|---|---|
| Standard prospectuses approved in 2021[251] | 382 | 1 862 |
| Estimated average cost standard prospectus[252] | EUR 220 000 | EUR 75 000 |
| Estimated average cost savings of an EU Growth prospectus (in %)[253] | 25% | 25% |
| Estimated average cost savings per standard prospectus (B * C) | EUR 55 000 | EUR 18 750 |
| Estimated cost savings (A * D) | **EUR 21 010 000** | **EUR 34 912 500** |

[249] Methodological note: approved prospectuses in 2021 grouped by prospectus type and by securities type (equity vs. non-equity) using the reported annexes. This might cause a limited double counting of prospectuses (i.e. for the same prospectus, there might be a document with annexes belonging to the equity category and another belonging to the non-equity category).
[250] Option 1 would not lead to any cost savings related to the more streamlined contents of the prospectus.
[251] ESMA's data for 2021.
[252] See Table 6.
[253] See Table 7.

### 4.5. Primary issuances: offers of securities to the public and listing on SME growth markets

**Option 1**

Under option 1, in the case of a full exemption for the offer of securities to the public coupled with a listing on an SME growth market, which entails that issuers would draw up the admission document required by the SME growth market (and which content would be based on the rulebook of the latter), issuers would be expected to achieve higher cost savings than under option 2 (see below), despite losing the benefit and flexibility of a passportable EU admission document.

According to Table 6, average costs for an EU Growth prospectus are approximately EUR 50 000. According to Nasdaq Baltics, SME growth market admission documents may range from 20 to 60 pages, and the total cost for the listing based on an admission document varies around EUR 50 000 to EUR 100 000 (average EUR 75 000). The cost of an average SME growth market admission document is estimated to be EUR 15 000 - EUR 30 000, which would correspond to the range of 20-40% of the average total cost of listing based on an admission document approved by an exchange (i.e. EUR 75 000). The estimated cost saving on SME growth market would thus be based on the average of this range, i.e. EUR 22 500. Considering that 135 prospectuses were approved in 2021 for a public offer and initial listing on an SME growth market, the estimated total net cost saving for companies listing on an SME growth market would amount to about EUR 3.7 million, as shown in Table 11.

**Table 11 - Primary issuances on SME growth markets with an SME growth market admission document (Option 1)**

| | |
|---|---|
| Prospectuses approved in 2021 for a public offer and initial listing on an SME growth market[254] | 135 |
| Estimated average cost of an EU Growth equity prospectus[255] | EUR 50 000 |
| Estimated total gross cost savings from prospectus exemption (A* B) | EUR 6 750 000 |
| Estimated average cost of an admission document | EUR 22 500 |
| Additional total costs of an admission document (A*D) | EUR 3 037 500 |
| Incremental cost savings by drawing up the admission document (C – E) | **EUR 3 712 500** |

**Option 2**

In the case of offers of securities to the public and of listings on an SME growth market, the replacement of the EU Growth prospectus with a more streamlined EU admission document, based on the level of disclosure of the EU Recovery prospectus and of the SME growth

[254] See Table 8.
[255] See Table 6.

market admission documents, would allow issuers to significantly reduce costs.[256] Assuming cost of the EU admission document[257] are equal to the cost of an EU Recovery prospectus (on which model the former would be built), and using the estimated cost savings of 40% for the use of an EU Recovery prospectus compared to the use of an EU Growth prospectus (as indicated in Table 7), issuers that submitted a prospectus for a public offer and listing on a SME growth market in 2021[258] could have realised cost savings of about EUR 2.7 million, as shown in Table 12.

**Table 12 - Primary issuances on SME growth markets with an EU admission document (Option 2)**

| | EU admission document |
|---|---|
| Prospectuses approved in 2021 for a public offer and initial listing on an SME growth market[259] | 135 |
| Estimated average cost of an EU Growth prospectus for equity securities[260] | EUR 50 000 |
| Estimated average savings of an EU admission document vs. an EU Growth prospectus (in %)[261] | 40% |
| Estimated average cost savings per prospectus | EUR 20 000 |
| Estimated total cost savings (A * D) | **EUR 2 700 000** |

## 4.6. Secondary issuances

### Option 1

In the case of **secondary issuances**, listed issuers who have a track record on either a regulated market or an SME growth market would achieve cost savings if the simplified prospectus for secondary issuances would be replaced by a very short and streamlined prospectus similar to the EU Recovery Prospectus for both equity and non-equity securities (the EU Recovery prospectus format would also be used by companies wishing to transfer from an SME growth market to a regulated market). Combining the 40% cost savings from using the EU Recovery prospectus relative to the use of a simplified prospectus for secondary issuances of equity securities indicated in Table 13 with 138 secondary equity issuances and 66 secondary non-equity issuances in 2021 would yield aggregate cost savings of about EUR 3.8 million.

**Table 13 - Secondary issuances of equity and non-equity securities with an EU Recovery prospectus**

[256] The EU Recovery prospectus is currently the most streamlined prospectus type, with a 30 page-size limit (and 2 pages for the summary), while SME growth market admission documents may range from 20 to 220 pages according to the feedback from some stakeholders (20-60 pages on Nasdaq Baltics, up to 100 pages on Nasdaq Nordics, 180-220 pages on Euronext Growth Milan).
[257] EU admission document should not be confused with existing admission documents of exchanges.
[258] See Table 8.
[259] See Table 8.
[260] See Table 6.
[261] See Table 7.

| | |
|---|---|
| Simplified prospectuses for secondary issuances of equity securities approved in 2021 | 138 |
| Estimated average cost of a simplified prospectuses for secondary issuances of **equity** securities[262] | EUR 50 000 |
| Simplified prospectuses for secondary issuances of **non-equity** securities approved in 2021[263] | 66 |
| Estimated average cost of a simplified prospectuses for secondary issuances of **non-equity** securities[264] | EUR 40 000 |
| Estimated total prospectus costs for secondary issuances<br>(A * B + C * D) | EUR 9 540 000 |
| Estimated average savings of an EU Recovery prospectus[265] | 40% |
| Estimated cost savings for secondary issuances (E * F) | **EUR 3 816 000** |

**Option 2**

In case of a full exemption from the obligation to draw up a simplified prospectus for secondary issuances of securities fungible with securities already admitted to trading, issuers would generate even more significant cost savings. These companies would be required to publish only a statement of continuous compliance with the reporting and disclosure obligations and a short summary document with a few key information (e.g. on the use of proceeds). For the purpose of this analysis, only secondary issuances of equity securities issued by means of a simplified prospectus for secondary issuances or an EU Recovery prospectus in 2021 are considered to be fungible with equity securities already admitted to trading[266]. The yearly cost savings stemming from this exemption could therefore be estimated at about EUR 7.4 million, as indicated in Table 14 (from which the cost of producing the compliance statement and the summary document should be deducted, although they are likely to be minimal).

**Table 14 - Secondary issuances of fungible securities exempted from the prospectus requirement**

| | Secondary issuance prospectus (equity) | EU Recovery prospectuses (shares) |
|---|---|---|
| Prospectuses approved in 2021[267] | 138 | 16 |

[262] See Table 6.
[263] See Table 9.
[264] See Table 6.
[265] See Table 7. It is assumed that the 40% savings of the current EU Recovery prospectus for shares versus a simplified prospectus for secondary issuances of equity securities also applies for non-equity securities (there is currently no EU Recovery prospectus for non-equity securities).
[266] Although it is possible that companies issued shares/other equity which was not fungible with the shares already in circulation (e.g. type A and type B shares), this was likely minimal. On the opposite side, it is likely possible that companies issue non-equity securities that are fungible with non-equity securities already admitted to trading. It is, therefore, unlikely to impact the estimate for cost savings in any sizeable manner.
[267] ESMA's data for 2021.

| | | |
|---|---|---|
| Estimated average cost[268] | EUR 50 000 | EUR 30 000 |
| Estimated total cost savings from exemption (A * B)<br>(Gross of cost of summary document and statement of continuous compliance with reporting and disclosure obligation) | **EUR 6 900 000** | **EUR 480 000** |

For the purpose of this analysis, non-fungible securities relate to the situation where issuers, whose equity securities are already admitted to trading on a regulated market or listed on an SME growth market, issue non-equity securities. Therefore, only non-equity securities issued by means of a simplified prospectus for secondary issuances in 2021 are taken into account in the analysis. If issuers could draw up a lighter prospectus (largely mirroring the EU Recovery prospectus) for such non-fungible issuances instead of the currently required simplified prospectus for secondary issuances[269], they could realise cost savings of about EUR 1 million, as shown in Table 15.

**Table 15 - Secondary issuances of non-fungible securities with an EU Recovery prospectus**

| | |
|---|---|
| Simplified prospectuses for secondary issuances for non-equity securities approved in 2021[270] | 66 |
| Estimated average cost of a simplified prospectus for secondary issuances for non-equity securities[271] | EUR 40 000 |
| Estimated average savings of an EU Recovery prospectus in (%)[272] | 40% |
| Estimated average cost savings per prospectus (B * C) | EUR 16 000 |
| Estimated cost savings (A * D) | **EUR 1 056 000** |

## 5. The costs of being listed

In addition to the upfront issuance costs, corporations may be discouraged to use market funding by the on-going costs of obligations that follow from being listed on public markets. Oxera (2020) reported that the time and costs associated with compliance and administration and requirements to disclose sensitive information were among the reasons cited by market participants of why firms delisted from public markets. This section reports the available evidence on the magnitude and breakdown of ongoing costs to comply with regulations, in particular to comply with market abuse rules. These numbers serve as input to scenario

[268] See Table 6.
[269] As the EU Recovery Prospectus is currently only available for shares, detailed templates (schedules) for non-equity securities would have to be laid down in the legislative act.
[270] ESMA's data for 2021.
[271] See Table 6.
[272] See Table 7.

analysis on the magnitude of cost savings that the policy options discussed in the main body of the IA could trigger.

## 5.1. Estimates of the magnitude of the costs of staying listed

An IPO leads to follow-on costs for the issuer because of transparency obligations to the shareholders and the general public. Listing obligations are may-fold, ranging from requirements on accounting, auditing, investor relationships to corporate governance. While the Oxera (2020) study identified the importance of the costs of remaining listed, there is actually little information about the magnitude and breakdown of such costs. Nevertheless, Wegemann (2013)[273] provides an illustrative breakdown of the ongoing costs of remaining listed using an example of a mid-sized enterprise, for which he estimated total ongoing costs would amount to almost EUR 400 000 per annum (Table ). Costs for auditing, the shareholder assembly and broader investor relationship accounted for the lion's share of the overall costs. Costs of information and publication disclosures – beyond business reports and accounting - accounted for EUR 20 000 per annum.

**Table 16 - Costs of remaining listed for a mid-sized enterprise**

| | **EUR** |
|---|---|
| Exchange fee | 7 500 |
| Designated sponsor | 35 000 |
| Listing partner | 15 000 |
| Quarterly and annual reports | 40 000 |
| Audit | 100 000 |
| Roadshows + meetings with analysts | 50 000 |
| Costs for the shareholder assembly | 60 000 |
| Costs for investor relations | 60 000 |
| Information and publication obligations | 20 000 |
| **Sum** | **387 500** |

*Source: Wegmann (2013).*

Apart from this study, there is little quantitative information about the ongoing costs and in particularly about the costs of complying for companies with obligations stemming from MAR.

There is however another compliance cost study that focuses exclusively on the financial sector. The study analyses data received from a few financial institution on compliance with MAR.[274] It reports that compliance with MAR leads to ongoing costs between EUR 2 million and EUR 26 million for these financial institutions, largely consisting of costs for data processing and validation, IT operation and maintenance. However, since financial institutions are specialised actors and frequent issuers of securities, it is not clear whether their experiences can be applied to non-financial corporations.

[273] Wegemann, J., 'Kosten eines IPOs', *IpoBOX*, 2013, retrieved 7 April 2022.
[274] ICF/CEPS (2019), Study on the costs of compliance for the financial sector, final report for the European Commission, see Table 210.

Workshops and bilateral meetings with the industry and industry associations were organised to collect further information on the general cost of compliance with MAR as well as that of compliance with the specific MAR obligations (such as the obligation to disclose all inside information as soon as possible). It turned out that such information was not collected by the industry. Issuers were also deemed to be too heterogeneous to produce telling statistics on this matter. The information used below was reported by an EU trading venue that could source such information from 13 issuers. Among them was one large firm, 5 mid-sized firms and 6 SMEs. Given the limited size, there was no possibility to check whether there is a bias in the sample. Furthermore, the sample can neither be considered representative for the Member State, in which the corporations are located, nor for the EU-27. Still it allows for a broad, order-of-magnitude, estimate.

**Table 17 - Breakdown of ongoing costs from being listed on a public venue – indications from the industry, average in EUR**

| | SME | non-SME |
|---|---|---|
| Annual exchange fees | 5 900 | 12 500 |
| Other fees (central depository, supervisory institution, etc.) | 10 900 | 34 800 |
| Higher costs of statutory audit | 15 300 | 58 100 |
| Higher costs of accounting team related to higher accounting standards | 16 200 | 73 900 |
| *Higher costs of legal team related to analyses of additional regulation* | *16 100* | *21 000* |
| Higher costs related to corporate governance | 59 500 | 150 000 |
| *Costs of investor relations/information disclosure* | *15 600* | *62 200* |
| TOTAL | 139 400 | 412 500 |
| Memo: average issuance volume (EUR) | 42 800 000 | 944 500 000 |
| | 7 | 6 |

*Source: Indications from individual issuers collected from a European trading venue.*

## 5.2. The potential for cost savings – orders of magnitudes and assumptions

### 5.2.1. Cost savings for issuers

The Commission asked for estimates of compliance cost with MAR in its public consultation and workshops with stakeholders. The outcome was not as clear as expected since respondents aggregated them together with other cost components and did not report them separately. The estimates produced in this section assume that the costs of compliance with MAR lead to higher costs for the legal team and, partly, to higher costs of investor relationships (see Table 17).

In the absence of further information about the determinants of these compliance costs for issuers, it is only possible to provide a broad, order-of-magnitude, estimate of the impact of changes to MAR by using a number of assumption for several parameter based on plausibility considerations. Given the broad range of numbers obtained by the study estimating compliance costs in the financial sector, a similar survey is unlikely to deliver suitable results for the even more heterogeneous issuers in the non-financial sector. That said, the following paragraph presents a scenario analysis to obtain a notion of possible cost savings.

The main type of cost incurred by the issuer complying with MAR is the cost of its legal team and/or the cost of (external) legal advice. The indications from issuers about the additional costs for the legal team when being listed can thus serve as a benchmark for estimating the costs of compliance (Table 17).

To get orders of magnitude, it is, first, assumed that 80% of the higher cost for *the legal team* reported by issuers are due to compliance with MAR and, second, that 80% of those MAR compliance costs are due to the legal uncertainty associated with applying the interpretation of inside information. The first assumption of 80% of MAR compliance costs over the total compliance costs is due to the fact that compliance with MAR was reported by stakeholders (in bilateral discussions and workshops) as the main ongoing concern requiring attention of the legal internal department or external legal advisors. All other ongoing compliance costs are covered by other cost items (in the table) under accounting, auditing and investor information. The second assumption of 80% devoted to the legal interpretation of inside information once again is deduced from talks with stakeholders who reported that dealing with the legal uncertainty around the interpretation of the notion of inside information is the dominant ongoing challenge for their respective legal consultant. Therefore, while stakeholders were not able to report the exact numbers, they confirmed that MAR compliance and the legal uncertainty surrounding the notion of inside information constitute significant cost elements for them.[275] It is then assumed that option 1 (dual definition of inside information accompanied by a non-exhaustive list of events) would allow to save a considerable part, but not all, of the costs for the legal team post-IPO associated with the definition of inside information (75%). The exhaustive list of events under option 2, in turn, would remove all legal uncertainty associated with the notion of inside information, reducing those legal costs by 100%.[276]

Applied to the average costs of the legal team and considering that there are about 3 100 SMEs listed on regulated markets or SME growth markets and around 6 400 other firms on regulated markets or MTFs[277], option 1 could lead to (estimated) economy-wide compliance cost reductions of about EUR 89 million, broken down into EUR 25 million for SMEs and EUR 65 million for non-SMEs. The adoption of a comprehensive list of events (option 2) could lead to a further cut in related compliance costs (i.e. 100% instead of 75% cost reduction for the portion of the costs associated with the legal team dealing with the interpretation of insider interpretation), resulting in aggregated (estimated) cost savings of EUR 119 million, of which EUR 33 million for SMEs and EUR 86 million for non-SMEs.

It is then assumed that 25%[278] of the costs attributed to *investor relations* and *information publication* costs in Table 17 could be attributed to the disclosure of information to investors and that the benefits of improved rules on the possibility to delay disclosure of inside information could represent 10%[279] of that part of the costs for investor relations/information

[275] Having said that, both assumptions remain to be ballpark numbers that should be treated as such and should not be used as statistically accurate estimates.
[276] Estimated costs savings of: *0.8*0.8*0.75*(underlying benchmark legal team cost level)* under option 1, and *0.8*0.8*1*(underlying benchmark legal team cost level)* under option 2.
[277] See Table 1of this Annex.
[278] In Wegmann (2013), the information disclosure costs amount to a quarter of the sum of *investor relations* and *information publication* costs, see Table 16.
[279] Both numbers are purely ballpark numbers, based on previous exchanges with stakeholders and our understanding.

publication costs, given the reduced need for delay notifications in the case of more mature information[280].

The estimates for cost savings from the clarification of the delay conditions rely on the cost data on investor relations and information publication provided by Wegmann (2013) (Table 18). Applying 25% (as set out above) the benchmark cost level and using a conservative assumption that the clarification on condition for delay would save 10% of these costs, produces the aggregate (estimated) cost savings of about EUR 12 million, out of which 1.2 million for SMEs and 10 million for larger firms.

**Table 18 - Scenario analysis of the cost savings from review of the definition of inside information and of the conditions for delaying its disclosure**

| | | SME | non-SMEs | total |
|---|---|---|---|---|
| 1 | Number of listed firms[281] | 3 168 | 6 411 | 9 579 |
| 2 | Higher costs for legal team from being listed[282] | 16 100 | 21 000 | |
| 3 | Higher costs for investor relations from being listed[283] | 15 600 | 62 200 | |
| 4 | Assumed ratio for MAR-related work of legal team | 80% | 80% | |
| 5 | Assumed share of the legal team's work related to the definition of inside information | 80% | 80% | |
| 6 | Assumed share of information costs in costs for investor relations and information publication | 25% | 25% | |
| Assumed share of cost saving from clarity on inside definition | | | | |
| 7 | Option 1 in % | 75% | 75% | |
| 8 | Option 2 in % | 100% | 100% | |
| Assumed share of cost saving from clarity on delays | | | | |
| 9 | Option 1 and Option 2 | 10% | 10% | |
| Aggregate cost savings from clarity on inside definition | | | | |
| 10 | Option 1 (10 = 1*2*4*5*7) | 24 554 000 | 64 595 000 | 89 149 000 |
| 11 | Option 2 (11 = 1*2*4*5*8) | 32 738 000 | 86 127 000 | 118 865 000 |
| Aggregate cost saving from clarity on disclosure | | | | |
| 12 | Option 1 and Option 2 (12 = 3*6*9) | 1 232 000 | 9 964 000 | 11 196 000 |

[280] Estimated cost savings: 0.*25*0.10*(underlying benchmark investor relationship cost level +information publication cost level)* (both under options 1 and 2, as both are assumed to lead in an equal manner to less delay notifications).
[281] See Table 1.
[282] See Table 17.
[283] See Table 17.

### 5.2.2. Cost savings for public authorities

National competent authorities (NCAs) incur costs when they have to examine the information sent by an issuer that disclosure of the information was delayed and a written explanation of how the relevant conditions were met. It was possible to gather data on these costs from 4 Members States: PL, MT, IT, ES.[284] As the data gathered from those Members States are captured in a different way, it was necessarily to make them the comparable. The following transformations were undertaken:

- In case of Malta, NCA assessed costs of delay when they needed to ask follow-on questions as EUR 175 and when they did not need to ask follow-on question - as EUR 90. Assuming that at least in one out of three cases they would need to ask follow-on questions, the average cost would be EUR 118.
- Spain's NCA indicated the costs of examining the notification on delay at EUR 45-55. For the purpose of this impact assessment, the average quote of EUR 50 will be taken into consideration.
- In Poland, the average number of delays per year for the period of 3-years was 150. The total costs for 2021 incurred by Polish NCA, when examining notifications on delays, were estimated at EUR 20 000. It gives an average of EUR 133 per delay.
- In case of Italy, the average number of delay for 3-years period was 286. The total costs for 2021 incurred by the Italian NCA, when examining notifications on delays, were estimated at EUR 25 000. The average cost of delay would be EUR 87 EUR.
- Assuming that these four Member States are a representative sample of Member States, the average costs per delay in the EU would be EUR 97. This is a prudent estimation, as the sample of NCAs taken into consideration for this calculation does not include countries with the highest labor costs.
- The total number of delays in EU for 3-years period reached 11 909 (see Annex 6 for more details), which gives an average of 3 970 delay notifications per year. This means that on average, the cost of examining delays by NCAs per year in the EU would equal EUR 385 090.

  If we assume a 20%[285] reduction in costs related to the examination of delay notifications following improvements introduced to the delay regime under option 1,[286] an estimated cost reduction for NCAs would amount to EUR 77 018.

[284] Those Member States indicated the cost valuation of the procedure.
[285] It is assumed that NCAs would enjoy more cost savings than issuers in relation to delay notifications (20% vs 10%). This is due to the fact that issuers would still be expected to do the necessary evaluation of a larger amount of information that may not all result in a delay notification submitted to the NCAs (we are thus broadly assuming that every second piece of information considered by an issuer would result in a formal delay notification to NCA).
[286] Option 2 foresees no amendments to conditions for delay.

# ANNEX 5: ANALYSIS OF THE PRE-IPO PHASE: MVR SHARE STRUCTURES

## 1. What are MVR share structures

MVR share structures (also called Dual Class share structures) are a straightforward form of control enhancement mechanism that generally builds on dividing shares in two classes based on voting rights. One of the classes has a lower or subordinate voting value (commonly one vote). The other class typically carries a larger number of votes (e.g. ten); it will be hereafter referred to as MVR shares.[287] The purpose of MVR share structures is generally to permit a shareholder (or a group of shareholders) to hold a controlling stake in a company without having to make the proportionate economical investment required for the size of the stake, should all shares have the same voting power.

Loyalty shares – another form of control enhancement mechanism - are shares that give enhanced voting power to shareholders that have held them for a specified time period. Typically loyalty-shareholders get two votes per share, instead of one vote, if they have held their shares for two years or more[288]. Any shareholder can obtain the added voting rights provided they maintain the share for the specified time period. When loyalty shares are traded, the buyer does not acquire the additional voting rights - rather they are extinguished. Although the introduction of loyalty shares aims at bringing long-term benefits for the company by incentivising long-term shareholders, empirical evidence has demonstrated that this is not always the case. Studies have demonstrated that in practice they are used to enhance control by controlling shareholders and do not increase the holding period of shares (see paragraph 2 for more detail).

MVR share structures are only one among the existing control enhancing mechanisms, i.e. mechanisms generating a discrepancy in the relation between financial ownership and voting power with the result that a shareholder can increase its control without holding a proportional stake of equity. The study on the proportionality between ownership and control in EU Member States[289], requested by the Commission and published in 2007, showed that the available mechanisms to enhance/lock in control by leveraging voting power may also include, among others, non-voting shares[290], non-voting preference shares[291], and voting right ceilings[292]. Nevertheless, being more rigid in their set-up, these alternative share structures naturally constrain the amount of equity that can be raised at the IPO stage and through

[287] In some Member States, MVR shares are shares with one voting right, while shares inferior to MVR shares may hold less than one voting right (e.g. 1/10 of a voting right).
[288] Loyalty shares are also called "tenure-share voting stock" or "time-phased voting stock". In some cases, additional (fractional) voting rights are added progressively, the longer the shareholder holds on to a share.
[289] Report on the Proportionality Principle in the European Union, External Study Commissioned by the European Commission, 2007, final_report_en (2).pdf.
[290] Shares with no voting rights and which carry no special cash-flow rights (such as a preferential dividend) to compensate for the absence of voting rights.
[291] Non-voting shares issued with special cash-flow right to compensate for the absence of voting rights. For example, shares that have no voting rights but have a preferential (higher or guaranteed) dividend.
[292] A restriction prohibiting shareholders from voting above a certain threshold irrespective of the number of voting shares they hold. Voting right ceilings can be expressed as a percentage of all outstanding voting rights (for example, when no shareholder may vote for more than three percent of the company's registered share capital) or as a percentage of all votes cast at a general meeting (very common in many Member States).[293] Becht, Marco and Kamisarenka, Yuliya and Pajuste, Anete, Loyalty Shares with Tenure Voting – Does the Default Rule Matter? Evidence from the Loi Florange Experiment (April 1, 2018). European Corporate Governance Institute (ECGI) - Law Working Paper No. 398/2018, Available at SSRN: https://ssrn.com/abstract=3166494 or http://dx.doi.org/10.2139/ssrn.3166494

follow-on issuances, since further share issuances would inevitably dilute the founder's interest due to a fixed (lower) voting ratio. By contrast, MVR shares allow founders to retain majority-voting control while selling a larger portion of their investment in the company.

MVR share structures can be especially beneficial for high-growth companies active in the tech-sector whose founders may desire to retain control of the company post-IPO to pursue their idiosyncratic vision for the company without becoming too exposed to the whims of the public markets. Regulatory competition to attract IPOs has led many jurisdictions outside the EU that had previously banned or restricted these structures to revise their regulatory approaches to MVR share structures. Asian financial centres, including Hong Kong and Singapore, and more recently Shanghai and Shenzhen, which traditionally prohibited MVR share structures, currently allow them, when certain requirements are met. In the same vein, the UK recently amended their listing rules to allow companies with these structures to list on the premium segment of the London Stock Exchange (see section 3.2. for more detail).

## 2. Loyalty shares vs MVR share structures

Both loyalty and MVR share structures imply a departure from the "one share, one vote" principle, as they confer proportionally more votes to the shareholder who holds one of these shares than ordinary shares. However, there are notable differences between the two both in terms of the reasoning behind their implementation and their effectiveness.

MVR share structures are introduced as a mechanism to preserve the rights of the founder or controlling shareholder through different classes of shares, one of which has a fixed, higher voting power. These structures are meant to increase the allure of public markets for founder driven company and to isolate their decision-making from market pressures. One of the main reasons that deters founders from listing their company is the risk that short-term market volatility could lead to investors seeking to change the founder's vision for the company as well as leaving them vulnerable to hostile takeovers. MVR share structures provide a way for founders to continue to pursue their vision on how the company should grow while still allowing investors to invest in the company and therefore profit economically from its growth. Founders' vision and ability to pursue that vision becomes part of a company's selling point and investors factor this into the share price when deciding whether to invest. MVR share structures are prevalent throughout the globe, with presence in diverse capital markets, such as the US, Nordics, South Africa and Hong Kong (see section 3 for more detail).

Unlike MVR share structures, loyalty shares are enhanced control mechanisms designed to foster long-term shareholding among investors, without constituting a separate class of shares. Any shareholder can obtain additional voting rights if they hold the stock for the designated time. Furthermore, as the enhanced voting rights are not attached to the shares themselves, but rather to the shareholders that own the shares, loyalty shares become ordinary shares when the shares change owner. Loyalty shares are expected to lead to a more stable, long-term-oriented ownership base that would benefit companies' development, protecting it from the influence of short-term investors. These structures exist, for example, in Italy, Belgium and France.

Empirical evidence, however, points to the fact that these shares have mostly been used by incumbent shareholders to lock-in control, sometimes in a less transparent manner than MVR shares. Studies in France found that there is no significant difference in the average holding

periods of investors between firms with and without loyalty voting shares[293]. This is corroborated by anecdotal evidence from Italy that neither institutional investors nor retail investors make use of loyalty voting rights to a significant extent, and that it is almost exclusively the controlling shareholder who benefits from it[294]. In the same vein, other research found that loyalty shares are used less widely and less intensely in firms with dispersed ownership than they are used in firms with a controlling shareholder[295].

## 3. Current situation in the EU Member States and in other jurisdictions outside of the EU

### 3.1. Situation in the EU Member States

There is currently fragmentation in the EU in regards to MVR share structures with twelve Member States allowing MVR share structures, 2 Member States allowing both MVR and loyalty shares, three Member States allowing loyalty shares while banning MVR shares, and twelve prohibiting both. Table 1 provides for an overview of the Member states' legislations regarding MVR share structures.

Some Member States, such as Sweden or Denmark, have allowed MVR share structures nearly since the inception of their capital markets in the 19th century. In Sweden, the percentage of listed companies with MVR share structures has always remained above 40%[296] and in Finland and Denmark they represent the majority of public market capitalization[297]. In contrast, other Member States such as Germany and Austria, do not allow companies to issue MVR shares.

Regardless of Member States' positions on MVR share structures, it seems that Member States allow for different deviations from the "one-share one-vote" principle. The study on the proportionality between ownership and control in EU Member States (published in 2007) already concluded that no EU jurisdiction within the analysed sample opted for an all "one share one vote" principle. On the contrary, and quite remarkably, even those Member States that had, to some extent, formally adopted the "one share one vote" principle authorised various control-enhancing mechanisms, such as voting right ceilings or non-voting preference shares[298]. These conclusions were recently confirmed in a study on minority shareholders protection, requested by the Commission and published in 2018[299]. This study contains a section on the application of the "one share, one vote" principle in Member States, where it is concluded that the national legal frameworks of the EU Member States do not see this principle as a fundamental one[300]. It is also pointed out that deviations from the "one share one vote" principle are a rather recent tendency.

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[293] Becht, Marco and Kamisarenka, Yuliya and Pajuste, Anete, Loyalty Shares with Tenure Voting – Does the Default Rule Matter? Evidence from the Loi Florange Experiment (April 1, 2018). European Corporate Governance Institute (ECGI) - Law Working Paper No. 398/2018, Available at SSRN: https://ssrn.com/abstract=3166494 or http://dx.doi.org/10.2139/ssrn.3166494

[294] Joint statement on the introduction of multiple voting rights at Italian listed Companies
https://www.eumedion.nl/en/public/knowledgenetwork/letters/2015-02---statement-on-italian-multiple-voting-rights.pdf

[295] Among the French dispersed ownership firms using loyalty shares, only 9.5 percent of the overall shares received the additional vote, while those companies with controlling shareholders had the loyalty-share vote boosting about four times as many (i.e. 36%) shareholder votes (see Mark J. Roe and Federico Cenzi Venezze, Will Loyalty Shares Do Much for Corporate Short-Termism, The Business Lawyer; Vol. 76, Spring 2021, p. 487).

[296] Skog. R, Lidman, E (2022) London allowing dual class Premium listings: A Swedish commentary

[297] Kim, J., Matos, P. and Xu, T. (2018), Multi-Class Shares Around the World: The Role of Institutional Investors

[298] Report on the Proportionality Principle in the European Union, External Study Commissioned by the European Commission, 2007, final_report_en (2).pdf, p. 14.

[299] Study on Minority Shareholders Protection, Final report, 2018, DS0418428ENN.en (2).pdf.

[300] *Ibid*, p. 192.

It is also worth noting that several EU Member States have recently changed their national legislation to allow MVR share structures and/or loyalty shares:

(i) In France, the 2014 Loi Florange made loyalty shares the default voting structure for French public companies;

(ii) in 2015, Italy, as part of a package of reforms designed to make listing more attractive for private companies (and, more generally, to further enhance contractual freedom in corporate law), allowed non-listed companies to issue MVR shares, while also ensuring that issuers can retain them once listed. Listed companies can adopt loyalty shares;

(iii) in 2018, Belgium departed from the traditional prohibition on issuing securities with MVR shares. Unlisted companies are now able to issue MVR shares without a limit on the number of votes that can be attached to a share. Listed companies may introduce loyalty shares, the introduction of which requires a two-thirds majority vote;

(iv) in 2021, Spain introduced loyalty shares when transposing the Shareholders Rights Directive[301];

(v) Portugal introduced MVR share structures in January 2022 with the objective of fostering IPOs and attracting companies to their public market. Companies going public or already listed have now the choice to issue MVR shares with a maximum voting ratio of 5:1.

**Table 1 - Current situation in all EU Member States regarding multiple voting right shares**

| | MVR shares | | Loyalty Share | Non-voting right share | |
|---|---|---|---|---|---|
| Member State | Allowed when listing or when listed | Maximum voting ratio | Allowed | Allowed | Type |
| Austria | no | N/A | no | yes | up to 1/3 of the share capital |
| Belgium | no | N/A | yes | yes | |
| Bulgaria | no | N/A | no | yes | Preference shares |
| Cyprus | no | N/A | no | yes | Preference shares |
| Croatia | no | N/A | no | yes | Preference and ordinary shares up to ½ of total shares |
| Czech Republic | yes | no | no | yes | Preference and ordinary shares |
| Denmark | yes | no | no | no | |
| Estonia | no | N/A | no | yes | Preference and ordinary shares |

[301] Directive 2007/36/EC, as amended by Directive (EU) 2017/828.

| | | | | | |
|---|---|---|---|---|---|
| Finland | yes | no | no | yes | |
| France | no | N/A | yes | yes | |
| Germany | no | N/A | no | yes | |
| Greece | no | N/A | no | yes | |
| Hungary | yes | 10:1 | no | yes | |
| Ireland | yes | - | no | yes | |
| Italy | yes | 3:1 (MVR shares can only be issued by private companies and retained after the IPO) | yes | yes | up to ½ of total shares |
| Latvia | no | N/A | no | yes | Preference shares |
| Lithuania | no | N/A | no | yes | Preference shares |
| Luxembourg | no | N/A | no | yes | |
| Malta | yes | - | no | yes | |
| Netherlands | yes | | yes | no | |
| Poland | yes | 2:1 (MVR shares can only be issued by private companies and retained after the IPO) | no | yes | |
| Portugal | yes | 5:1 | no | yes | Only preference shares without a vote |
| Romania | yes | Only listed companies can issue these shares | no | yes | Only preference shares without a vote |
| Slovakia | no | - | no | yes | Only preference shares without a vote |
| Slovenia | no | N/A | no | yes | Only preference shares without a vote up to ½ of total shares |
| Spain | no | N/A | yes | yes | up to ½ of total shares |
| Sweden | yes | 10:1 | no | no | |

*Source: European Commission*

### 3.2. Situation outside the EU

Outside the EU there are several jurisdictions that have a long history of using MVR share structures, such as the US, Canada or Norway. However, regulatory competition to attract

IPOs has recently led many other jurisdictions that previously banned or restricted these structures to revise their regulatory approaches. The UK recently amended their listing rules so as to allow companies with these structures to list on the premium segment of the London Stock Exchange. In Asian financial centres, including Hong Kong and Singapore, and more recently Shanghai and Shenzhen, there has also been a reversal of the legislation on MVR shares. In all of these jurisdictions, the use of MVR share structures had been traditionally prohibited, and it is currently allowed if certain requirements are met. This approach was adopted in an attempt to compete with other leading financial centres for the attraction of IPOs, after seeing how companies like Alibaba—the then biggest IPO in history—decided to go public in New York because they were unable to go public with a MVR share structure in Hong Kong[302]. In Singapore, losing out on the IPO of the English football club Manchester United in 2012 to the US sparked a debate on MVR share structures. After a public consultation and internal debate, MVR share structures were approved in 2016.

**Table 2 - Current situation in countries outside the EU regarding multiple voting right shares**

| Country | Multiple voting right shares | |
|---|---|---|
| | Allowed | Type |
| Australia | No | N/A |
| Canada | Yes | MVR shares (no limit) |
| China (Mainland) | Yes[303] | MVR shares (10:1) |
| Hong Kong | Yes | MVR shares (10:1) |
| India | Yes | Differential voting right shares |
| Israel | No | N/A |
| Japan | Yes | MVR shares |
| Norway | Yes | MVR shares (10:1) |
| Singapore | Yes | MVR shares (10:1) |
| South Korea | No | N/A |
| Switzerland | Yes | MVR shares (10:1) |
| United Kingdom | Yes | MVR shares (20:1) |
| United States | Yes | MVR shares (no limit) |

*Source: European Commission*

[302] See HKEX Concept Paper, "New Board" (2017), 1, 13, available at https://www.hkex.com.hk/-/media/HKEX-Market/News/Market-Consultations/Concept-Paper-on-New-Board/cp2017061.pdf. "*Hong Kong has faced heavy competition from the US for the listings of some of the most sought after Mainland companies from the information technology sector. One major attraction of the US market for many such companies is that WVR structures are permitted there, whereas the Hong Kong market does not allow them. Although only 33 out of 116 (28%) Mainland companies with primary listings in the US have WVR structures, their combined market capitalisation of US$561 billion represents 84% of the market value of all US-listed Mainland companies. Their market capitalisation is equivalent to 15% of the entire market capitalisation of the Hong Kong market. Moreover, 18 out of 33 (55%) US-listed Mainland Chinese companies with WVR structures, accounting for 84% of market capitalisation, are from precisely the information technology industry*".

[303] MVR shares are allowed for companies listed on the Science Technology Innovation Board of SSE or on the ChiNext Market of SZSE.

### 3.2.1. The recent changes to the UK listing rules

The existence of MVR share structures in the UK dates back to the beginning of the 20th century. Although popular during their inception, during the 1950's pushback from institutional investors led to these structures being negatively perceived and banned from the premium segment of the London Stock Exchange, although it remained possible for companies with MVR shares to list shares in the standard listing segment. This ban had been in place until 2021, when the UK Financial Conduct Authority changed the rules in order to allow for companies with MVR share structures to be listed on the premium segment.

The reversal of the UK position was ignited by the UK Listing review published in early 2021[304]. The UK Listing Review published a set of recommendations "*to boost the UK as a destination for Initial Public Offerings (IPOs) and to optimise the capital raising process for companies seeking to list on the main UK markets*", including one on allowing MVR share structures on the premium segment of the London Stock Exchange. This proposal had the objective of incentivising listings by high-tech companies whose founders often fear dilution of control. However, in order to maintain high corporate governance standards for companies listed in the premium segment, companies listing with MVR share structures would have to include a 5-year sunset provision and be subject to certain additional conditions, such as the requirement that MVR share shareholders be directors, limitations on the transfer of MVR shares (transfer based sunset clause) and a maximum voting ratio of 20:1.

The UK listing review was followed up by a consultation where the Financial Conduct Authority inquired stakeholders on several subjects including MVR share structures (called Dual Class Shares in the survey)[305]. 58 stakeholders responded to the consultation. A large majority of respondents (30) were in favour of the introduction of the MVR share structures into the premium listing segment with the specified conditions with only a minority of respondents objecting (8 respondents). Respondents also mainly agreed that there was a proper balance between allowing MVR share structures into premium listing while maintaining London's high levels of corporate governance and stewardship.

The results of the public consultation were published in December 2021 together with the amendments to the UK listing rules to allow MVR share structures on the premium segment[306]. One of the latest companies to list in the LSE using MVR share structures was the FinTech payments company Wise (formerly TransferWise) in July 2021 which was founded by two Estonians.

### 3.2.2. Recent developments in Asia (Singapore and Hong Kong)

Although MVR share structures have been traditionally available in a number of developed markets nearly since the inception of their capital markets, they have not been widespread in the Asia Pacific region until recently.

[304] The document is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/966133/UK_Listing_Review_3_March.pdf

[305] PS21/22: Primary Market Effectiveness Review, Consultation Paper, available at CP21/21: Primary Markets Effectiveness Review (fca.org.uk).

[306] Primary Market Effectiveness Review: Feedback and final changes to the Listing Rules, Policy Statement, PS21/22 December 2021, available at PS21/22: Primary Market Effectiveness Review: Feedback and final changes to the Listing Rules (fca.org.uk).

In Hong Kong, after missing out on Alibaba's IPO in favour of NYSE in 2014 due to not allowing the possibility of listing with a MVR share structure, HKEX changed its listing rules in 2018 to allow companies to list with these shares. Xiaomi Corporation, one of the world's largest smartphone makers, was listed in early July 2018, making it the first MVR share IPO on HKEX.

Similarly, in Singapore, the Singapore Exchange ('SGX') concluded their second round of consultations on MVR share structures in April 2018 and announced in June 2018 that companies with MVR share structures would be eligible for listings on the SGX. Similar to Hong Kong, the debate on allowing MVR share structures started in Singapore after missing out on the IPO of the English Football Club Manchester United in 2012 that, like Alibaba, listed in the US.

SGX began its push for the adoption of MVR share structures to capture opportunities presented by the "new economy" companies in 2016, when its Listings Advisory Committee provided ground rules for listings using MVR share structures. Those rules were largely in line with the subsequent (2018) amendments to Singapore's company law. Then, the Future Economy Council[307] made the following recommendation, "*for listed companies, the Government should permit dual class share (DCS) structures while instituting appropriate safeguards to promote market transparency and mitigate governance risks. DCS listings are increasingly being considered, for example, in industries such as information technology and life sciences. DCS should be permitted for companies seeking a listing on the Singapore Exchange (SGX) while instituting appropriate safeguards to promote market transparency and mitigate governance risks"*[308].

The moves by Hong Kong and Singapore, two of the key financial centres in Asia, created a ripple effect amongst other players in the region. In the subsequent years both India and China amended their listing rules in order to accommodate these types of structures.

**4. EU Legislation on voting rights**

EU legislation does not contain to date any general principle/rules on voting rights and/or proportionality between ownership and control. Efforts have been made in the past by the Commission to instil the "one vote one share" principle at EU level, first, in 1972, with the draft proposal for the fifth company law directive and later, in 2007, with the work on a Commission Recommendation on the proportionality principle. In both instances, however, the Commission's efforts did not come to fruition, due to a lack of political support as well as of conclusive supportive evidence. The 2007 study on the Proportionality Principle in the EU clarified that, on the basis of the available academic research, there was no conclusive evidence of a causal link between deviations from the proportionality principle and either the economic performance of listed companies or their governance. The study also found that there was some evidence that investors perceive these mechanisms negatively and consider more transparency would be helpful in making investment decisions.

[307] The Future Economy Council is an economic body that drives the growth and transformation of Singapore's economy for the future. It is chaired by the Deputy Prime Minister & Coordinating Minister for Economic Policies and comprises members from government, industry, trade associations and chambers, unions, and educational and training institutions.

[308] Committee on the Future Economy. 2017. "Report of the Committee on the Future Economy: Pioneers of the Next Generation" Ministry of Communications and Information [SG].

In the last decade the focus gradually shifted from the opportunity of mandating the "one share, one vote" principle to considering whether certain deviations from that principle should be introduced into EU law. This gradual shift followed suit with the recent tendency in some Member States to allow MVR share structures and/or loyalty shares. In 2011, the Reflection Group on the Future of EU Company Law proposed that the Commission recommends to the Member States to allow loyalty shares[309]. The introduction of loyalty shares was also suggested by the European Parliament, during the negotiations on the Shareholder Rights Directive, but did not receive sufficient political support at the time. More recently, the CMU HLF as well as the TESG recommended that companies are allowed to implement (and list with) MVR share structures with a view to ensuring that founders do not have to relinquish control when going public.

A few provisions referring to MVR shares are contained in the Takeover Bid Directive[310]. This Directive lays down rules to coordinate Member States' regulation of takeover bids (i.e. a public offer to acquire all or part of the securities of a company listed on a regulated market). As deviations from the "one share one vote" principle may limit the contestability of corporate control, the Directive aims to ensure full disclosure on whether a company has issued shares that deviate from the "one share one vote" principle and provides that disproportionate voting rights can be neutralized by the so-called breakthrough rule. The latter aims to make certain restrictions inoperable during the takeover period and allows a successful bidder to easily remove the incumbent board of the target company and modify its articles of association.

Article 10(1)(a) of the Takeover Bids Directive requires Member States to ensure that companies admitted to trading on a regulated market publish detailed information on "*the structure of their capital […] with an indication of the different classes of shares and, for each class of shares, the rights and obligations attaching to it and the percentage of total shares capital that it represents*". Information must also be published as to "*the holders of any securities with special control rights*" (e.g. golden shares) and to "*any restrictions on voting rights, such as limitations of the voting rights of holders of a given percentage or number of votes, deadlines for exercising voting rights, or systems whereby, with the company's cooperation, the financial rights attaching to securities are separated from the holding of securities*" (Article 10(1)(d) and (f)).

With respect to MVR shares, in particular, Article 11(3) last sentence requires that these shares carry only one vote at the general meeting of shareholders which decides on any defensive measures in accordance with Article 9[311] (breakthrough rule). Art. 11(5) moreover provides that "*equitable compensation shall be provided for any loss suffered by the holders of those rights*" under the terms set by the Member States.

Member States may, however, opt-out of the breakthrough rule under Article 12(1), which allows them to "*reserve the right not to require companies … which have their registered offices within their territories to apply Article 9(2) and (3) [on shareholder approval of post-*

[309] See Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union by Jaap W. Winter, Jan Schans Christensen, José M. Garrido Garcia, Klaus J. Hopt, Jonathan Rickford, Guido Rossi, Joelle Simon :: SSRN

[310] Directive 2004/25/EC of 21 April 2004 on takeover bids.

[311] Under Article 11(4), the same principle applies whenever, following a bid, the offeror holds 75% or more of the capital carrying voting rights, with reference to "the first general meeting of shareholders following closure of the bid, called by the offeror in order to amend the articles of association or to remove or appoint board members".

*bid defences] and/or Article 11*". Yet, where Member States make use of this option, "*they shall nevertheless grant companies which have their registered offices within their territories the option, which shall be reversible, of applying Article 9(2) and (3) and/or Article 11*" (Article 12(2)). Listed companies, therefore, shall be granted an opt-in right with respect to the breakthrough rule by those Member States that decided to opt-out. To date, only three Member States have chosen to fully adopt the breakthrough rule.

## 5. Advantages and disadvantages of MVR share structures

There has been a long standing debate among academics, policy-makers, stock exchanges and other stakeholders regarding MVR share structures and on whether they are beneficial for companies and the overall capital markets ecosystem and if companies should be allowed to go public with a MVR share structure. This section presents advantages and disadvantages of MVR share structures as reported by stakeholders in public consultations and workshops and as set out in studies and research papers.

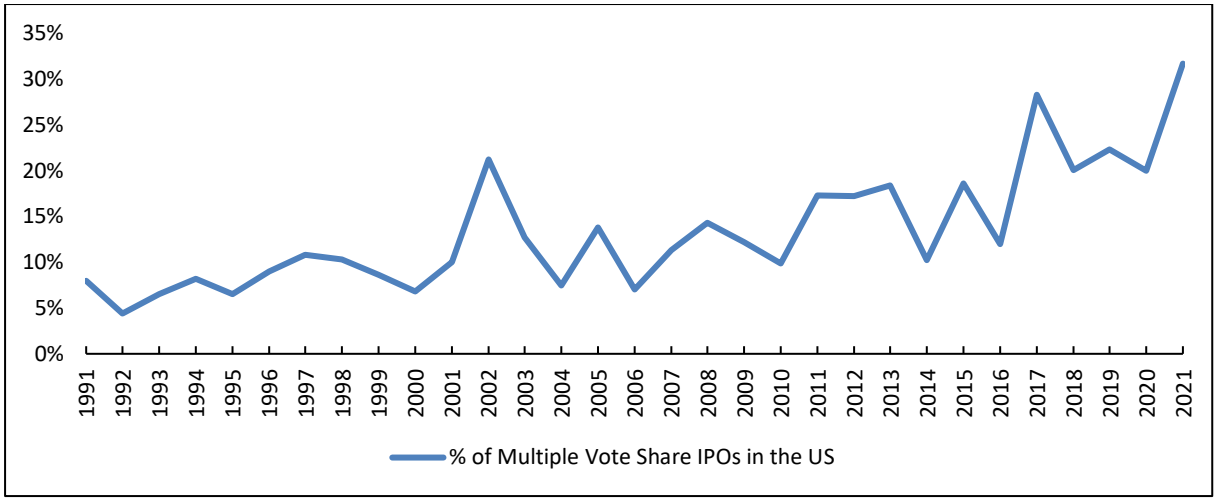
### 5.1. Advantages of MVR share structures

**The availability of MVR share structures may incentivise more founders to list.** MVR share structures provide founders with the opportunity to tap public equity capital markets for funding, and enjoy all the benefits associated to listing (e.g. reported higher growth compared to unlisted peers[312]), while retaining a larger control over their company. Hi-tech, high growth issuers as well as family-owned and smaller companies are more likely to consider listing on a public market as a viable funding source if reassured that they would not have to cede control over their business once they list. This is backed by the results of the public consultation, where 76% of the respondents agreed that, where allowed, the use of MVR shares has effectively encouraged more firms to seek a listing on public market.

Empirical evidence shows that the popularity of MVR share structures in the US has grown noticeably in the last years, reaching 33% of all IPOs in 2021. Although it cannot be assumed that the 98 companies that listed in the US in 2021 with MVR shares would not have listed if these share structures were not allowed, it can be inferred that the possibility of adopting a MVR share structure was a very important part of the decision to list.

**Figure 1. Percentage of MVR share structure IPOs in the US.**

[312] Didier, Tatjana; Levine, Ross, and Schmukler, Sergio, L. (2016) Capital market financing, firm growth, and firm size distribution, ESRB Working Paper No 4, March 2016.




*Source: Jay Ritter – IPO statistics*

Thus, the introduction of MVR share structures can, on the one hand, attract companies that would have otherwise listed abroad and, on the other hand, attract companies that would have remained private if listing with these shares were not allowed. Annex 4 contains further analysis on the link between MVR shares and issuers' propensity to go public.

**Companies with MVR share structures can potentially have higher valuations at the IPO stage**. According to literature, companies with MVR share structures tend to have higher valuations at the IPO stage generating more wealth for founders and other initial investors.[313] Recently listed firms tend to trade at a premium and operate at least as efficiently as recently listed single-class firms. This is supported by a study that established that companies with MVR share structures exhibit higher valuations around the time of the IPO, but find that as these companies mature, their valuation relative to single class share companies recedes[314]. Some studies have shown that as companies with MVR share structures mature their agency costs increase, their valuation, margins, labour productivity, and pace of innovation decrease, and they may become more reluctant to cut investment and employment in bad times, increasing risk[315]. Other studies have also demonstrated that companies with MVR share structures generate greater premiums during takeovers than single class share firms which benefits all shareholders equally[316].

**Companies with MVR share structures tend to be more insulated against short-term market pressures**. Studies have found evidence supporting the hypothesis that MVR share structures can help managers focus on the implementation of long-term projects and reduce short-term market pressures[317]. This is further supported by the fact that short-term market

[313] Kim, Hyunseob and Michaely, Roni, Sticking around Too Long? Dynamics of the Benefits of Dual-Class Voting (January 2, 2019). European Corporate Governance Institute (ECGI) - Finance Working Paper No. 590/2019, Swiss Finance Institute Research Paper No. 19-09, Available at SSRN: https://ssrn.com/abstract=3145209 or http://dx.doi.org/10.2139/ssrn.3145209.
[314] (Cremers et al., 2018; Kim and Michaely, 2019).
[315] Cremers M, Lauterbach B, Pajuste A (2018) The life-cycle of dual class firm valuation. European Corporate Governance Institute (ECGI)—Finance Working Paper No 550. Accessible at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062895.
[316] Baugess, Slovin, Sushka (2012), Large shareholder diversification, corporate risk taking, and the benefits of changing to differential voting rights.
[317] Allaire Y (2016) enough with the shibboleth on dual class of shares. Le MÉDAC. 2016-05 yvan allaire vote multiple anglais.pdf (medac.qc.ca).

pressures increase in companies with MVR share structures after a share unification takes place[318]. Companies with MVR share structures are also more protected against hostile takeovers in times of market turbulence[319]. Therefore, high-growth firms and firms with long-term projects that require significant upfront costs (such as R&D expenditures) may find it optimal to adopt MVR share structures, so that managers can focus on creating long-term value for shareholders, which, in turn, can be desirable to promote innovation, research, and sustainable growth.

**MVR share structures are more transparent than other control-enhancing mechanisms.** Companies going public with MVR share structures provide a fair, transparent and easy to understand image of the company when contrasted with other control enhancing mechanisms, such as cross-ownership structures, shareholder agreements or stock pyramids[320]. As mentioned earlier, the Takeover Bid Directive already requires Member States to ensure than companies admitted to trading on regulated markets publish detailed information on the right and obligation attached to each class of shares. When a company goes public using MVR share structures, investors, can simply decide if they trust the founder enough to invest in the company. If they do not trust the founder, they will simply choose not to invest in the company or invest at a discount. As long as the MVR share structure is properly disclosed, the investor can easily distinguish who will be the controlling party, unlike in other structures where it can be lost among a maze of holding companies.

MVR share structures can also be, in some cases, more transparent than loyalty shares. Loyalty shares do not constitute a separate class of shares, meaning all shareholders theoretically have an equal chance to acquire loyalty voting rights. Therefore, in certain countries, loyalty voting rights can simply be introduced by an amendment to the articles of association. One study found that in one country, 14 firms switched from "one share, one vote" to loyalty voting right following legislative changes that made these share structures the default share structure for listed companies. In seven cases, there was not even a vote that proposed to retain the "one share, one vote" structure, as the controlling shareholder had the necessary one-third blocking minority to block an amendment to disapply loyalty voting rights.[321] This could lead to loyalty shares strengthening the power of existing controlling shareholders (including the state in some companies) and making it more difficult for these companies to be acquired.

### 5.2. Disadvantages of MVR share structures

**MVR share structures may provide founders with lifetime/perpetual control and thereby lead to controlling shareholder entrenchment**.[322] MVR share structures may allow managers and controllers to be entrenched and insulated from the market for corporate

[318] Jordan, Bradford D. and Kim, Soohyung and Liu, Mark H., Growth Opportunities, Short-Term Market Pressure, and Dual-Class Share Structure (November 11, 2013). Available at SSRN: https://ssrn.com/abstract=2474645 or http://dx.doi.org/10.2139/ssrn.2474645.

[319] Joel Seligman, 'Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy' (1986) 54 George Washington Law Review 687, 687.

[320] Gurrea-Martínez A (2018) Should securities regulators allow companies going public with dual-class shares? Oxford Business Law Blog. Accessible at: https://www.law.ox.ac.uk/business-law-blog/blog/2018/01/should-securities-regulators-allow-companies-going-public-dual-class.

[321] Becht, Marco and Kamisarenka, Yuliya and Pajuste, Anete, Loyalty Shares with Tenure Voting - Does the Default Rule Matter? Evidence from the Loi Florange Experiment (April 1, 2018). European Corporate Governance Institute (ECGI) - Law Working Paper No. 398/2018, Available at SSRN: https://ssrn.com/abstract=3166494 or http://dx.doi.org/10.2139/ssrn.3166494.

[322] See for instance https://alexedmans.com/wp-content/uploads/2015/03/Dual-Class-Shares.pdf.

control. Therefore, both controlling shareholders and managers may be more relaxed when running the company since potential acquirers may be prevented from taking over the company and implementing a potentially superior business plan thus damaging the value of the company.[323] Furthermore, unless sunset clauses are introduced, founders could hold MVR shares perpetually, long after the structure brings positive benefits to the company. Studies demonstrate that controllers have perverse incentives to retain MVR share structures even when those structures become substantially inefficient. Thus, as time passes from the IPO, there is a growing risk that MVR share structures will become value decreasing and that public investors will find themselves subject to an inefficient structure with significant governance risks and costs.[324]

**In some cases, MVR share structures may give company insiders the power to outvote minority shareholders on important issues, such as sustainability.** There is recent evidence about the diluting effect of MVR share structures resulting in blocking sustainability resolutions by the controlling shareholder/management. A 2021 US analysis showed that 19 sustainability resolutions could potentially have gathered shareholders' support (Amazon, Facebook, Berkshire Hathaway, etc.), had they not been opposed to by corporate insiders with outsized voting rights.[325]

**The founder/controlling shareholder does not have economic interests proportional to his control over the company, which may lead to agency costs and expropriation risk.** Since the founders own a percentage of the company's share capital disproportionate to their economic interest, they will only bear a small percentage of the company's potential economic downturn. This may generate agency costs which increase with the size of the wedge between control rights and cash-flow rights, as shown by both theoretical and empirical studies. These studies found that, as the size of the wedge widens, CEOs receive higher levels of compensation, managers are more likely to make shareholder-value destroying acquisitions, and capital expenditures contribute less to increase shareholder value[326]. As demonstrated, in the long run this may decrease company value and damage investor interests.

**MVR share structures may damage company value.** It is alleged that the aforementioned risks of controlling shareholders' entrenchment, increased agency costs and expropriation risk, can ultimately (and over time) lead to the destruction of company value. Some argue that, since the interests of holders of MVR shares are not economically aligned with the interests of the company, holder of MVR shares have no incentives to maximise the company's value or potential. This would mean that a company with MVR share structures should have a lower valuation than if it did not have this structure or lower than its peers that do not have these structures. In a study of 675 European public companies from 11 countries, Barontini and Caprio analysed the relation between firm value and the wedge between the voting and the cash-flow rights of the largest shareholder. The results push the notion on the

[323] Bebchuk, Kraakman, & Triantis, *Stock Pyramids, Cross-Ownership and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control From Cash-Flow Rights*, in Morck (ed.), *Concentrated Corporate Ownership* 2000, pp. 445–460.

[324] Bebchuk, Lucian A. and Kastiel, Kobi, *The Untenable Case for Perpetual Dual-Class Stock* (April 18, 2017). Virginia Law Review, Volume 103, pp. 585-631, June 2017, Harvard Law School John M. Olin Center Discussion Paper No. 905, Harvard Law School Program on Corporate Governance Discussion Paper 2017-6

[325] Examples include resolutions in Facebook/Meta. Further examples are available, e.g. at https://rankingdigitalrights.org/mini-report/its-time-to-bring-down-the-barriers-blocking-shareholders-on-human-rights/.

[326] Masulis R, Wang C, Xie F (2009) Agency problems at dual-class companies. J Financ 64(4):1697–1727.

existence of negative association between corporate valuation and the control-enhancing devices that boost the voting power of the largest shareholder.[327] Furthermore, some studies have noted the positive effects that occur after a share unifications in terms of long-term market valuation.[328]

**Companies with MVR share structures may be less attractive for investors.** Companies that listed with MVR share structures may be less attractive for investors due to several reasons which mainly stem from the fact that they do not have a voting power proportional to their economic stake in the company. The views were split among the investors' community in the public consultation on the question of MVR shares, with 22% of investor representatives voicing support and 36% expressing criticism.[329] Studies have demonstrated that institutional investors exhibit strong aversion towards multi-class firms, investing less in these firms, and discount their valuation, as stated in the previous paragraph. The presence of institutional investors correlates with a higher likelihood of share-class unification.[330] However, regarding this last point, it is only active investors who push for share unification with passive investors usually not influencing these decisions[331].

## 6. Merits of introducing MVR shares in the EU

MVR share structures have gained a newfound importance and relevance in today's capital markets due to the surge of founder driven high-tech companies. This has reignited the debate regarding their potential benefits and costs and if they help create more attractive public capital markets. Their popularity among founder-driven high tech companies has led to capital markets reassessing their benefits and in many cases reversing their previous positions on these type of structures. Most respondents[332] to the public consultation, as well as stakeholders' representatives that participated in the technical meetings[333] held by the Commission, agreed that MVR share structures incentivise issuers to list and make public markets more attractive (see Annex 2 for more details). However, some stakeholders, mainly investors, argued that despite these benefits these structures are overall negative for investors and capital markets. Their main argument against MVR share structures is focused on the idea that these structures destroy company value.

[327] Barontini R, Caprio L (2005), The effect of family control on firm value and performance. European Corporate Governance Institute (ECGI)—Finance Working Paper No 88.
[328] Lauterbach, Pajuste, (2015), The long-term valuation effects of voluntary dual class share unifications.
[329] When asked about the impact that MVR shares have on the attractiveness of a company for investors, 36% of respondents (equivalent to 15 respondents) opted for negative or slightly negative, 22% (equivalent to 9 respondents) opted for positive or slightly positive, while 29% (equivalent to 12 respondents) opted for neutral. Some of the respondents who viewed the attractiveness negatively (including two NCAs and some investors' associations) expressed their concern about the disappearance of the one share – one vote principle and noted, in particular, that MVR share schemes may undermine existing accountability mechanisms in corporate governance law, such as shareholders' ability to elect directors, and lead to management's entrenchment.
[330] Kim, Matos, Xu, (2018), Multi-Class Shares Around the World: The Role of Institutional Investors.
[331] Loyalty shares (outside the scope of this initiative) may also give rise in certain cases to issues pertaining to the treatment of foreign investors, where national shareholders (insiders, family owners, the State in State-controlled companies) can get preferential treatment to the detriment of shareholders from other Member States. For example, existing national shareholders can be allowed to reduce their shareholding without relinquishing control, discouraging investment from other Member States. An example is the so-called French loi Florange (adopted in 2014) introducing loyalty shares that automatically granted investors who had held stock in a listed French company for at least two years double the voting rights of other investors.
[332] 53 out of 71 respondents. Among those in favour were issuer associations, stock exchanges, investment banks, academia, law firms and some investor associations. Among those against were mainly investor associations and some stock exchanges.
[333] Among exchanges 83% (5 out of 6) were in favour and among issuers and investors 83% (5 out of 6) were in favour.

It may be argued that since the holders of MVR shares do not have their interest and the interests of the company aligned economically they are not incentivised to maximize the company's value or potential. This would then theoretically mean that a company with MVR share structures should have a lower valuation than if it did not have this structure or lower than its peers that do not have these structures. However, there is no definitive view on this question. There are several studies that conclude that MVR share structures have a positive or neutral impact on companies' valuation[334,335]. Furthermore, a research project carried out by ECGI on behalf of the Commission also demonstrated that there is no conclusive evidence on the effects of MVR share structures on company value in either direction. It stated that based on the empirical evidence, it cannot be said whether the presence of differentiated ownership (MVR) in companies destroys the market value outside of equity of these companies.[336] Some studies suggest that the benefits in terms of valuation for companies tend to peter out after time similar to the other perceived benefits of MVR share structures. These studies point to the use of sunset clauses to remedy this. Therefore, it cannot be definitively concluded that MVR share structures always have a negative impact on a company's valuation.

As regards the argument that MVR share structures damage company value, it should be noted that without the availability of MVR share structures, some companies included in the empirical studies would never have gone public in the first place.[337] Therefore, even if some studies showed that firms with MVR share structures underperform their peers (which is not necessarily the case as shown by other studies), the fact that MVR share structures allow more companies to go public and hence contribute to the overall size and scale of public markets militate against an outright ban of MVR share structures.

Regarding investor concerns on the risks of expropriation costs and the long-term entrenchment of founders, there are effective remedies, such as sunset clauses. These can further be complemented by other safeguards to maximise the protection for investors. When MVR share structures were introduced in Singapore, the Singapore Exchange expressly asked stakeholders if they agreed to include safeguards against expropriation risk such as having the majority of the Audit Committee, Nominating Committee and Remuneration Committee, including the respective chairmen, independent. In the UK, a 5 year time based and a transfer based sunset clause are required to list on the premium segment along with other requirements. Canada introduced a so called "coattail provision" which ensures that all shareholders receive the same price for their shares, should the controlling shareholders decide to sell out. However, it must be noted that sunset clauses and conditions should not be excessively restrictive as they may make the MVR share structures ultimately undesirable for issuers.[338] In China, there has been little use of MVR share structures since the rules were introduced in 2019 and this has been attributed to the overly restrictive investor safeguards.[339] If these safeguards are made so restrictive that no issuer will want to use them, MVR shares

[334] Anh, Fisch, Patatoukas & Davidoff Solomon, *Synthetic Governance*, ECGI Finance Working Paper no. 693/2020.
[335] von der Crone, Hans Caspar and Plaksen, Evgeny, *The Value of Dual-Class Shares in Switzerland* (March 2010). Available at SSRN: https://ssrn.com/abstract=1542780.
[336] *Proportionality between ownership and control in EU listed companies: External study commissioned by the European Commission pg. 13*, carried out by ISS, Sherman & Sterling and the ECGI.
[337] Gurrea-Martínez A, (2021) Theory, Evidence, and Policy on Dual-Class Shares: A Country-Specific Response to a Global Debate.
[338] Min Yan (2021) The myth of dual class shares: lessons from Asia's financial centres, Journal of Corporate Law Studies, 21:2, 397-432, DOI: 10.1080/14735970.2020.1870843.
[339] Min Yan (2020) Differentiated voting rights arrangement under dual-class share structures in China: expectation, reality, and future, Asia Pacific Law Review, 28:2, 337-359, DOI: 10.1080/10192557.2020.1855794.

lose any appeal for investors. Therefore, it is key to ensure a proper balance between the issuers' and investors' interests.

Taking into account the new market context, which has increased the popularity of these structures, the potential benefits these structures bring (in terms of more listings) and the recent trends in other capital markets, it would appear justified to allow these structures throughout all Member States, either for all companies or with a scope targeted to a specific subset of companies, such as issuers listing on SME growth market.

Currently, it appears that without EU intervention, some Member States would not reverse their ban on these structures in the short-term. It could be due to multiple reasons, starting from historical reasons, stakeholder pressures, past experience and the fact that changing company law, which was developed over centuries in many countries, is often complex. Nevertheless, any delays in allowing these structures in the EU could lead to considerable negative effects over time with companies increasingly going abroad to list or foregoing on listing completely (until the rules change). As a result the EU stand to lose in terms of the potential size and scale of its public markets.

Therefore, the introduction of MVR share structures would not only be beneficial for EU issuers, it would be beneficial for the overall competitiveness of EU financial markets. In order to address institutional investor concerns regarding shareholder entrenchment and expropriation risk, the use of safeguards and conditions, such as sunset clauses, would be key.

# ANNEX 6: ANALYSIS OF THE IPO PHASE[340]: PROSPECTUS REGULATION

## 1. Objectives and key changes introduced by the Prospectus Regulation

The Prospectus Regulation[341] entered into force on 21 July 2017 and was fully into application on 21 July 2019. It was supplemented by (i) Commission Delegated Regulation (EU) 2019/980[342], which lays down rules on the format, content, scrutiny and approval of the prospectus; (ii) Commission Delegated Regulation (EU) 2019/979[343], which establishes rules on key financial information in the prospectus summary, publication and classification of prospectuses, advertisements for securities, supplements and the notification portal; and (iii) Commission Delegated Regulation (EU) 2021/528[344], which lays down rules on the minimum information for the exemption document to be published in case of a takeover by means of an exchange offer, a merger or a division.

As stated in recital 7[345], the **aim of the Prospectus Regulation,** is to **ensure investor protection and market efficiency, while enhancing the internal market for capital**. A prospectus is a document that must contain the necessary information which is material for an investor to make an informed investment decision. In that regard, a prospectus mainly describes a company's main line of business, its finances and shareholding structure as well as the securities being offered to the public or admitted to trading on a regulated market.

The Prospectus Regulation harmonised the provisions set out in the Prospectus Directive[346] and introduced several changes or innovations, in particular:

- **No prospectus required** for offers of securities to the public below EUR 1 million, (EUR 100 000 under the Prospectus Directive) considered "breathing space for crowdfunding". Furthermore, Member States have discretion to exempt from the prospectus requirement offers that do not require notification and with a consideration between EUR 1 million and an amount which cannot exceed EUR 8 million (EUR 5

[340] The Prospectus Regulation also includes alleviated regimes for secondary issuances of securities by issuers whose securities are already admitted to trading on a regulated market or an SME growth market. Such alleviations stem from the fact that issuers who are already listed on those venues for a required minimum period of time are well known to the market and subject to periodic and ongoing disclosures requirements (such as under MAR or TD). However, there are no disclosure requirements under the Prospectus Regulation stemming from the fact of being listed (i.e. follow on issuances are a choice of the issuer).

[341] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12).

[342] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 (OJ L 166, 21.6.2019, p. 26).

[343] Commission Delegated Regulation (EU) 2019/979 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/301 (OJ L 166, 21.6.2019, p. 1).

[344] Commission Delegated Regulation (EU) 2021/528 of 16 December 2020 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the minimum information content of the document to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division (OJ L 106, 26.3.2021, p. 32).

[345] "The aim of this Regulation is to ensure investor protection and market efficiency, while enhancing the internal market for capital. The provision of information which, according to the nature of the issuer and of the securities, is necessary to enable investors to make an informed investment decision ensures, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make that information available is to publish a prospectus".

[346] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC (OJ L 345, 31.12.2003, p. 64).

million under the Prospectus Directive). A voluntary EU prospectus opt-in available at the choice of issuers.

- **Full prospectus exemption** for employee share schemes (only partial exemption under the Prospectus Directive, disadvantaging EU employees of non-EU employers).
- **Exemption** of issuers from the admission prospectus in case of secondary issuance of securities fungible with securities already admitted to trading, subject to a 20% cap (the cap was 10% under the Prospectus Directive and the exemption was limited to shares). A similar exemption applies to shares resulting from the conversion or exchange of securities (no cap under the Prospectus Directive for the latter).
- **Risk factors** to be classified by category of risks, with the most material mentioned first (risk factors sections used to be excessively long and used as liability shield by issuers under the Prospectus Directive).
- Shorter (7 pages) and retail investor-friendly **prospectus summaries**. Issuers subject to the PRIIPs Regulation[347] can recycle their key information document (KID) into the summary.
- Removal of incentives to issue in large denominations (beyond EUR 100 000) where regulated markets set up a ring-fenced professional segment for non-equity securities, (EUR 100 000 denomination was the only criterion under the Prospectus Directive to distinguish between retail and wholesale non-equity securities).
- Increased use of the **incorporation by reference of information** in the prospectus, to avoid redundancies and duplication of disclosures.
- More efficient and flexible rules on prospectuses and base prospectuses, such as to allow tripartite base prospectuses (i.e. consisting of separate documents) for all non-equity securities.
- A **simplified prospectus for secondary issuances** of securities available for issuers listed continuously and for at least the last 18 months on a regulated market or an SME growth market (replacing the previous prospectus for rights issues).
- A new **EU Growth prospectus** for SMEs, mid-caps listed on an SME growth market and small unlisted offers (up to EUR 20 million for unlisted issuers with less than 500 employees). The regime is however not available for regulated markets.
- A **universal registration document** (URD) for frequent issuers of securities, to be approved for the first two years and filed every year after with the NCA (i.e. available 'on the shelf'). The approval time of a prospectus incorporating a URD reduced from 10 to 5 days ('fast-track approval').
- More convergent rules on **scrutiny and approval of the prospectus** by NCAs (in particular completeness, comprehensibility and consistency of the prospectus put on equal ground).

[347] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (OJ L 352, 9.12.2014, p. 1).

- A new ESMA's **EU-wide database** with free online access to the public and search function to all EU prospectuses and relating documents.
- Possibility for third country issuers to offer securities to the public or seek admission to trading of securities in the EU by either drawing up an EU prospectus or, in presence of a Commission equivalence decision, a prospectus in accordance with the law of a third country.
- Alignment of the administrative sanction regime for prospectuses with the standards of MiFID II, transparency and market abuse regimes.

**2. Subsequent amendments to the Prospectus Regulation**

Since its entry into application, the Prospectus Regulation has been amended in three circumstances.

At the end of 2019, the *SME Listing Act*[348] initiative introduced targeted amendments to the Prospectus Regulation, in particular the possibility to use the simplified prospectus for secondary issuances for convertible and exchangeable securities and to transfer the listing from an SME growth market to a regulated market (aka '**transfer prospectus**'), provided that the issuer has been listed on the SME growth market continuously and for at least the last two years and has fully complied with reporting and disclosure obligations.

In 2020, the Crowdfunding Regulation[349] amended the Prospectus Regulation by introducing a new exemption for an offer of securities to the public from a crowdfunding service provider, under a specific threshold.

In 2021, the Capital Markets Recovery Package (CMRP)[350] amended the Prospectus Regulation introducing: (i) the **EU Recovery prospectus** regime, a short-form prospectus of 30 page-maximum size for secondary issuances of shares; (ii) an increase of the threshold for the exemption to publish a prospectus for the offer or admission to trading of non-equity securities issued on a continuous and repeated manner by credit institutions; and (iii) clarifications on the rules about supplements (including an extension of the time for financial intermediaries to contact investors when a summary is published and an extension of withdrawal rights for investors). All such amendments are temporary and due to expire on 31 December 2022.

An attempt by the Commission to further amend the Prospectus Regulation to attribute certain competences to scrutinize prospectuses to ESMA, which was made in 2017 in the context of the proposal for the ESAs Review Regulation[351], did not find political support and

[348]Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets (OJ L 320, 11.12.2019, p. 1).

[349] Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 (OJ L 347, 20.10.2020, p. 1).

[350] Regulation (EU) 2021/337 of the European Parliament and of the Council of 16 February 2021 amending Regulation (EU) 2017/1129 as regards the EU Recovery prospectus and targeted adjustments for financial intermediaries and Directive 2004/109/EC as regards the use of the single electronic reporting format for annual financial reports, to support the recovery from the COVID-19 crisis (OJ L 68, 26.2.2021, p. 1).

[351] Regulation (EU) 2019/2175 of the European Parliament and of the Council of 18 December 2019 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority), Regulation (EU) No 1094/2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), Regulation (EU) No 1095/2010 establishing a European Supervisory Authority (European Securities and Markets Authority), Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) 2016/1011 on indices used as benchmarks in financial instruments and financial contracts or to measure the

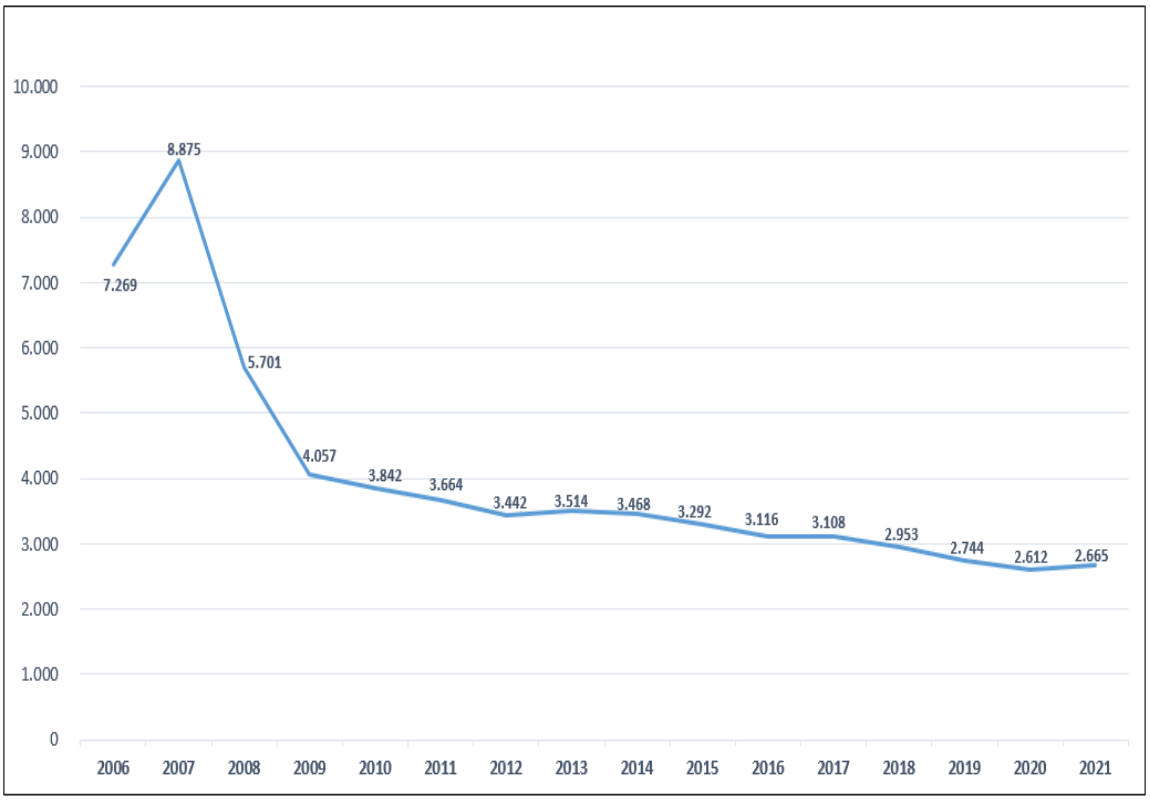
was not adopted. That proposal aimed to confer to ESMA the supervision (including the scrutiny and approval) of certain categories of prospectuses, including those more relevant in a cross-border context (prospectuses for wholesale non-equity securities, prospectuses for asset-backed securities, prospectuses drawn up by third country issuers and prospectuses drawn up by specialist issuers).

## 3. The evolution of prospectus approval in the EEA

The evolution of prospectus approval during the last 15 years shows a rather declining trend, although in recent years there has not been a steep decline like the one experienced from 2007 to 2010 (the years of the financial crisis).

As indicated in Annex 4, there were periods when the business cycle was mature creating an incentive for firms to tap market funding. In terms of prospectus approval, the peak of activity of 2007, followed by a steep decline during the following three years, was concentrated in 3 Member States: Ireland (2789 prospectuses approved in 2007 and 509 in 2010), Luxembourg (1823 prospectuses approved in 2007 and 640 in 2010) and Italy (1161 prospectuses approved in 2007 and 584 in 2010).

**Figure 1. Total annual prospectus approval in the EEA (exc. UK) from 2006 to 2021.**



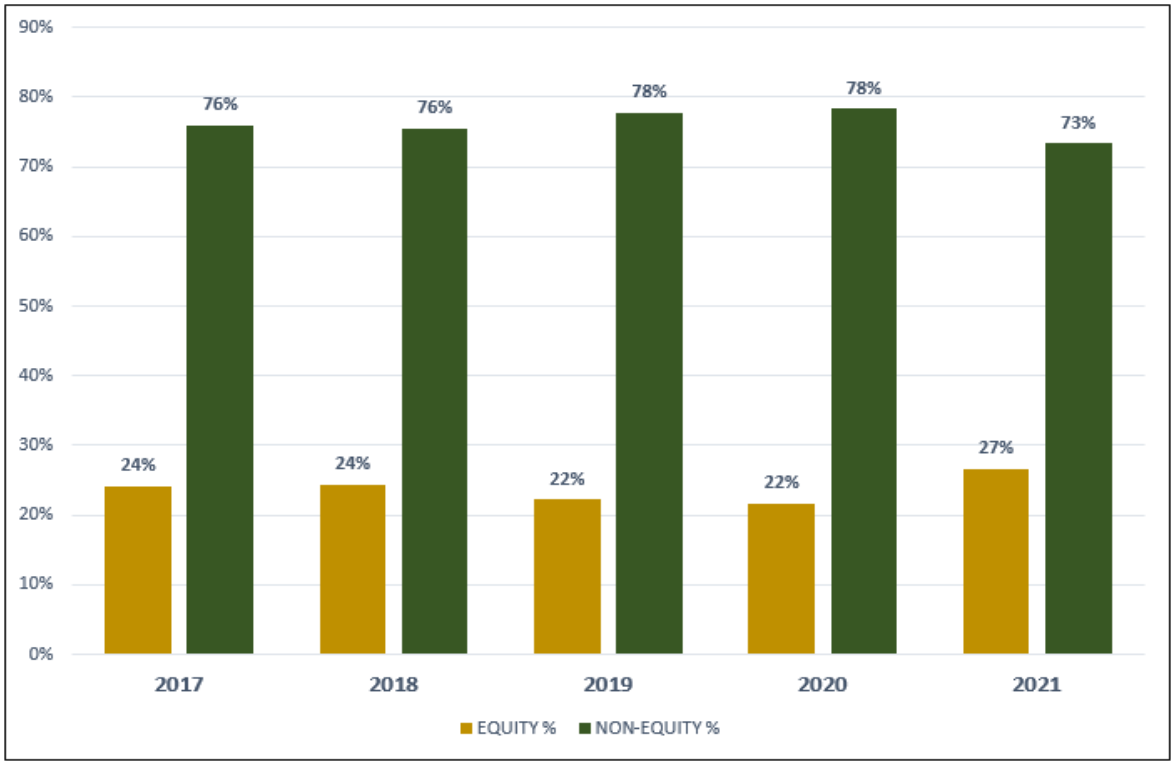

*Source: ESMA data for 2021[352], ESMA's EEA prospectus activity report for 2019 and 2020.*

performance of investment funds, and Regulation (EU) 2015/847 on information accompanying transfers of funds (OJ L 334, 27.12.2019, p. 1).

[352] Methodological note: all approved prospectuses in 2021 submitted to ESMA counted as the number of unique identifiers for the following document types: Base Prospectuses with and without Final Terms, Standalone Prospectuses and Securities Notes, to avoid counting prospectuses that are not from 2021.

The entry into application of the Prospectus Regulation in July 2019 has not reverted the declining trend in terms of prospectus approval. The slight bounce back in 2021 is considered to be correlated to the increase in IPO activity in the EU in the same year (as referred to in Annex 4), as reflected in the increase in equity prospectuses versus non-equity prospectuses in the course of that year shown in Figure 2.

**Figure 2. Equity and non-equity prospectuses (%) approved in the EEA (exc. UK) from 2017 to 2021.**

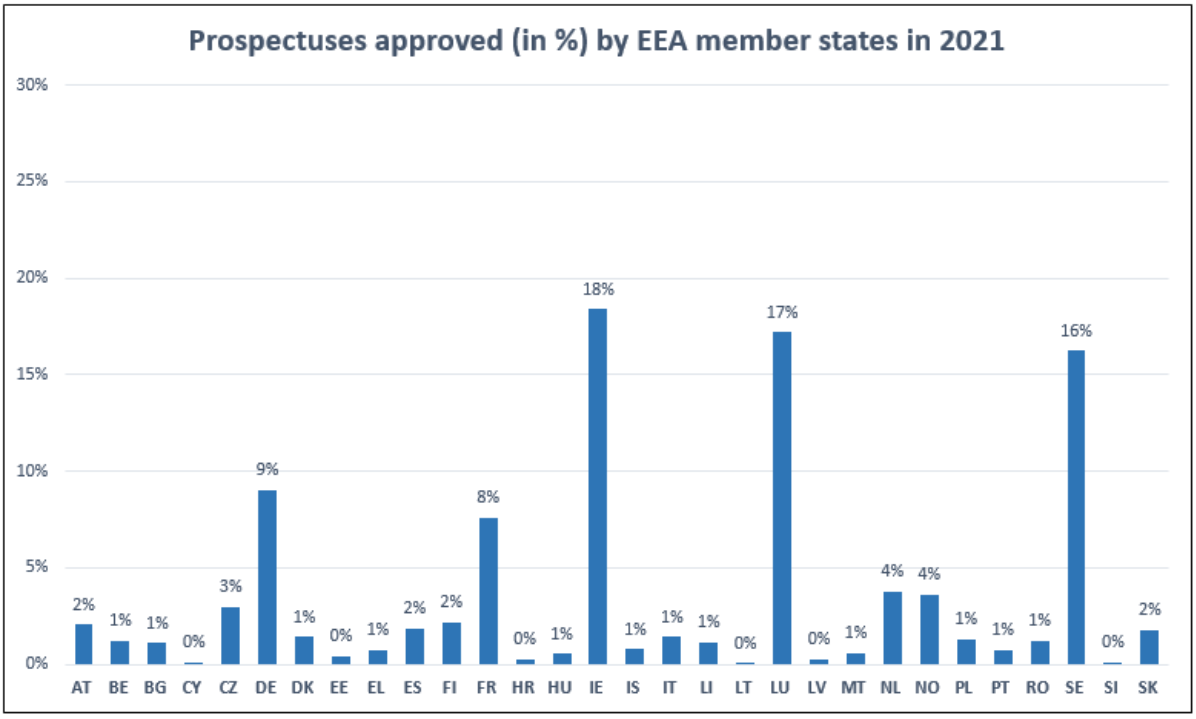



*Source: ESMA data for 2021[353], ESMA's EEA prospectus activity report for 2017, 2018, 2019 and 2020.*

As regards the approval of prospectuses by country, Figure 3 shows the concentration of prospectus activity in some Member States. In particular, Ireland, Luxembourg and Sweden approved in 2021 respectively 18%, 17% and 16% of prospectuses in the EEA.

[353] Methodological note: approved prospectuses in 2021 grouped by prospectus type and by securities type (equity vs. non-equity) using the reported annexes. This might cause a limited double counting of prospectuses (i.e. for the same prospectus, there might be a document with annexes belonging to the equity category and another belonging to the non-equity category).

**Figure 3. Annual prospectus approval in the EEA (exc. UK) by Member State in 2021.**



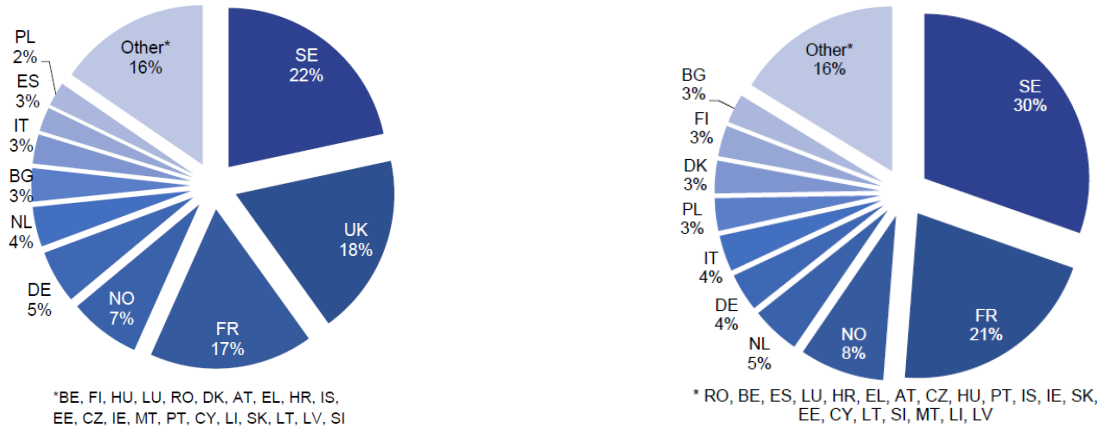

*Source: ESMA data for 2021[354], ESMA's EEA prospectus activity report for 2019 and 2020.*

However, the prospectus activity varies substantially depending on the security type, as some Member States tend to approve the majority of prospectuses for non-equity securities while others tend to approve mostly prospectuses for equity securities. As shown in Figures 4 and 5, based on 2020 figures, the equity prospectus activity tends to be concentrated in Sweden (30%), France (21%) and Norway (8%), while non-equity prospectuses are mainly approved in Luxembourg (24%), Ireland (22%) and Germany (14%). The trend was very similar in 2019, although the UK was included in the numbers.

**Figure 4. Equity prospectuses approved in 2019 (inc. UK) and in 2020 (exc. UK) as of share of all equity prospectuses approved within the EEA.**

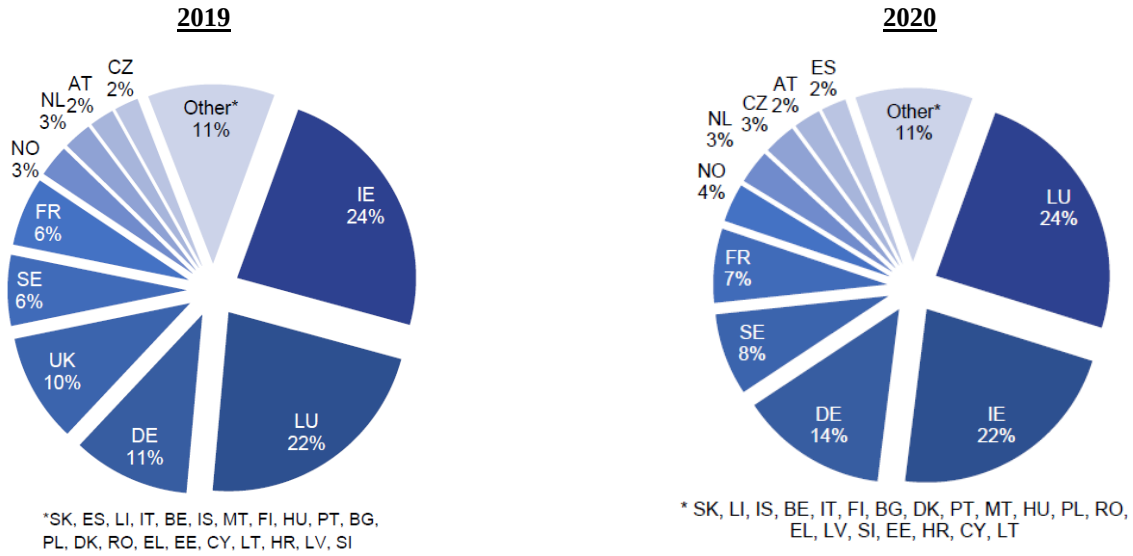
**2019** **2020**

[354] Methodological note: all approved prospectuses in 2021 submitted to ESMA counted as the number of unique identifiers for the following document types: Base Prospectuses with and without Final Terms, Standalone Prospectuses and Securities Notes, to avoid counting prospectuses that are not from 2021.




*Source: ESMA reports on EEA prospectus activity in 2019 and in 2020.*

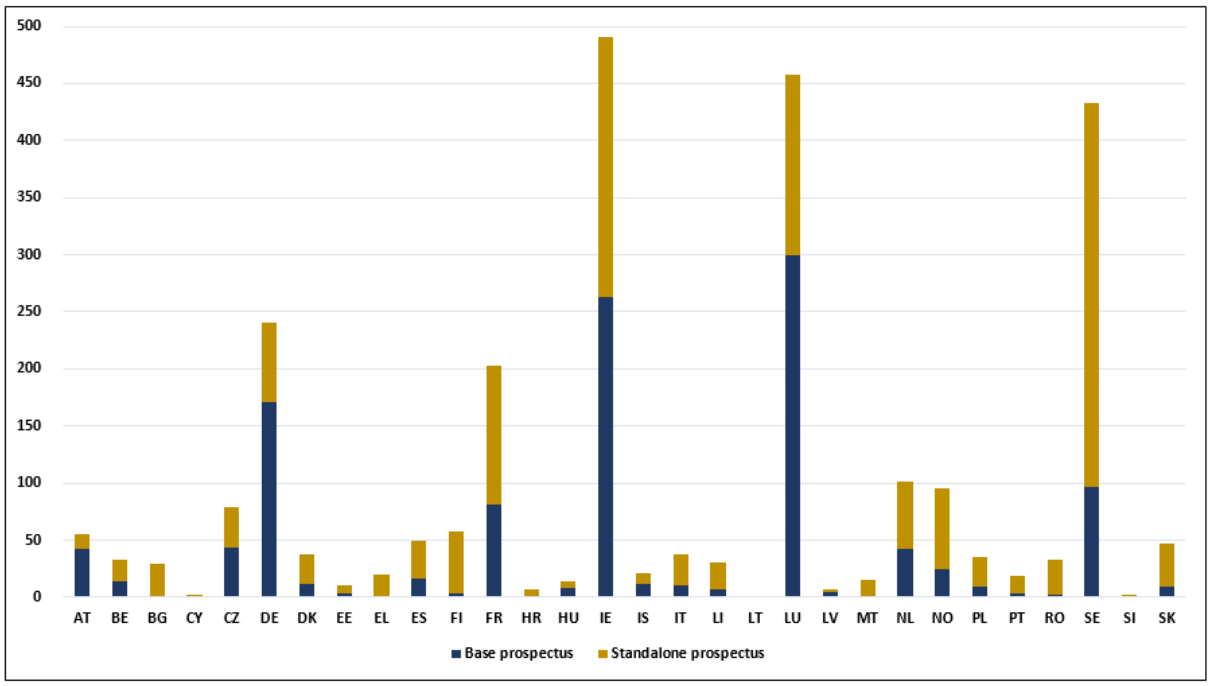
**Figure 5. Non-equity prospectuses approved in 2019 (inc. UK) and 2020 (exc. UK) as of share of all non-equity prospectuses approved within the EEA.**




*Source: ESMA reports on EEA prospectus activity in 2019 and in 2020.*

Furthermore, Figure 6 shows that the approval of base prospectuses is concentrated in Member States that approve most non-equity prospectuses (Ireland, Luxembourg, and Germany).

**Figure 6. Number of base prospectuses and standalone prospectuses approved in the EEA in 2021 in the respective Member States**

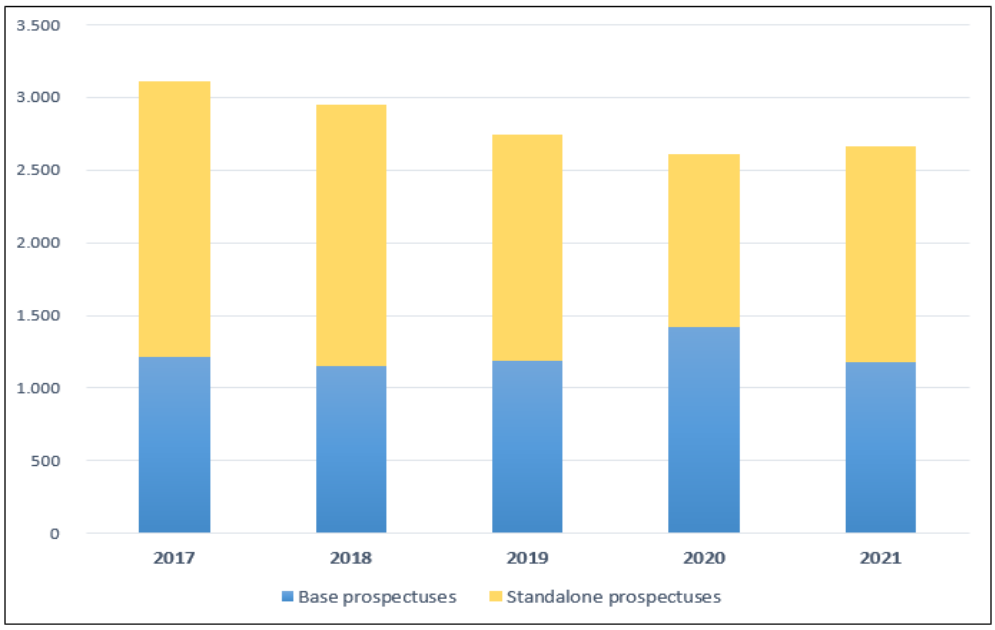



*Source: ESMA's data*[355] *for 2021.*

Finally, Figure 7 shows the 5 year-trend relating to the approval of base prospectuses versus standard prospectuses. A greater percentage of base prospectuses was approved in 2020 during the peak of the Covid-19 crisis, possibly linked to the decrease in IPOs in that year.

**Figure 7. Number of base prospectuses and standalone prospectuses approved in the EEA (exc. UK) from 2017 to 2021**

[355] Methodological note: all approved prospectuses in 2021 submitted to ESMA counted as the number of unique identifiers for the following document types: Base Prospectuses with and without Final Terms, Standalone Prospectuses and Securities Notes, to avoid counting prospectuses that are not from 2021.




*Source: ESMA's data for 2021[356], ESMA report on EEA prospectus activity in 2017, 2018, 2019 and 2020.*

## 4. Evaluation of the key measures of the Prospectus Regulation

This evaluation focuses on some key elements of the Prospectus Regulation, in particular taking into account Article 48 of the latter, which requires to assess whether the prospectus summary, the simplified disclosure regime for secondary issuances, the EU Recovery prospectus, the EU Growth prospectus and the URD remain appropriate in light of their pursued objectives. Given that the report to be produced by ESMA in accordance with Article 47 of the Prospectus Regulation was not available at the time of writing this evaluation, the latter is based on data provided bilaterally by ESMA to the Commission services for the year 2021[357], on ESMA's reports on EEA approved prospectuses previously published for the years 2019[358] and 2020[359]. Furthermore, this evaluation takes into account the reports published by the CMU HLF[360] and the TESG[361], the Oxera study[362] on the primary and secondary equity markets in the EU, the feedback gathered from stakeholders who responded to the targeted consultation on the Listing Act and ESMA's peer review of the scrutiny and approval procedures of prospectuses by authorities of 21 July 2022 report.

[356] Methodological note: all approved prospectuses in 2021 submitted to ESMA counted as the number of unique identifiers for the following document types: Base Prospectuses with and without Final Terms, Standalone Prospectuses and Securities Notes, to avoid counting prospectuses that are not from 2021.
[357] At the time of writing the impact assessment, ESMA continues working to improve the quality and consistency of the data.
[358] EEA prospectus activity in 2019. See: esma32-384-4852_prospectus_activity_report_2019.pdf.
[359] EEA prospectus activity and sanctions in 2020. See: esma32-382-1153_prospectus_activity_and_sanctions_report_2020.pdf
[360] See: https://ec.europa.eu/info/files/200610-cmu-high-level-forum-final-report_en.
[361] See: https://ec.europa.eu/info/sites/default/files/business_economy_euro/growth_and_investment/documents/210525-report-tesg-cmu-smes_en.pdf?msclkid=dce6c304b4f111ecb78dc84c756a1e20.
[362] See: https://www.oxera.com/wp-content/uploads/2020/11/Oxera-study-Primary-and-Secondary-Markets-in-the-EU-Final-Report-EN-1.pdf.

### 4.1. The standard prospectus for equity and non-equity securities

The Prospectus Regulation, when generically referring to 'the prospectus', considers all different forms of prospectuses available in view of the specificities of different types of securities, issuers, offers and admissions[363].

However, for the purpose of this analysis, **standard prospectus** refers to all types of prospectuses (for both equity and non-equity securities, including when drawn up in the form of a base prospectus) other than the EU Growth prospectus, the simplified prospectus for secondary issuances or the EU Recovery prospectus.

Furthermore, for the purpose of this analysis, **primary issuances** refer to the issuance of securities to be offered to the public or to be admitted to trading on a regulated market by companies whose securities are not yet admitted to trading. Primary issuances include IPOs of shares by companies going public. The ***standard prospectus*** for primary issuances is the most comprehensive prospectus type. It can be drawn up as a single document or may consist of separate documents (i.e. in a 'tripartite form', with its constituting documents – the registration document or universal registration document, the securities note and, where applicable, the summary – approved separately). However, the standard prospectus can be drawn up in any case, including when the Prospectus Regulation allows to use alleviated prospectuses. As a general principle, as also stated in Commission Delegated Regulation (EU) 2019/980[364], the issuer, offeror or person asking for admission to trading on a regulated market is allowed to provide in the prospectus the most comprehensive information available. With the exception of the recently introduced EU Recovery prospectus, which regime and disclosure Annexes were both laid down in the Prospectus Regulation[365], the rules on format and content for all other prospectus types (including all disclosure Annexes) were laid down in the above mentioned Delegated Regulation, which built on a technical advice from ESMA.

For the specific case of for non-equity securities, including those issued in a continuous or repeated manner or as part of an offering programme, issuers are allowed to draw up a prospectus in the form of a ***base prospectus***[366]. The base prospectus contains information on the issuer and some general information on the securities, while the final terms to a base prospectus contain information relating to the securities note which is specific to the individual issue (such as the ISIN, the issue price, the date of maturity, any coupon, the exercise date, the exercise price, the redemption price). Where the final terms are not included in the base prospectus they are not approved by the NCA, but only filed with it, together with the specific summary of the issue which is annexed to them. Such flexibility renders the base prospectus a very popular document across the community of non-equity issuers. In Member States with active non-equity markets (e.g. Germany, Luxembourg, Ireland), thousands of final terms are filed with NCAs every year.

To ensure the proper functioning of the wholesale market for non-equity securities and increase market liquidity, the Prospectus Regulation sets out a distinct alleviated treatment for non-equity securities admitted to trading on a regulated market and designed for qualified investors only. Such alleviated treatment consists on less onerous information requirements

[363] Recital 24 of the Prospectus Regulation.
[364] Recital 2 of Commission Delegated Regulation (EU) 2019/980.
[365] Articles 7(12a), 14a, 20(6a), 21(5a) and Annex Va to the Prospectus Regulation.
[366] Article 8 of the Prospectus Regulation.

than for non-equity securities offered to retail investors, no requirement to include a summary in the prospectus, and more flexible language requirements. The alleviated prospectus for wholesale non-equity securities is eligible for (i) the admission to trading of non-equity securities on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purpose of trading in those securities, or (ii) non-equity securities with a denomination per unit of at least EUR 100 000, which reflects the higher investment capacity of investors concerned by the prospectus.

*A) Effectiveness*

The Commission's targeted consultation on the Listing Act[367] included an overarching question on whether the **standard prospectus** for an offer of securities to the public or an admission to trading of securities on a regulated market in its current form strikes an appropriate balance between effective investor protection and the proportionate administrative burden for issuers (i.e. whether it meets the overarching objectives of the Prospectus Regulation). Amongst the stakeholders who provided an answer, the majority (35 stakeholders accounting for 59.3%) responded negatively. Such group includes 13 business associations[368], 15 companies/business organizations[369], 2 academia, 2 NGOs and 2 NCAs. The minority that responded positively (22 stakeholders accounting for 37.3%) includes 8 public authorities (including ESMA), 6 business associations[370], 6 companies/business organizations[371], 1 NGO, 1 academic. Furthermore, section 3 to this Annex shows that the entry into application of the Prospectus Regulation in 2019 does not seem to have impacted the long-term trend of the prospectus approval in the EEA, albeit that trend is impacted by several factors (e.g. issues related with taxation, civil law, the general macroeconomic and geopolitical trend). Likewise, the split between equity and non-equity prospectuses approved has remained relatively stable through the years and the concentration of the approval of prospectuses by securities type in some Member States has not changed significantly even after the UK left the EU (figures 4 and 5 of section 3 to this Annex).

The targeted consultation also included a dedicated section on the ***standard prospectus for non-equity securities***, including the base prospectus, as well as on the ***dual regime retail versus wholesale*** non-equity securities.

Stakeholders' feedback on the standard prospectus for non-equity securities tends to be more positive than for the standard prospectus in general. In particular, almost half of respondents (20 stakeholders[372] accounting for 47.6%) considers that the prospectus, including the base prospectus, for non-equity securities has been successful in facilitating fundraising through capital markets and that the differentiation between whole-sale and retail is very important

[367] See Annex 2.
[368] Mainly of issuers and banks, but also one association of investors and of law firms.
[369] Including 9 operators of a trading venue, 1 financial research provider and 2 law firms.
[370] Of issuers, banks and trading venues and 1 association of institutional investors.
[371] Including 3 operators of a trading venue, 2 investment banks, 1 law firm.
[372] Including 12 business associations (of banks, trading venues, issuers), 4 companies/business organisations (4 operator of a trading venue and 1 investment bank), 1 NCA, 1 academic.

and appropriately tailored to the needs of those two investor classes (8 stakeholders[373], accounting for 19% expressed a negative opinion in that regard).

In that group, some stakeholders suggest limited improvements to the whole-sale prospectus regime (e.g. remove unnecessary disclosure requirements where the information is available in financial reports, focus the materiality test of the prospectus for non-equity securities on creditworthiness of the issuer, allow the incorporation by reference of future regulated information, make a better use of the registration documents and URD).

Furthermore, to the question on the alignment of the prospectus for retail non-equity securities with the lighter disclosure regime of the prospectus for wholesale non-equity securities, 47.5% of the respondents (19 stakeholders[374]) responded positively and 25% (10 stakeholders[375]) responded negatively (the rest expressed no opinion).

In the smaller group with a less positive view, some business organizations mentioned that the non-equity securities prospectus remains too complicated for retail clients and the current uncertainty around the exact scope of the PRIIPs Regulation has deterred many issuers to extend their non-equity offerings to retail clients. As a result most non-equity securities are offered only to the wholesale market. Other stakeholders invoke the high level of denomination (EUR 100 000) that prevent many retail investors to access the fixed income investment.

Table 1 shows that in 2021, the total prospectuses for wholesale debt securities account for 61% of the total (mostly debt with denomination equal to EUR 100 000, while debt traded on qualified investors-only segments are still marginal), while prospectuses for retail debt securities account for 38% of the total.

**Table 1 - Prospectuses for debt securities approved in 2021 differentiated by denomination**

| **Retail debt securities** | **Wholesale debt securities** | |
|---|---|---|
| Prospectuses for debt with denomination **< EUR 100.000** | Prospectuses for debt with denomination **< EUR 100.000 available only to qualified investors** | Prospectuses for debt with denomination **= EUR 100.000** |
| **499** (38%) | **56** (4%) | **745** (57%) |

*Source: ESMA's data for 2021*[376].

*B) Efficiency*

Tables 4 and 5 of Annex 4, which outlines examples of costs of a standard prospectus based on stakeholders' feedback from the targeted consultation, show that the price ranges for the

[373] Including 2 business associations (banks and law firms), 5 companies/business organisations (including 3 operators of a trading venue, 1 investment bank and a financial research provider), 1 NCA.
[374] Including 9 business associations (of banks, issuers, investors, law firms) and 6 companies/business organisations (including 3 operators of a trading venue, 1 investment bank and a financial research provider) and 2 NCAs.
[375] Including 5 business associations (of trading venues, banks and issuers), 2 operators of a trading venue, 1 investment banks and 2 NCAs.
[376] Methodological note: all approved prospectuses in 2021 grouped by prospectus type and by securities type (equity-non equity), as well as the number of ISINs reported in these approved prospectuses

standard prospectus are substantially higher than price ranges for alleviated prospectus types. In that regard, the TESG's final report published in May 2021, also highlighted that the large size and complexity of prospectus documentation is detrimental for the both the sell-side and buy side. The TESG report described prospectuses for primary issuances as costly and time consuming for issuers to produce, and pointed out that the disproportionate length might discourage investors to read them and even to invest. Furthermore, the size and complexity of prospectuses might delay the scrutiny and approval process by NCAs. The TESG report, referring to the high median length of prospectuses in the EU and the significant divergence across jurisdictions highlighted in the Oxera report[377] recommended limiting the number of pages of an IPO prospectus to 300 pages, with the possibility to request a size extension to the NCA if justified by a complex financial history.

The association of Italian joint stock companies[378] analysed the average length of the IPO prospectus for the 10 most recent IPOs in the main EU markets as of March 2019[379], as shown in Table 2. It established that the median length of an IPO prospectus in the EU was 400 pages, with significant divergence among Member States, ranging from 250 pages in the Netherlands to over 800 pages in Italy. There is little proportionality between the length of the IPO prospectus and the size of the issuer: the mean number of pages for issuers with a market capitalisation between EUR 150 million and EUR 1 billion is even higher than for issuers with a market capitalisation above EUR 1 billion (577 versus 514 pages, respectively).

**Table 2 - Average length (number of pages) of prospectus documents, March 2019[380]**

| | Total sample | | | Mean, by market capitalisation | | |
|---|---|---|---|---|---|---|
| | Median | Min. | Max. | <€150m | €150m–€1bn | >€1bn |
| France | 447 | 217 | 683 | 376 | 368 | 668 |
| Germany | 390 | 183 | 591 | 296 | 392 | 468 |
| Italy | 807 | 563 | 1,367 | 818 | 831 | 839 |
| Netherlands | 266 | 105 | 389 | 192 | 249 | 280 |
| Spain | 481 | 216 | 674 | 266 | 517 | 500 |
| **Total** | **400** | **105** | **1,367** | **342** | **577** | **514** |

Note: Analysis of most recent ten IPOs in each respective member state as at March 2019.

Source: Assonime (2019), 'Osservazioni di Assonime e Confindustria al documento di consultazione Consob per l'adeguamento al Regolamento (UE) 2017/1129, relativo al prospetto', March, http://www.assonime.it/_layouts/15/Assonime.CustomAction/GetPdfToUrl.aspx?PathPdf=http://www.assonime.it/attivita-editoriale/interventi/Documents/consultazioni%203-2019A.pdf.

ESMA's data for 2021 on the length of different types of prospectuses, reported on Table 3, differ quite significantly from those reported in the Oxera study, most likely due to differences in the respective samples (ESMA's sample covering a larger group of companies and types of prospectuses). However, the difference between the average and median length of a standalone prospectus, which are respectively 147 and 109 pages, is an indication of

[377] See Oxera report, Table 4.1 on p. 68.
[378] Assonime.
[379] See Oxera study, page 68.
[380] See Oxera study, page 68.

discrepancies between the shortest and the longest prospectuses or, more generally, of a wider divergence and lack of uniformity of prospectuses across the EU.

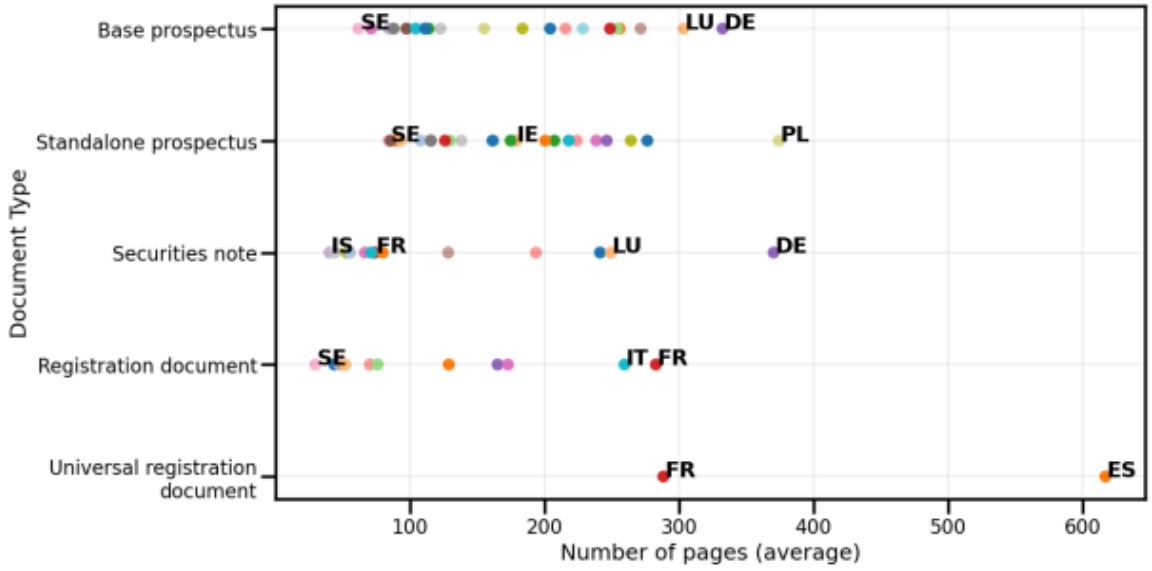
**Table 3 - Page length of prospectuses in 2021 for different types of prospectuses**

| Document type | Average | Median | Percentile 10 | Percentile 25 | Percentile 75 | Percentile 90 |
|---|---|---|---|---|---|---|
| **Standalone prospectus** (1144 documents) | 147 | 109 | 44 | 66 | 203 | 315 |
| **Base prospectus without Final terms** (878 documents) | 220 | 164 | 58 | 105 | 261 | 427 |
| **EU Growth standalone prospectus** (195 documents) | 72 | 59 | 42 | 50 | 74 | 114 |
| **EU Recovery prospectus** (15 documents) | 32 | 32 | 29 | 31 | 34 | 35 |

*Source: ESMA's data for 2021*[381].

The divergent scenario about the length of prospectuses across EU Member States is also highlighted in Figure 8, which shows that certain jurisdictions tend to have more or less voluminous prospectuses (or related documents) compared to others. For example, Sweden is featuring in the low range in terms of page size for both standalone and base prospectuses, while on the opposite side Luxembourg and Germany are featuring in the high range for base prospectuses, and Ireland and Poland are featuring in the high range for standalone prospectuses.

**Figure 8. Average document by prospectus type and NCA in different EU Member States**[382]




*Source: ESMA peer review report*

[381] Methodological note: data on the length of prospectus by document type (single language prospectuses only). Documents with approval or filing date between 01/01/2021 and 31/12/2021.

[382] Each dot shows the average number of pages for documents of a specific type issued in a specific member state. Dots of the same colour represent the same member state. Due to space constraints, dots are labelled only for "outliers" at the right-hand side of the chart and member states with a large number of prospectus approvals.

In the targeted consultation, within the group of stakeholders that responded negatively to the aforementioned overarching question on the standard prospectus, the majority (18 stakeholders[383] accounting for 52.9%) considers that the standard prospectus should be significantly alleviated. While some respondents (7 stakeholders[384], accounting for 20.6%) would replace the standard prospectus with a more efficient prospectus type, pointing out to the EU Growth prospectus or the EU Recovery prospectus as a model, and some others (8 stakeholders[385] accounting for 23.5%) proposed different solutions (e.g. set a page limit, make the prospectus a standardized and fully harmonized document).

On the content of the standard prospectus, Table 4 outlines stakeholders' views, gathered from the targeted consultation, on the most/least burdensome sections of the prospectus. Three stakeholders also provided feedback on possible sections that could be alleviated or removed[386]. Furthermore, some stakeholders that participated to the dedicated meeting with issuers and investors (see Annex 2) provided some comments on specific prospectus sections or times that are considered burdensome, redundant or that could be incorporated by reference.[387]

**Table 4 - Stakeholders' feedback on standard prospectus sections.**

| PROSPECTUS SECTIONS | Not Burdensome + Rather Not - Burdensome | Neutral | Rather Burdensome + Very Burdensome |
|---|---|---|---|
| ***Risk factors*** | 4% (1 respondent) | 8% (3 respondents) | **88%** (22 respondents) |
| ***Profit forecasts or estimates*** | 10% (2 respondents) | 10% (2 respondents) | **80%** (16 respondents) |
| ***Operating and financial review*** | 4% (1 respondent) | 40% (10 respondents) | 56% (14 respondents) |

[383] Including 11 business associations (of investors, issuers, banks law firms), 4 companies/business organisations (1 trade association, 1 financial research provider, 1 operator of trading venues and 1 law firm), 1 NGO, 1 NCA, 1 academic.
[384] Including 3 operators of a trading venue, 2 issuers, 1 law firm, and 1 academic.
[385] Including 6 operators of a trading venue, 1 association of banks and 1 NCA.
[386] Regulatory environment; important events in the development of the issuer's business; capital resources; administrative, management and supervisory bodies and senior management; related party transactions; statement of capitalization and indebtedness; legal information regarding a description of the rights attached to the securities, including any limitations of those rights and procedure for the exercise of those rights; history of share capital; interim financial statement (if on the date of the approval of the prospectus the document contains audited historical financial information covering the period of the interim); complex financial history; investments; remuneration and benefits.
[387] The requirements for presentation and categorisation of risk factors make the prospectus unnecessarily complicated, the required ranking of risk factors imposes an undue burden and, more importantly, liability risk to the issuer and its managers. In addition, many things are unpredictable, for example the Covid-19 pandemic. The information on administrative, executive and supervisory bodies as well as senior management appears unnecessarily detailed and can be difficult and time-consuming to compile (board membership during the last 5 years is not relevant). The information on the statement of capitalisation and indebtedness is already included in the balance sheet. However, the current presentation of capitalisation and indebtedness does not harmonise with IFRS accounting. For this reason, there is an additional effort that is also unnecessary. Since the required framework does not correspond to any standard, the presentation is so different that investors cannot even compare the prospectuses at this point. In the worst case, there is even irritation among investors who do not know this background. The effort is higher when issuers may have to prepare a separate new balance sheet, as the statement on capitalisation and indebtedness may not be older than 90 days. And this is the case even if they submit full quarterly reporting in accordance with IFRS. Such a balance sheet preparation thus also contradicts the valuations of the Transparency Directive. At least no disclosure beyond the historical financial information or, if applicable, interim financial information should be required. The following information could be incorporated by reference: names and addresses of issuers' auditors may be inferred from the audit report); important events in the development of the issuer's business (already included in the issuer's financial information and in the description of the issuer's business), remuneration and benefits and related party transactions (part of the disclosures required by IAS 24 for the issuer's consolidated financial statements), capital resources (can be taken from the balance sheet and the cash flow statement as part of the IFRS financial statements).

| | | | |
|---|---|---|---|
| ***Financial information concerning the issuer's assets and liabilities, financial position and profit and losses*** | 16% (4 respondents) | 32% (8 respondents) | 52% (13 respondents) |
| ***Administrative, management and supervisory bodies and senior management*** | 27.3% (6 respondents) | 22.7% (5 respondents) | 50% (11 respondents) |
| ***Business overview*** | 8.3% (2 respondents) | 45.8% (11 respondents) | 45.8% 11 respondents) |
| ***Statement of capitalisation and indebtedness*** | 9.1% (2 respondents) | 45.5% (10 respondents) | 45.5% (10 respondents) |
| ***Regulatory environment*** | - | 63.6% (14 respondents) | 36.4% (8 respondents) |
| ***Trend information*** | 31.8% (7 respondents) | 36.4% (8 respondents) | 31.8% (7 respondents) |
| ***Working capital statement*** | 12.5% (3 respondents) | 58.3% (14 respondents) | 29.2% (7 respondents) |
| ***Summary*** | 39.1% (9 respondents) | 34.8% (8 respondents) | 26.1% (6 respondents) |
| ***Related party transactions*** | 39.1% (9 respondents) | 39.1% (9 respondents) | 21.7% (14 respondents) |

*Source: Targeted consultation on the Listing Act (Question 9: "What are the sections of a prospectus that you find the most cumbersome and costly to draft?").*

As regards the format of the prospectus, almost all respondents who answered the dedicated questions (50 stakeholders or 92.6%) consider that a prospectus should only be provided in an electronic format, which would entail that paper copies could no longer be requested. Furthermore, the efficiency of the prospectus may be impacted by the language regime. In that regard, 21 stakeholders[388] who provided an answer to the dedicated question (35.6% of respondents) agreed that the prospectus should be drawn up only in English as the language customary in the sphere of international finance and additional 20 stakeholders[389] (accounting for 33.9%) agreed on the same statement except for the prospectus summary. This feedback indirectly addresses the issue of prospectus length (Table 4 shows that multiple language prospectuses are much lengthier than single language prospectuses), and directly addresses the issue of translation costs.

Finally, for share prospectuses, the majority of respondents (26 stakeholders[390] accounting for 57.8%) consider that the minimum period of 6 working days between the publication of the prospectus and the end of an offer of shares should be relaxed to facilitate swift book-

[388] Including 11 business associations (of banks, trading venues, issuers, law firms, institutional investors), 8 companies/business organisation (7 operators of a trading venue and 1 investment bank), 1 NGO, 1 NCA.
[389] Including 6 business associations (of banks and issuers), 7 companies/business organisations (issuers, operators of trading venues, banks), 2 academia, 4 NCAs.
[390] Including 11 business associations (of issuers, banks, investors, trading venues, law firms), 4 companies/business organisations (issuers, law firms, operators of trading venues, investment banks), 2 NCAs, 1 NGO and 1 academic.

building processes. The CMU HLF[391] also recommended to consider decreasing that minimum period from 6 to 3 days.

*C) Coherence*

The disclosures requirements of the standard prospectus are coherent with other EU legislations. In particular, the expansion of the list of information that can be incorporated by reference in the prospectus allows issuers to avoid duplicating the disclosure of information already published in accordance with other EU legislations. For example, issuers are allowed to incorporate by reference regulated information published under Transparency Directive[392], management reports and corporate governance statements disclosed under the Accounting Directive[393], remuneration reports as referred to in the Shareholders Rights Directive[394], annual reports or any disclosure of information required under AIFMD[395].

*D) Relevance in terms of value added for the EU*

While the Prospectus Regulation has harmonized prospectus rules compared to the Prospectus Directive, the format of the standard prospectus might be further standardized, as indicated by some stakeholders in the targeted consultation, which would improve comparability of prospectuses throughout the EU and facilitate cross-border investing.

### 4.2. The Prospectus summary

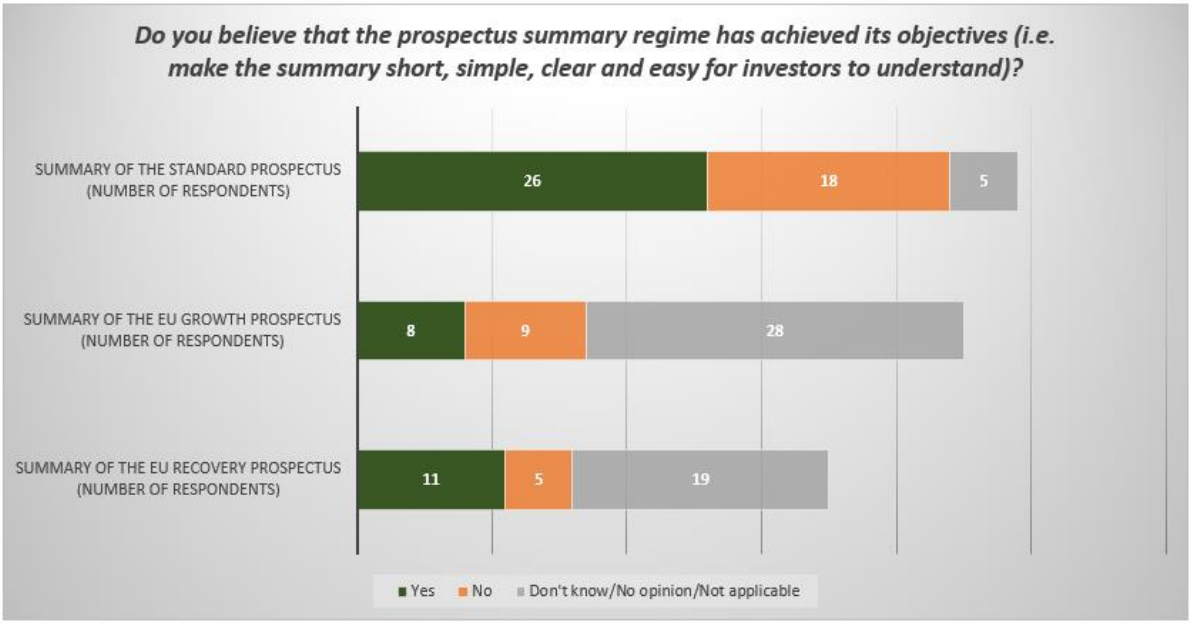
The Prospectus Regulation sets out that a summary of the prospectus must provide the key information that investors need to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered or admitted to trading on a regulated market[396]. According to the Prospectus Regulation, no civil liability shall attach to any persons only on the basis of the prospectus summary, unless the latter is misleading, inaccurate or inconsistent (when read together with the prospectus) or does not provide together with the other parts of the prospectus the key information in order to aid investors when considering whether to invest in the securities[397].

*A) Effectiveness*

[391] See CMU HLF final report (page 68).
[392] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (OJ L 390, 31.12.2004, p. 38).
[393] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).
[394] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies (OJ L 184, 14.7.2007, p. 17).
[395] Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 (OJ L 174, 1.7.2011, p. 1).
[396] Article 7(1) of the Prospectus Regulation.
[397] Article 11(2), second subparagraph, of the Prospectus Regulation.

As shown in Figure 9, in the targeted consultation, the majority of respondents (26 stakeholders[398] or 53.06%) considers that the summary of the standard prospectus has achieved its objectives (i.e. to make the summary short, simple, clear and easy for investors to understand). As regards the summary of the EU Growth prospectus, despite a large majority of stakeholders did not express an opinion, the respondents that answered positively and negatively are almost equally split. Finally, as regards the summary of the EU Recovery prospectus, the number of stakeholders that consider it has achieved its objectives is greater than the number of respondents who answered negatively (most respondents did not express an opinion). Some stakeholders also provided feedback on how to improve the summary of the standard prospectus, such as to further streamline it, further align it to the key information document (KID) requirements under the PRIIPs Regulation, improve its format, usability and style to make it more user-friendly, allow to insert tables and graphs to make it more comprehensible.

**Figure 9. Stakeholders' feedback on the prospectus summary**




*Source: stakeholders' feedback from the targeted consultation.*

## B) *Efficiency*

The Prospectus Regulation has streamlined the prospectus summary for the standard prospectus[399], making it retail investor-friendly, limiting the risk factors to be disclosed and introducing a page limit. However, a derogation is possible where a single summary covers several securities that differ only in some very limited details (e.g. the issue price or maturity date, where there is a guarantor, or where the KID prepared under the PRIIPs Regulation (if relevant) substitutes the section on key information on the securities in the summary.

[398] Including 12 business associations (of banks, issuers, investors), 6 companies/business organisations (3 operators of a trading venue, 2 investment banks, 1 law firm), 5 NCAs, 1 academic.
[399] Article 7 of the Prospectus Regulation.

Table 5 shows that the distribution in terms of number of pages of the summary of a standard prospectus for equity or non-equity securities is rather stable, with a median length of 6 to 7 pages and percentile 75 only slightly higher (9 to10 pages). However, while this might suggest lower costs for issuers to prepare the summary, some stakeholders who responded to the targeted consultation have expressed concerns about the page-size limit and the maximum number of risk factors, which are considered burdensome for issuers (in particular, the cap on the number of risk factors obliges issuers to make a selection of the most material ones).

**Table 5 - Page numbers analysis for the prospectus summary**

| Document type | Percentile 10 | Percentile 25 | Median | Percentile 75 |
|---|---|---|---|---|
| **Summary of equity prospectus** | 7 | 7 | 7 | 9 |
| **Summary of non-equity prospectus** | 8 | 5 | 6 | 10 |

*Source: ESMA's data for 2021.*

While the specific summary of the EU Growth prospectus[400] is similar in its format and content to the summary of the standard prospectus, its maximum length is 6 pages (however the same page size-derogations as for the standard prospectus are possible).

Finally, the summary of the EU Recovery prospectus[401] is the most streamlined summary type, with a maximum size of 2 pages. As the EU Recovery prospectus can only be drawn up for shares, the size-limit derogations provided for the summary of the standard prospectus are not applicable.

*C) Coherence*

The summary of the standard prospectus and of the EU Growth prospectus are coherent with the PRIIPs regulation, as they both allow to replace the section on the key information on the securities with the PRIIPs KID.

*D) Relevance in terms of value added for the EU*

In fact, albeit the Prospectus Regulation clarifies that the summary of the prospectus is to be read together with the other parts of the prospectus to aid investors when considering whether to invest in the issuer's securities[402], retail investors tend to read mainly the summary and less frequently the whole or part of the prospectus, as reported by several stakeholders. Therefore, it is considered that the prospectus summary plays an important role in terms of protection of retail investors. For this reason, as qualified investors are considered to possess the skills and expertise to navigate through the whole prospectus, for non-equity securities issued with a minimum denomination of EUR 100 000 or to be admitted to trading on regulated markets or

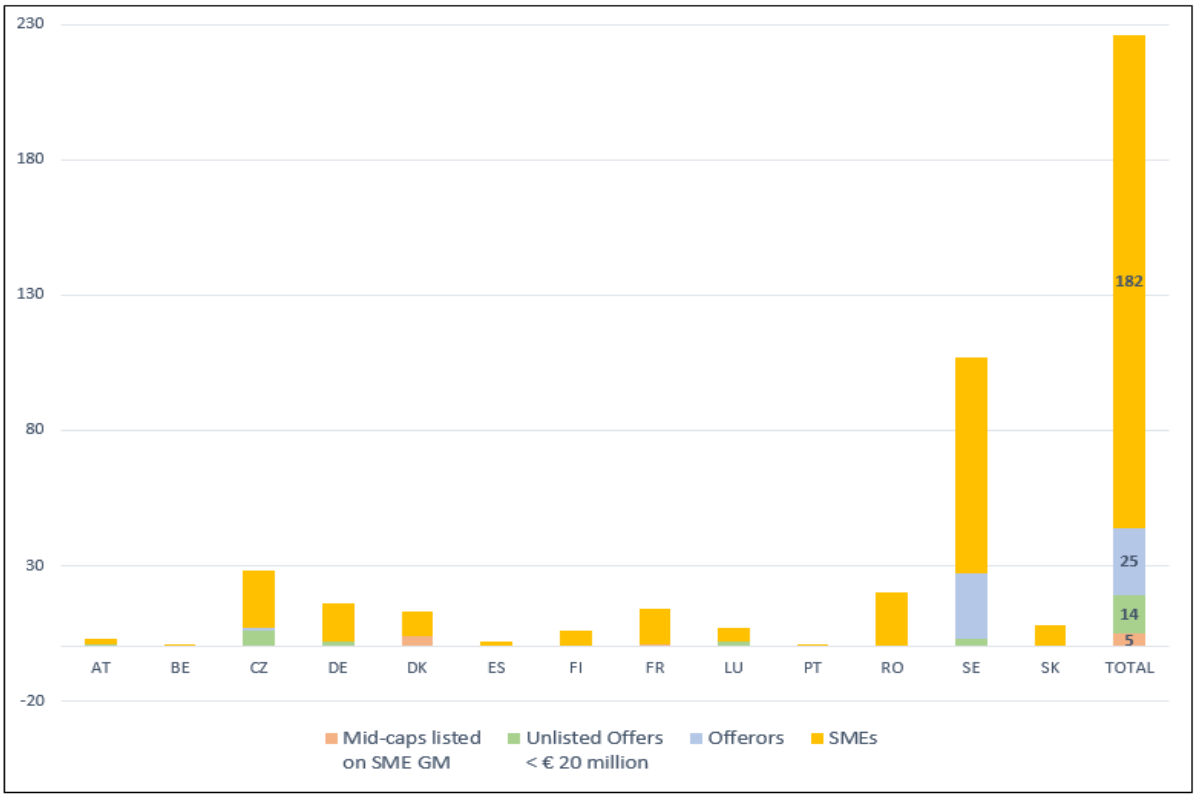
[400] Article 33 of Commission Delegated Regulation (EU) 2019/980.
[401] Article 7(12a) of the Prospectus Regulation.
[402] Article 7(1) of the Prospectus Regulation.

ring-fenced segments thereof only open to qualified investors, a prospectus summary is not required.

## 4.3. The EU Growth prospectus

To facilitate access to financing on capital markets for SMEs in the Union, the Prospectus Regulation introduced the ***EU Growth prospectus***[403], for both equity and non-equity securities (for the latter, it may be also drawn up as a base prospectus), as a single document or in a tripartite form. While the EU Growth prospectus may be used by other categories of beneficiaries (e.g. mid-caps listed on SME growth markets with a market capitalisation up to EUR 500 million, certain offerors of securities, unlisted offers up to EUR 20 million by companies with less than 500 employees), SMEs are the primary focus of this prospectus, as shown in figure 10.

**Figure 10. EU Growth prospectuses by category of beneficiaries approved in 2021 in the EEA.**




*Source: ESMA's data for 2021*[404].

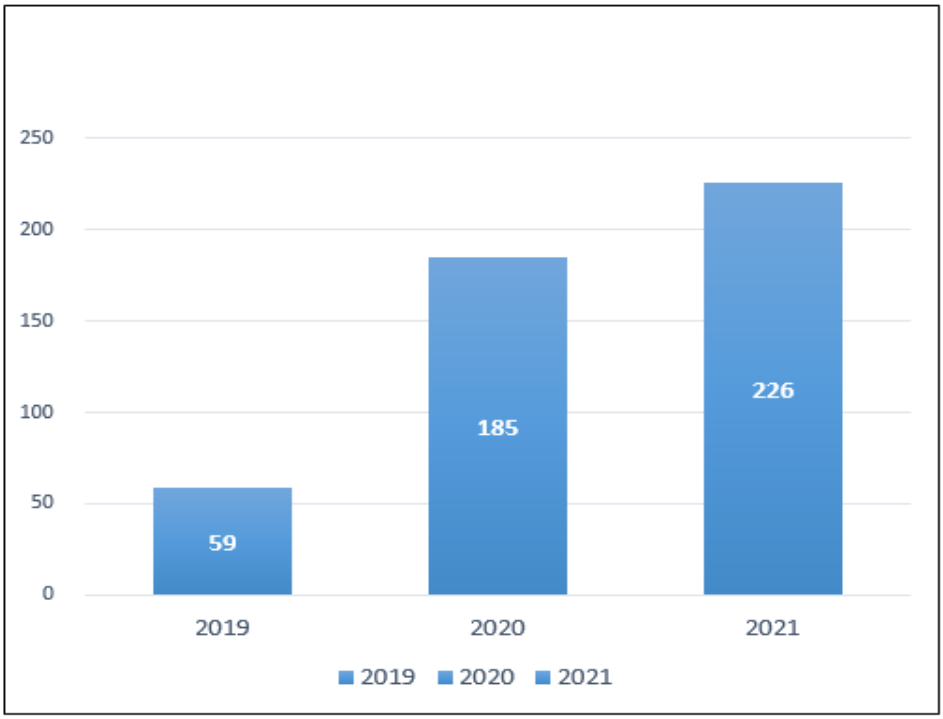
### *A) Effectiveness*

Figure 11 shows that the uptake of the EU Growth prospectus has been rather limited, if compared to the total number of prospectuses approved. Even if we exclude the year 2019, as

[403] Article 15 of the Prospectus Regulation.
[404] Methodological note: unique number of prospectus identifiers for which the EU Growth prospectus category is not empty.

the EU Growth prospectus was introduced by the Prospectus Regulation that entered in application only in July of that year, the number of EU Growth prospectuses approved account for 7.1% of total prospectuses in 2020 and 8.5% in 2021.

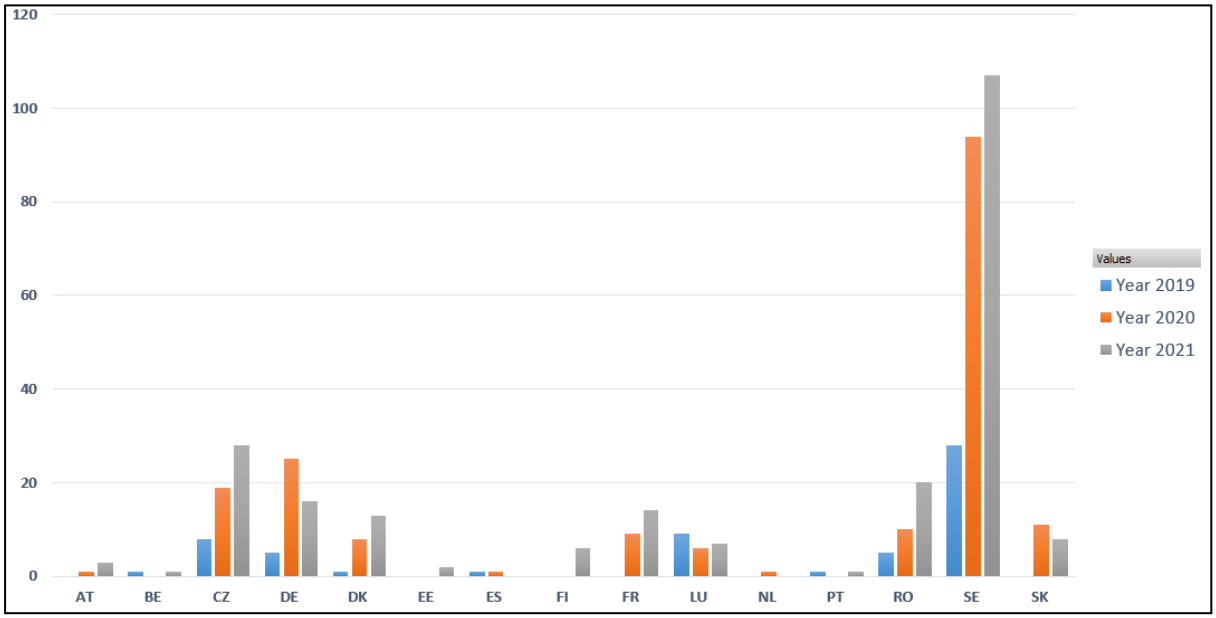
**Figure 11. EU Growth prospectuses approved in the EEA (exc. UK) from 2019 to 2021**




*Source: ESMA's EEA prospectus reports for 2019, 2020 and ESMA's data for 2021*

Furthermore, Figure 12, which shows the breakdown of EU Growth prospectuses approved by Member States in 2019, 2020 and 2021, indicates that there is a clear concentration of EU Growth prospectuses approved in one EU jurisdiction (Sweden).

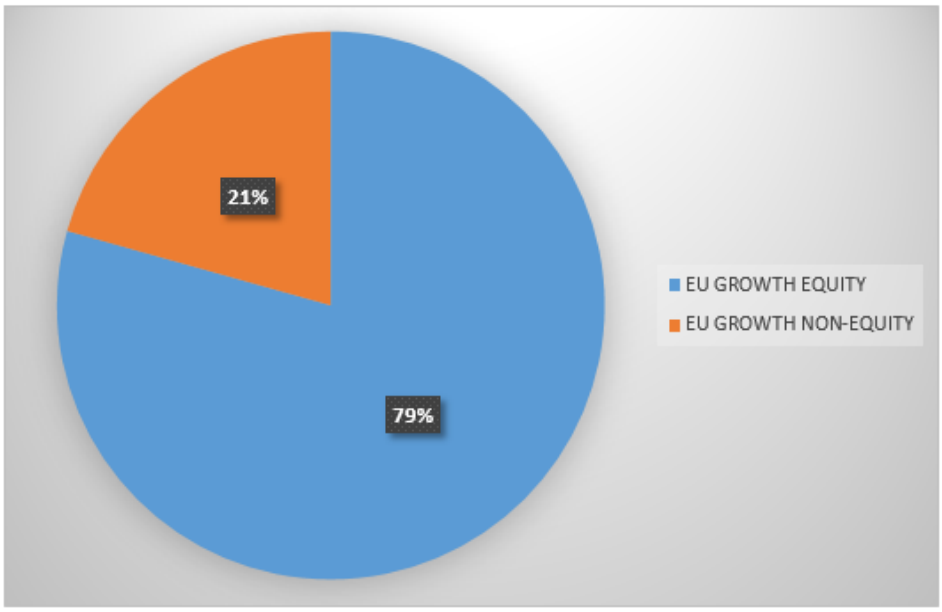
**Figure 12. EU Growth prospectuses approved in the EEA by Member State from 2019 to 2021**




*Source: ESMA's data for 2021.*

It should however be highlighted that the mere admission to trading of securities on an MTF (including an SME growth market) or the publication of bid and offer prices does not require per se the publication of a prospectus[405], unless coupled with an offer of securities to the public. Therefore, issuers listing securities on an SME growth market and benefiting from a prospectus exemption for the offer (such as an offer addressed solely to qualified investors), are not required to publish a prospectus. In such case, issuers are required to publish, under their responsibility, an admission document in accordance with the SME growth market rulebook and clearly state whether or not that admission document has been approved or reviewed and by whom[406]. According to the feedback received from some stakeholders, listings on MTFs/SME growth markets are in most cases exempted from the prospectus obligation (e.g. 90% of listings on Nasdaq Baltic Exchange and almost all listings on Euronext Growth Milan). Figure 13 also shows that EU Growth prospectuses are predominantly drawn up for equity securities, despite the fact that it can be also drawn up as a base prospectus for frequent issuances of non-equity securities.

**Figure 13. EU Growth prospectuses approved in 2021 by type of securities.**




*Source: ESMA's data for 2021[407].*

In the targeted consultation, it emerged that many respondents (21 stakeholders[408] or 43.8%) do not believe that the EU Growth prospectus strikes a proper balance between investor protection and the reduction of administrative burden for SMEs (while 6 stakeholders[409] or 12.5% believe it does and the rest expressed no opinion). Some stakeholders provided several

[405] Recital 14 of Regulation (EU) 2017/1129.
[406] Article 78(2), point (c), of Commission Delegated Regulation (EU) 2017/565.
[407] Methodological note: all EU Growth approved prospectuses in 2021 grouped by prospectus type and by securities type (equity vs non-equity) using the reported annexes. This might cause a limited double counting of prospectuses (i.e. for the same prospectus, there might be a document with annexes belonging to the equity category and another belonging to the non-equity category). In case that the EU Growth annexes are not reported, these prospectuses are not counted, as they cannot be classified.
[408] Including 7 business associations (of issuers, trading venues, investors, law firms), 10 companies/business organisations (5 operators of trading venues, issuers, law firms, investment banks), 2 NCAs, 1 NGO.
[409] Including 3 operators of trading venues and 2 investment banks).

comments on how the EU Growth prospectus might be improved (e.g. for SMEs a more streamlined format as the EU Recovery prospectus should be taken as reference; the EU Growth prospectus should be made lighter and possibly a page limit introduced; a new prospectus for SMEs should be introduced and aligned to the level of disclosures required for the listing on MTFs/SME Growth markets; instead of a prospectus, another form of admission or listing document should be introduced). One stakeholder remarked that, while not being sufficiently alleviated for SMEs, the EU Growth prospectus is a simpler, shorter, and clearer document than a standard prospectus.

*B) Efficiency*

The EU Growth prospectus is more streamlined than the standard prospectus, it has a bespoke summary and a standardised format. Table 6 outlines the main alleviations, for equity securities, of an EU Growth prospectus compared to a standard prospectus.

**Table 6 - Main alleviations of an EU Growth prospectus compared to a standard prospectus**

| **DISCLOSURE ITEMS REMOVED FROM THE EU GROWTH PROSPECTUS** |
|---|
| ***Statutory auditors*** |
| ***Patents and licenses*** |
| ***The basis for any statements made by the issuer regarding its competitive position*** |
| ***Information relating to the joint ventures and undertakings*** |
| ***Description of environmental issues that may affect the issuer's utilisation of the tangible fixed assets*** |
| ***Financial condition***, not required for:<br>non-equity issuers<br>equity issuers with market capitalisation < EUR 200 million<br>equity issuers with market capitalisation >= EUR 200 million who include the Management Reports in accordance with Articles 19 and 29 of Directive 2013/34/EU |
| ***Operating results*** |
| ***Capital resources*** (with the exception of information on the issuer's borrowing requirement and funding structure) |
| ***Regulatory environment*** (required only when relevant to the issuer's strategy and objectives) |
| ***Board practices*** |
| ***Employees*** (with the exception of shareholdings and stock options in relation to members of the administrative, management and supervisory bodies and senior management) |
| ***Cash flow statement and a statement of changes in equity*** (where not required under the applicable financial reporting framework) |
| ***Information on the registry and entry number of the Memorandum and Articles of Association and a brief description of the issuer's objects and purposes*** |
| ***Capitalization and indebtedness*** (not required for equity issuers with market capitalisation < EUR 200 million) |
| **DISCLOSURE ITEMS ALLEVIATED IN THE EU GROWTH PROSPECTUS** |
| ***Principal activities*** |
| ***Principal markets*** |
| ***Organisational structure*** |
| ***Investments*** (the geographic distribution of investments not required) |
| ***Trend information*** |
| ***Administrative, management and supervisory bodies and senior management*** |
| ***Conflicts of interest*** |
| ***Interim and other financial information*** |

| |
|---|
| ***Dividend policy*** |
| ***Memorandum and Articles of Association*** |

*Source: Annexes 1, 11, 24 and 26 to Commission Delegated Regulation (EU) 2019/980*

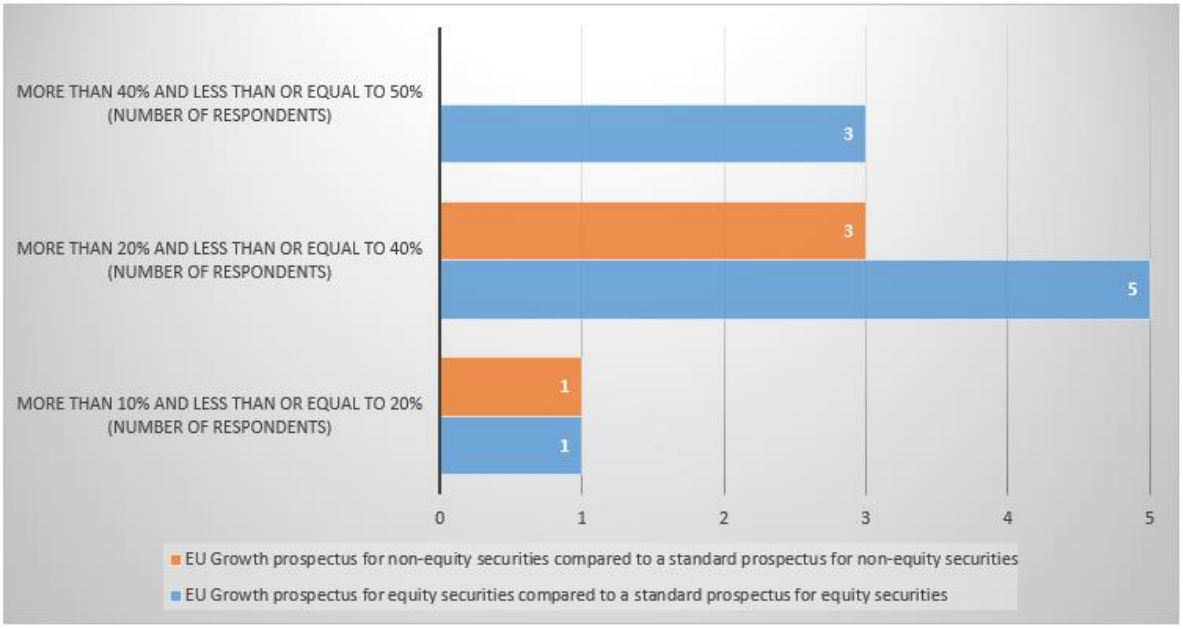
However, the EU Growth prospectus for equity securities includes two disclosure requirements that are not present in the standard prospectus, which take into account respectively the link between the use of proceeds and the business objectives and strategy[410], as well as environment and employee matters[411]. Unlike the standard prospectus, the EU Growth prospectus cannot be used by issuers whose securities are already admitted to trading or to be admitted to trading on regulated markets.

According to the Oxera study, feedback from market participants indicates that there has not been a substantial decrease in the length of documents submitted after July 2019[412]. However, the Oxera report indicates that only two EU Growth prospectuses (of 202 and 221 pages respectively) had been approved on Euronext Growth and AIM Italia since the entry into application of the Prospectus Regulation. This data seems to match with the page size of the two multiple language-EU Growth prospectuses shown in Table 4 to this Annex, which average is 248 pages. However, Table 4 includes a wider sample of EU Growth prospectuses drawn up in a single language, which average of 72 pages and median length of 59 pages is more significant, as it is based on 195 documents.

Finally, in addition to the data on costs provided in Tables 5, 6 and 7 of Annex 4, which show that an EU Growth prospectus can allow 25% cost savings compared to a standard prospectus, Figure 14 shows some additional indications of cost savings provided by stakeholders. The largest part of respondents (5 stakeholders) consider that an EU Growth prospectus can allow to save from 20 to 40% compared to a standard prospectus, which is broadly in line with the estimation provided for in Table 7 to Annex 4.

**Figure 14. Savings achieved with an EU Growth prospectus compared to a standard prospectus.**

[410] Item 1.7.2 of Annex 26 to Commission Delegated Regulation (EU) 2019/980: "An explanation about how the proceeds from this offer align with the business strategy and strategic objectives described in the registration document".
[411] Item 2.5.1 of Annex 24 to Commission Delegated Regulation (EU) 2019/980: (…) "To the extent necessary for an understanding of the issuer's development, performance or position, the analysis shall include both financial and, where appropriate, non-financial Key Performance Indicators relevant to the particular business, including information relating to environmental and employee matters. This analysis shall, where appropriate, include references to, and additional explanations of, amounts reported in the annual financial statements".
[412] See Oxera report, page 68.




*Source: targeted consultation on the Listing Act.*

*C) Coherence*

The EU Growth prospectus is coherent with the objective of the CMU action plan to support SME's access to capital markets. In particular, the EU Growth prospectus aims to foster listings on SME growth markets, by allowing its use by non-SMEs with a market capitalisation up to 500 million and that are listed or to be listed on those venues. However, the latter category of beneficiaries has so far only made marginal use of the EU Growth prospectus as shown in Figure 10 (only 5 EU Growth prospectuses were drawn up in 2021 by mid-caps listed or to be listed on an SME growth market).

Furthermore, Table 8 of Annex 4 shows that 135 prospectuses were approved in 2021 for IPOs in SME growth markets. Although information is not available on the type of prospectus used for those IPOs, the fact that at least 50% of issuers listed on an SME growth markets must be SMEs[413], and that 182 EU Growth prospectuses drawn up in 2021 were from SMEs, suggests that for most of those IPOs on SME growth markets an EU Growth prospectus was used. Finally, the same considerations for the incorporation by reference and coherence of disclosures compared to other legislations made for the standard prospectus also apply to the EU Growth prospectus.

*D) Relevance in terms of value added for the EU*

The EU Growth prospectus is the only prospectus type that has a standardized format: issuers must follow the order of disclosure of the prospectus sections[414]. The EU Growth prospectus is therefore the only prospectus type that allows for an enhanced comparability across EU jurisdictions. However, it is possible to deviate from the order of the information items within the prospectus sections, a rule which grants some flexibility to issuers.

[413] Article 33(3), point (a) of MiFID II.
[414] Article 32 of Commission Delegated Regulation (EU) 2019/980.

### 4.4. Simplified prospectus regimes for secondary issuances

The Prospectus Regulation exempts from the prospectus obligation for the admission to trading securities fungible with securities already admitted to trading on the same regulated market, up to a 20% threshold[415]. This exemption needs to be combined with an exemption for public offers (e.g. offers solely addressed to qualified investors) to avoid the publication of a prospectus. A similar exemption exists also for the admission to trading of shares resulting from the conversion or exchange of other securities from the exercise of the rights conferred by other securities[416].

When the aforementioned exemptions do not apply, or where the obligation to publish a prospectus is triggered by an offer of securities to the public, the Prospectus Regulation enable certain categories of beneficiaries to benefit from alleviated prospectus types, namely the ***simplified prospectus for secondary issuances***[417] and the ***EU Recovery prospectus***[418]. Both regimes mainly apply to issuers that have a track record (minimum continuous listing for at least the last 18 months) on a regulated market or an SME growth market and are subject to periodic and ad hoc disclosure under MAR, as well as Transparency Directive (for regulated markets) or Commission Delegated Regulation (EU) 2017/565[419] (for SME growth markets). A delay of 18 months ensures that the issuer has complied at least once with its obligation to publish an annual financial report under the Transparency Directive or under the rules of the operator of an SME growth market[420].

*A) Effectiveness*

In the targeted consultation on the Listing Act, the majority of respondents (31 stakeholders[421] accounting for 50.8%), considered that the obligation to publish a prospectus for companies with continuous listing of not less than 18 months on a regulated market or an SME growth market should remain. However, a significant minority (26 stakeholders or 42.6%[422],) considers that it should be lifted.

Among the first group (that would like to maintain the prospectus obligation for secondary issuances), the majority of respondents (57.1%) considers that a significantly simplified prospectus focusing on essential information only (often referring to the EU Recovery prospectus as a model) should be available on permanent basis.

Some stakeholders in the group that would be favourable in lifting the prospectus obligation for secondary issuances, made several proposals on the best way to achieve this objective (such as replacing the prospectus with a statement confirming compliance with continuous disclosure and financial reporting obligations; increasing the existing exemption threshold for

[415] Article 1(5), first subparagraph, point (a), of the Prospectus Regulation.
[416] Article 1(5), first subparagraph, point (b), of the Prospectus Regulation.
[417] Article 14 of the Prospectus Regulation.
[418] Article 14a of the Prospectus Regulation.
[419] Article 78.
[420] Recital 50 of the Prospectus Regulation.
[421] Including 11 business associations (of issuers, banks, trading venues and 1 association of investors), 8 companies/business organizations (including 5 operators of a trading venue and 2 law firms), 10 NCAs, and 1 NGO.
[422] Including 9 business associations (of issuers, banks and 2 associations of investors), 12 companies/business organizations (including 8 operators of a trading venue, 2 investment banks, 1 law firm and 1 issuer), 2 academia, 1 NGO and 1 NCA.

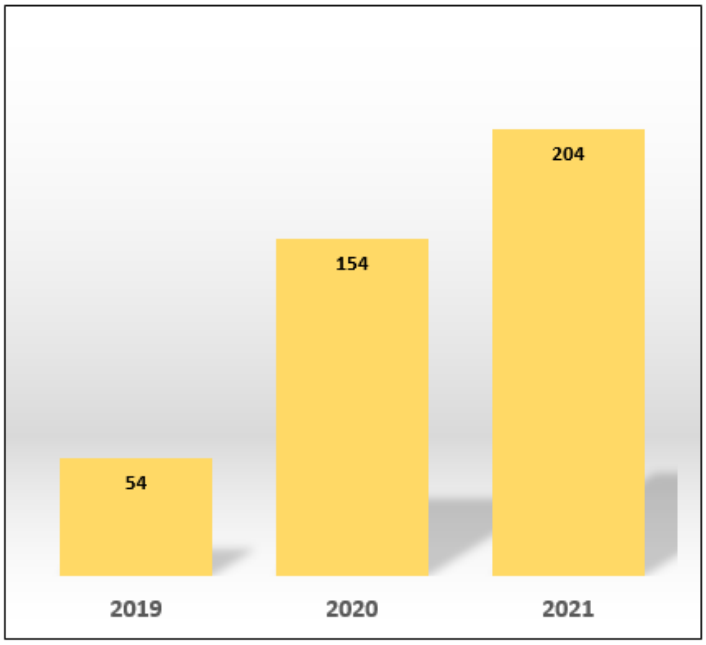
fungible securities; replacing the prospectus for fungible securities with a document to be filed to NCAs containing few key information; exempting public offers of non-equity securities fungible to existing non-equity securities issued pursuant to a valid base prospectus; removing the prospectus obligation for transferring shares from a SME growth market to a regulated market; replacing the prospectus with a MAR-compliance statement on the impact of dilution and the use of proceeds; publishing a document with information on the characteristics of the securities and terms and conditions of the offer/admission).

### *4.4.1. Simplified prospectus for secondary issuances*

As regards the simplified prospectus for secondary issuances, Figure 15 shows that its uptake has been rather limited, if compared to the total number of prospectuses approved during the same years. Even if we exclude the year 2019, as the simplified prospectus for secondary issuances was introduced by the Prospectus Regulation that entered in application only in July of that year, the number of simplified prospectus for secondary issuances approved accounts for 5.9% of total prospectuses approved in 2020 and 7.7% in 2021.

The simplified prospectus for secondary issuances can also be used by issuers who have a minimum and continuous listing of 2 years on an SME growth market and who have fully complied with reporting and disclosure obligations to seek admission to trading on a regulated market of securities fungible with existing securities that have been previously issued (aka '***transfer prospectus***')[423]. According to ESMA's data, in 2021 there was only one prospectus approved for the initial admission to trading on regulated market from previously being traded on an SME growth market.

**Figure 15. Simplified prospectuses for non-secondary issuances approved in the EEA (exc. UK) from 2019 to 2021**

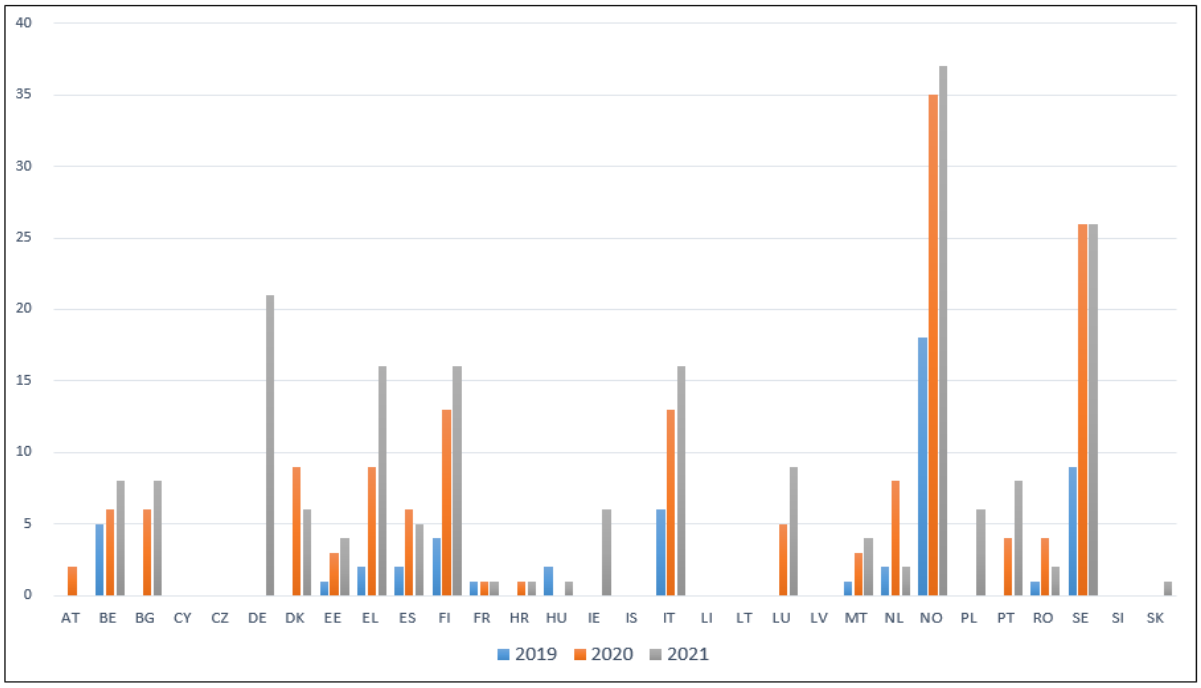



*Source: ESMA's EEA prospectus reports for 2019, 2020 and ESMA's data for 2021.*

[423] Article 14(1), point (d) of the Prospectus Regulation.

Figure 16, showing the breakdown of simplified prospectuses for secondary issuances approved by countries in 2019, 2020 and 2021, indicates that there is a concentration in few jurisdictions (notably, Norway, Sweden, Germany, Italy, Greece and Finland).

**Figure 16. Simplified prospectuses for secondary issuances approved in the EEA (exc. UK) from 2019 to 2021.**

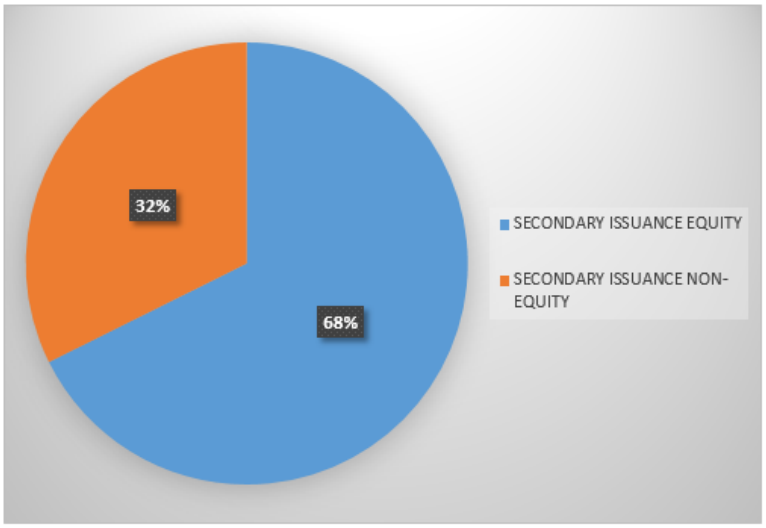



*Source: ESMA's EEA prospectus reports for 2019, 2020 and ESMA's data for 2021*[424].

Figure 17 shows the breakdown of the simplified prospectus for secondary issuances by securities type. Like for the EU Growth prospectus, the simplified prospectus for secondary issuances is mainly used for equity securities. Several stakeholders have highlighted that non-equity issuers who use base prospectuses are less interested to alleviated prospectus types for secondary issuances, given the flexibility to only file, for any issuance of non-equity securities within the base prospectus, final terms with NCAs (i.e. no need to have a prospectus scrutinised and approved for any secondary issuance). One item of the simplified prospectus for secondary issuances that has been flagged by some stakeholders as particularly burdensome is the summary of information disclosed under MAR over the last 12 months which is relevant as at the date of the prospectus.

**Figure 17. Simplified prospectus for secondary issuances approved in 2021 by securities type.**

[424] Methodological note: secondary issuance prospectuses approved in 2021 grouped by prospectus type and by securities type (equity vs non-equity) using the reported annexes. This might cause a limited double counting of prospectuses (i.e. for the same prospectus, there might be a document with annexes belonging to the equity category and another belonging to the non-equity category). In case that the secondary issuance annexes are not reported, these prospectuses are not counted, as they cannot be classified.




*Source: ESMA's EEA prospectus reports for 2019, 2020 and ESMA's data for 2021.*

### *4.4.2. The EU Recovery prospectus*

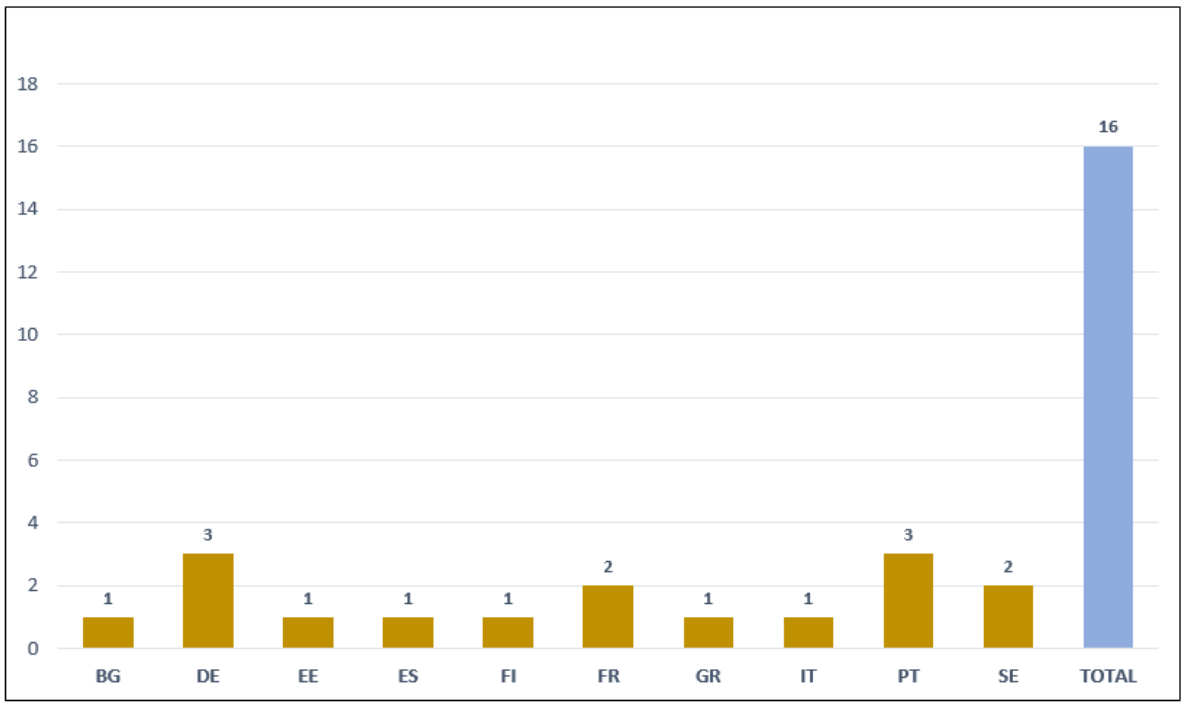
The EU Recovery prospectus, introduced by the CMRP in order to support the recapitalisation of companies to recover from the negative impact of the COVID-19 pandemic, is at present the most streamlined prospectus type (30 page-document with a 2 page-summary), it benefits from a reduced NCAs' notification time for the decision regarding its approval (7 days instead of 10 days) and is available for secondary issuances of shares fungibles with shares already admitted to trading that account for no more than 150% of existing share capital (aka 'anti-dilution cap').

The EU Recovery prospectus regime, which is due to expire on 31 December 2022, is currently not available for the secondary issuance of securities other than shares, for non-fungible securities or for transferring listing from an SME growth market to a regulated market . In those cases, the issuer has the choice between the standard prospectus and the simplified prospectus for secondary issuances.

The final report published by the TESG recommended that a new simplified prospectus similar in its form to the EU Recovery prospectus, should be adopted on a permanent basis both equity and non-equity securities, including to transfer listing from an SME growth market to a regulated market, and replace the simplified prospectus for secondary issuances.

Figure 18 shows that the uptake of the EU Recovery prospectus has been rather soft in 2021, albeit this new regime is only in application since March 2021.

**Figure 18. EU Recovery prospectuses approved in 2021 in the EEA.**



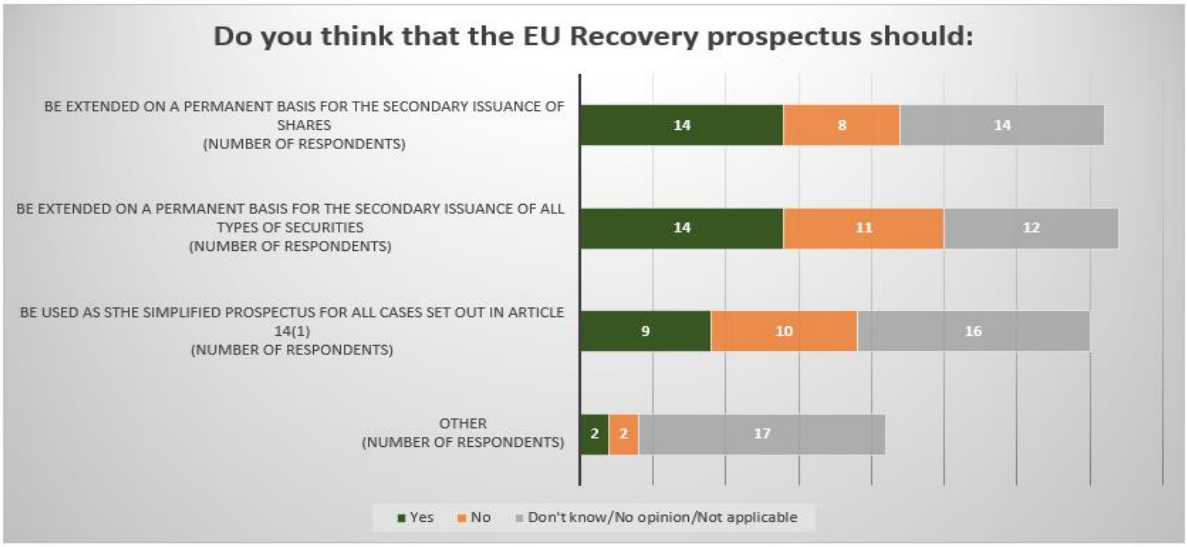

*Source: ESMA's data for 2021*[425].

Some stakeholders, in particular companies and business associations, highlighted some possible reasons for the soft performance of the EU Recovery prospectus: issuers still need to adjust to this new regime, which is only available for shares; issuers frequently tapping capital markets don't see the value to adapt to a transitional regime that expires in a short time period (and then revert to the normal prospectus); the 30 page-limit is difficult to comply with as the disclosure requirements have not been sufficiently reduced and some are complex to produce (e.g. working capital statement and the risk factors specific to the issuer and the shares); the name of the prospectus and the requirement to describe the effects of COVID-19 might discourage non-distressed issuers to use this prospectus; unfamiliarity of advisors and professional investors with this new type of prospectus.

Figure 19 shows that the largest part of stakeholders who responded to the dedicated question are in favour of making the EU Recovery prospectus permanent and extend it to securities other than shares.

**Figure 19. Stakeholders' feedback on EU Recovery prospectus.**

[425] Methodological note: the EU Recovery Prospectus was implemented after the RTS was approved and the IT development was almost finished. Consequently, instead of changing all NCAs and ESMA reporting systems for a temporary regime, NCAs were instructed to use the already existing fields comments to report the wording "EU Recovery Prospectus" in English.

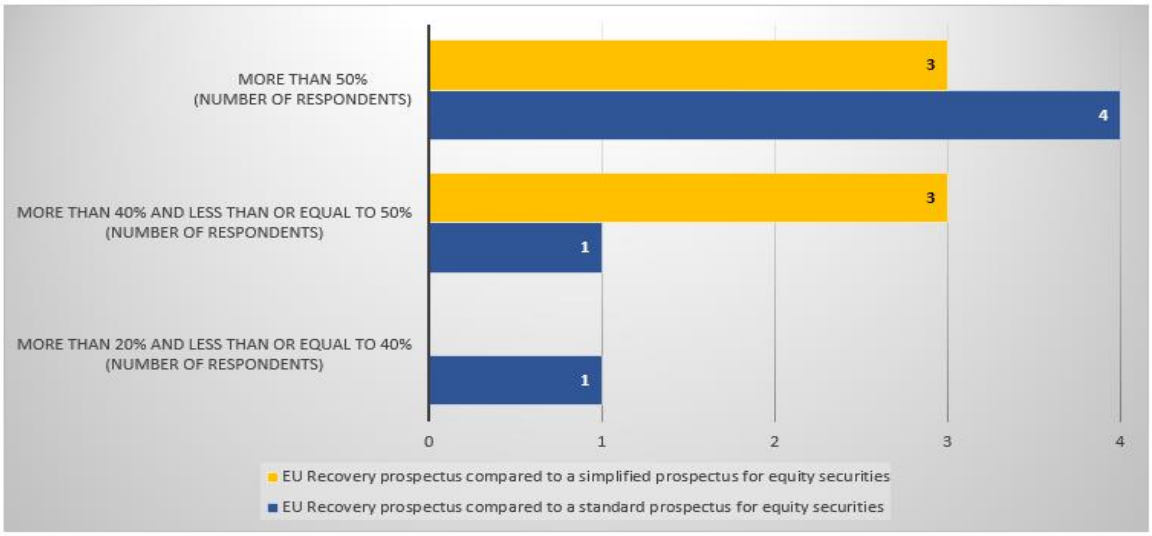



*Source: Targeted consultation on the Listing Act.*

B) *Efficiency*

As highlighted in Tables 5 and 6 of Annex 4, the simplified prospectus for secondary issuances is on the same average cost range of an EU Growth prospectus. Table 7 of Annex 4 also indicates that an EU Recovery prospectus allows to save average 40% costs compared to a simplified prospectus for secondary issuances. In addition to these costs estimates, few stakeholders provided ambitious estimations of percentage cost savings for the drawing up of an EU Recovery prospectus as opposed to a standard prospectus or a simplified prospectus for secondary issuances for equity securities (non-equity securities are not considered as the EU Recovery prospectus can only be used for shares). As shown in Figure 20, 3 stakeholders consider that an EU Recovery prospectus might allow to save costs from 40% to 50% compared to a simplified prospectus for secondary issuances (in line with estimations set out in Table 7 of Annex 4), and 3 other stakeholders consider that savings can go beyond 50%.

**Figure 20. Savings achieved with an EU Recovery prospectus.**




*Source: Targeted consultation on the Listing Act.*

Finally, the simplified prospectus for secondary issuances is subject to the 10 day NCA's notification regarding approval like a standard prospectus and includes a summary with the same format and size of a standard prospectus (7 pages, subject to few derogations). On the contrary, the EU Recovery prospectus is subject to a reduced notification time of 7 days regarding approval and includes a short-form summary of two pages only.

*C) Coherence*

The basis for justifying the reduced disclosures under the simplified disclosure regime for secondary issuances and the EU Recovery prospectus regime is that issuers whose securities are admitted to trading on a regulated market or on an SME growth market are subject to transparency and reporting obligations that stem from other pieces of EU legislations. In particular, the Prospectus Regulation refers to the ongoing and periodic disclosures requirements under MAR and Transparency Directive or, in the case of SME growth markets, Commission Delegated Regulation (EU) 2017/565[426].

The same considerations for the incorporation by reference and coherence of disclosures compared to other legislations made for the standard prospectus also apply to the simplified prospectus for secondary issuances and the EU Recovery prospectus.

*D) Relevance in terms of value added for the EU*

The EU Recovery prospectus was one of the most tangible prospectus measures that was introduced by the CMRP to support the real economy by facilitating the recapitalisation of highly indebted companies in the aftermath of the COVID-19 crisis. Furthermore, the maximum page limit of an EU Recovery prospectus makes the document more standardized

[426] Article 78.

and easier to be analysed by investors, given the short size of 30 pages (albeit the information incorporated by reference is not counted for the size-limit). As shown in Table 3 of section 4.1 of this Annex, the EU Recovery prospectus has a median and an average length of 32 pages, and percentiles 10 and percentile 90 are respectively 29 and 35 pages (i.e. no major outliers). As information incorporated by reference is not considered for the purposes of the page-size limit allows issuer to take advantage of incorporation by reference.

## 4.5. The Universal Registration Document (URD)

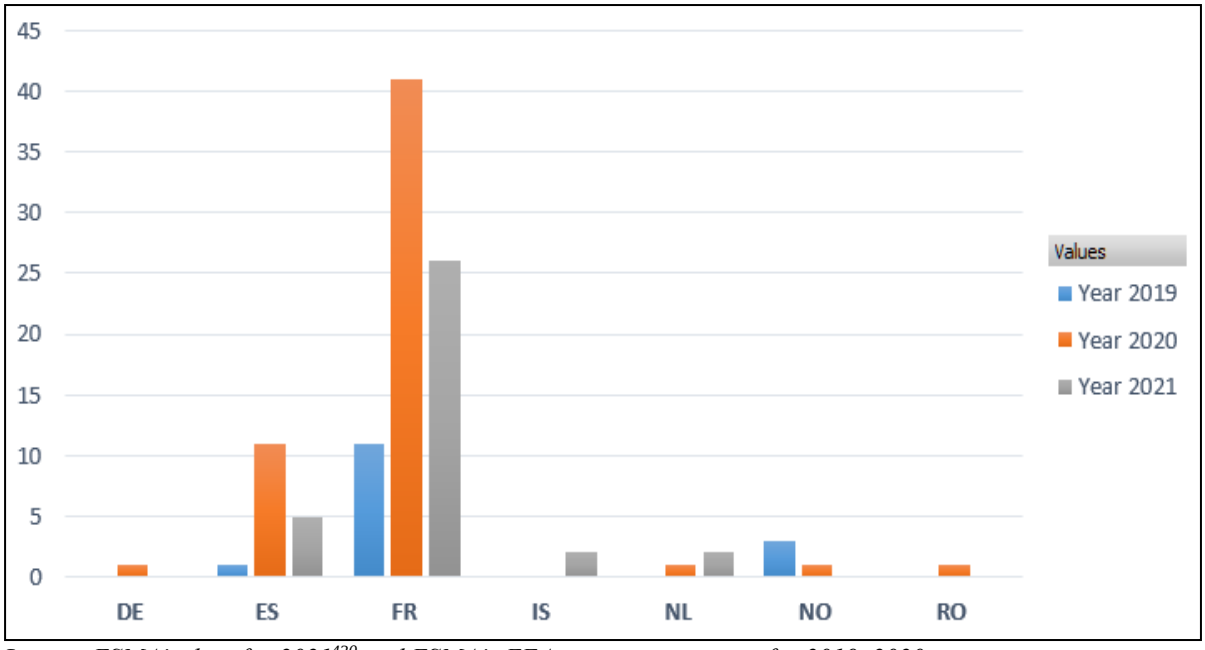
Issuers whose securities are admitted to trading on a regulated market or an MTF have the possibility to draw up a ***universal registration document***[427] (URD), to be approved by the NCA for two consecutive years and filed every year after (i.e. kept on 'the shelf'). The URD allows the issuer to keep the information up-to-date and to draw up a prospectus when market conditions become favourable by adding a securities note and a summary and submitting the prospectus to the NCA for approval. The URD allows issuers that comply with its conditions to obtain the status of frequent issuers and benefit of a 'fast-track' approval time (5 days instead of 10 days).

*A) Effectiveness*

As shown in Figure 21, so far the uptake of the URD has been very limited and concentrated mainly in one jurisdiction (France[428]). Even if we exclude the year 2019, as the URD was introduced by the Prospectus Regulation that entered in application only in July of that year, the number of URDs approved was relatively marginal. However, the data from ESMA do not include the number of URDs that are filed every year. According to ESMA's reply to the targeted consultation[429], the number of URDs filed in France was signalled to be 323, which suggests the number of new approvals is quite high relative to the number of URDs which are eligible for filing only.

**Figure 21 – URDs approved in the EEA (exc. UK) from 2019 to 2021**

[427] Article 9 of Regulation (EU) 2017/1129.
[428] Before the introduction of the URD, listed companies in France used to use a similar national document called the "document de reference". See: Du document de référence au document d'enregistrement universel (ou URD) : l'AMF attire l'attention des sociétés cotées pour cette prochaine échéance réglementaire | AMF (amf-france.org).
[429] See: https://www.esma.europa.eu/sites/default/files/library/esma32-384-5357_annex_-_response_to_ec_consultation_on_the_listing_act.pdf.




*Source: ESMA's data for 2021[430] and ESMA's EEA prospectus reports for 2019, 2020.*

*B) Efficiency*

Despite the efficiency stemming from the frequent issuer's status and the fact that a prospectus drawn up by a frequent issuer and incorporating a URD is subject to the 5 day NCA's notification regarding approval (instead of 10 days for a standard prospectus), the URD is only marginally used across the EU, with the exception of France. On possible issues to explain why the URD has had so far a very soft take up, few stakeholders that responded to the dedicated question in the targeted consultation highlighted that the content of the URD is too burdensome (7 stakeholders), the time period necessary to benefit from the status of frequent issuer is too lengthy (7 stakeholders); the URD supervisory approval process is too lengthy (7 stakeholders); the costs of regularly updating, supplementing and filing the URD are not outweighed by its benefits (7 stakeholders); the URD is not suitable for non-equity securities as it builds on the more comprehensive registration document for equity securities (6 stakeholders); the URD language requirements are too burdensome (3 stakeholders). In addition, few stakeholders highlighted that there should be more synergies between the Prospectus Regulation and the TD, to more effectively use the URD to disclose the annual and half-yearly financial report.

Furthermore, the majority of respondents (16 stakeholders[431] accounting for 51.6%) to the dedicated question consider that the URD should be based on the level of disclosures for secondary issuances instead of primary issuances (as this document can only be used by listed companies), while there is an equal split from stakeholders that would like to require the approval of the URD for one year only and those that would like to keep the current two years in order to obtain the status of frequent issuer. Finally, there is full support to allow

[430] Methodological note: URDs received in 2021. URDs IDs are only counted once even if they are used in multiple prospectuses.
[431] Including 7 business associations (of issuers, investors, banks), 5 companies/business organisations (including 3 operators of trading venues, 1 law firms, 1 issuer), 2 NCAs and 1 NGO.

drawing up the URD in English, which is in line with the feedback received for the prospectus in general.

*C) Coherence*

Issuers that comply with the procedures for the filing, dissemination and storage of regulated information and with the deadlines set out in the Transparency Directive are allowed to publish the annual and half-yearly financial reports required under that directive as parts of the URD, provided that the language of the URD and the home Member States for its approval are the same as for the purposes of the Transparency Directive requirements[432].

*D) Relevance in terms of value added for the EU*

The URD is a relevant tool to foster frequent issuances of securities, maximize efficiency and therefore provide benefits for issuers that are listed on an EU public market. However, in order to achieve this objective, and taking into account the feedback received from stakeholders, the existing framework might need to be improved.

### 4.6. Exemptions from the prospectus for small offer of securities to the public.

The Prospectus Regulation provides two exemptions from the obligation to publish a prospectus in case of small offers of securities to the public. The new prospectus framework has increased the "lower threshold"[433] below which the Prospectus Regulation does not apply to EUR 1 million (previously EUR 100 000), and the "upper threshold"[434] up to which Member States may decide to exempt public offers form the prospectus to EUR 8 million (previously EUR 5 million).

*A) Effectiveness*

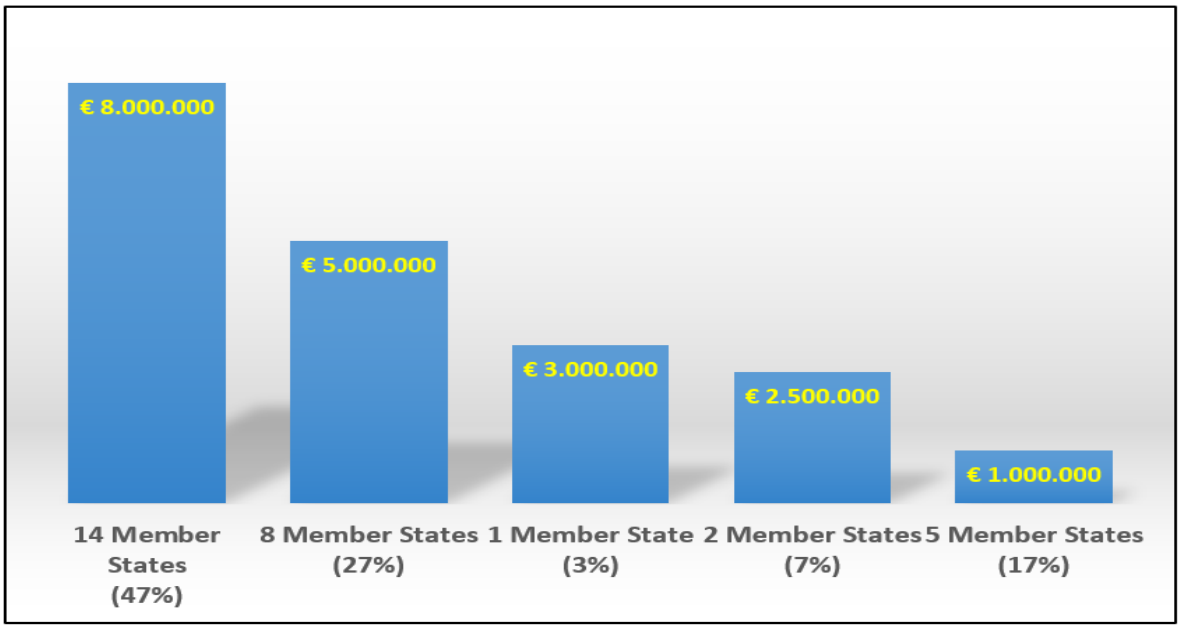
The upper threshold grants Member States discretion to exempt small offers of securities to the public between EUR 1 million and 8 million, provided that those offers do not require notification (passporting) and are not coupled with an admission to trading on a regulated market (which would trigger the prospectus obligation even in presence of an exemption for the public offer). ESMA highlighted in its response to the targeted consultation that both the current drafting of Article 1(3) and Article 3(2) of the Prospectus Regulation is creating issues in terms of legal clarity and proposed a clarification.

At the time of writing this impact assessment, according to ESMA's published data[435], the EEA landscape in terms of the upper thresholds set out by Member States looks rather fragmented as shown in Figure 22 (note: national rules may apply and few Member States may allow to use a different threshold depending on certain conditions). However, it should be noted that there is a trend towards the highest thresholds: Member States that set out the

[432] See recital 45 and Articles 9(12) and 9(13) of the Prospectus Regulation.
[433] Article 1(3) of the Prospectus Regulation.
[434] Article 3(2) of the Prospectus Regulation.
[435] See: esma31-62-1193_prospectus_thresholds.pdf (europa.eu).

maximum threshold of EUR 8 million account for 47%, which combined with Member States that chose the second highest threshold of EUR 5 million accounts for 74% of the total.

**Figure 22. Thresholds under Article 3(2) of the Prospectus Regulation in the EEA**




*Source: ESMA's website*

In response to the question about whether Member States should be allowed to exercise discretion over the threshold set out in Article 3(2) of the Prospectus Regulation with a view to tailoring it to national specificities of their markets, the majority of stakeholders (27 stakeholders[436] accounting for 56%) responded negatively. Within that group, some stakeholders also expressed their concerns about the complexity of adapting to different national thresholds and highlighted a preference for a harmonised EU threshold.

B) *Efficiency*

The targeted consultation also included a question on whether stakeholders would consider that the lower and upper thresholds should be adjusted to allow a larger number of offers to be carried out without a prospectus. Seventeen stakeholders provided some specific feedback as shown in Table 7.

[436] Including 12 business associations (of issuers, trading venues, banks, law firms, institutional investors), 11 companies/business organisations (including 7 operators of trading venues, 1 law firm, 1 investment bank), 3 NCAs, and 1 NGO.

**Table 7 - Stakeholders' feedback on lower and upper exemption thresholds for public offers.**

| STAKEHOLDER | Lower Threshold | Upper Threshold | Flexibility Yes/No |
|---|---|---|---|
| Company/business organisation | | € 20.000.000 | No |
| Public authority | | € 20.000.000 | Yes |
| Investment bank | | € 20.000.000 | No |
| Public authority | | € 20.000.000 | No |
| Business association | € 15.000.000 | € 15.000.000 | No |
| Business association | € 5.000.000 | € 15.000.000 | Yes |
| Other | € 5.000.000 | € 10.000.000 | No |
| Operator of a trading venue | € 1.000.000 | € 10.000.000 | No |
| Academic/research institution | € 3.000.000 | € 10.000.000 | Yes |
| Business association | € 1.000.000 | € 8.000.000 | No |
| Operator of a trading venue | € 1.000.000 | € 8.000.000 | No |
| Business association | € 1.000.000 | € 8.000.000 | No |
| Other | € 1.000.000 | € 8.000.000 | No |
| Public authority | € 1.000.000 | € 8.000.000 | Yes |
| Company/business organisation* | | € 8.000.000 | No |
| Public authority | | € 5.000.000 | Don't know/no opinion |
| Company/business organisation** | | 20% | Yes |

*Source: Feedback from targeted consultation.*

The two stakeholders flagged in Table 7 remarked that (*) the upper threshold of EUR 8 million should only be kept for private companies making offers, while the prospectus should be lifted for companies with securities listed on an MTF or admitted to trading on a regulated market; and (**) the upper exemption threshold should be consistent with the threshold for the admission to trading on a regulated market of securities fungible with securities already admitted to trading on the same regulated market, with a 20% cap.

Taking into account the overall feedback provided, in monetary terms, it emerges that:

- The average lower threshold proposed (in accordance with Article 1(3) of the Prospectus Regulation) would be EUR **3 400 000**;
- The average upper threshold proposed (in accordance with Article 3(2) of the Prospectus Regulation) would be EUR **12 062 500;**
- There should be no flexibility for Member States to set out a national threshold.

If one or both thresholds were to be adjusted upwards, or if only the upper threshold would be retained and national discretion would be removed, more offers of securities to the public would be exempted from the costs and burden of drawing up a prospectus, which can be disproportionate for issuers for such low considerations.

*C) Coherence*

The possibility to exempt small offers of securities to the public from the prospectus obligation is coherent with other EU legislations, such as the Crowdfunding Regulation.

*D) Relevance in terms of value added for the EU*

Granting national discretion on the upper threshold does not fit with the objective of supporting the single market and creates difficulties for issuers that seek to make cross-border offers. According to the feedback received from the majority of stakeholders, there is ground to consider harmonizing the upper threshold, which would also entail removing the lower threshold. Furthermore, allowing companies to access capital markets without a prospectus, for small offers of securities to the public, contributes to the objectives of the CMU, which is the reason why the Prospectus Regulation increased both lower and upper thresholds compared to the Prospectus Directive.

### 4.7. Scrutiny and approval of the prospectus

One of the key changes stemming from the Prospectus Regulation is the promotion of convergence and enhanced harmonization of rules about scrutiny and approval of the prospectus by NCAs. In particular, the criteria for the scrutiny of the completeness, comprehensibility and consistency of the prospectus were put on equal ground and a list of those criteria was laid down in Commission Delegated Regulation (EU) 2019/980[437]. However, as it was not considered feasible to draw up an exhaustive list of criteria that takes into account the developments and innovations in financial markets, a legal hook was included in Article 40[438] of that Delegated Regulation to allow NCAs to apply additional criteria for the scrutiny of the completeness, comprehensibility and consistency where necessary to protect investors. Furthermore, recital 24[439] of that Delegated Regulation clarifies that if new securities stemming from the evolution in financial markets are not covered by the existing prospectus annexes, the NCA should decide in consultation with the issuer which information should be included in the prospectus.

As regards the approval of the prospectus, the Prospectus Regulation[440] sets out rules and timelines for NCAs to notify the issuer, the offeror or the person asking for admission to trading on a regulated market of its decision regarding the approval of the prospectus, including for the case where the latter does not meet the standards of completeness, consistency and comprehensibility and changes or supplementary information is needed, as well as on the circumstances that enable NCAs to refuse the approval and terminate the review process.

The Prospectus Regulation includes a requirement for ESMA to organise at least one peer review of the scrutiny and approval procedures of NCAs (including notifications of approval between competent authorities), which shall also assess the impact of different approaches

[437] Articles 35 to 45 of Commission Delegated Regulation (EU) 2019/980 specifically relate to the process of scrutinising and approving prospectuses and URDs. In particular, Articles 36 to 38 lay down scrutiny criteria for the completeness, consistency, and comprehensibility of the prospectus.

[438] "Where necessary for investor protection, the competent authority may apply criteria in addition to those laid down in Articles 36, 37 and 38 for the purposes of scrutinising the completeness, comprehensibility and consistency of the information in the draft prospectus".

[439] "Due to the rapid evolution of securities markets, there is the possibility that certain types of securities that are not covered by the Annexes to this Regulation will be offered to the public or admitted to trading. In such a case, to enable investors to make an informed investment decision, competent authorities should decide in consultation with the issuer, offeror or person asking for admission to trading on a regulated market which information should be included in the prospectus".

[440] Article 20 of the Prospectus Regulation.

with regards to scrutiny and approval by competent authorities on issuers' ability to raise capital in the EU[441]. The peer review mandate was approved by ESMA's Board of Supervisors in July 2021, and the peer review report was published on 21 July 2022. The peer review covered five assessment areas concerning the prospectus scrutiny and approval processes:

1. the scrutiny of prospectuses having regard to their completeness, comprehensibility and consistency;[442]
2. the approval process by NCAs of prospectuses, including the notification of approvals by NCAs;[443]
3. NCAs' application of Guidelines 1-5, 7 and 11 on risk factors;
4. the adequacy of NCAs' resources to carry out the scrutiny and approval of prospectuses;
5. the independence and the liability regime of the NCA in relation to the supervision of prospectuses.

Amongst the several areas under assessment, the peer review report identified some specific element of NCAs' scrutiny and approval of prospectuses that can particularly impact issuers' ability to raise capital: (i) communication with issuers; (ii) flexibility of approval procedures; (iii) expertise of NCAs' staffing; and (iv) NCAs' attitude towards liability.

Furthermore, the peer review report highlighted some areas where material differences exists across the EU, such as the deadlines imposed by NCAs to issuers to respond to comments, NCAs' procedures for the approval of prospectuses and additional criteria that NCAs apply to prospectuses under their scrutiny.

Finally, additional findings related to the issuers' ability to raise capital in the EU concern: (i) the number of draft prospectuses submitted to NCAs before approval; (ii) the length of prospectuses (significant variations across Member States); and (iii) the length and number of risk factors in prospectuses (significant variations observed).

*A) Effectiveness*

The targeted consultation included a question on whether there is alignment in the way NCAs assess the completeness, comprehensibility and consistency of the draft prospectuses that are submitted to them for approval. The majority of respondents (23 stakeholders[444], accounting for 53.5%) responded negatively, while only 16% answered positively (7 stakeholders[445]). Some stakeholders provided comments about what they consider the key issues with the current scrutiny and approval process. Some stakeholders pointed out to divergent scrutiny and approval practices from NCAs and highlighted in particular the frequent requests to produce additional information going even beyond the Prospectus Regulation requirements (even in presence of clear ESMA's guidelines) and the tendency of some NCAs to challenge the issuer on most items of the relevant prospectus annexes. Two stakeholders advocated a more harmonized approach about additional documentation that NCAs may request, which

[441] Article 20(13) of the Prospectus Regulation).
[442] Pursuant to Articles 35 to 45 of Commission Delegated Regulation (EU) 2019/980.
[443] Pursuant to Article 25 of the Prospectus Regulation.
[444] Including 10 business associations (of banks, issuers, and law firms), 7 companies (including 2 operators of trading venues, a trade association and a law firm), 3 NCAs and 2 NGOs
[445] 3 NCAs, 1 operator of a trading venue, 1 association of trading venues, 2 issuers' associations).

should not be over and above what is required under the Prospectus Regulation, and a stronger oversight from ESMA, including more frequent use of peer reviews.

The peer review on prospectus assessed several areas that may impact the effectiveness of the scrutiny and approval of prospectuses. Some of the key findings are summarised below:

- the '4-eyes principle'[446] is generally applied in a satisfactory manner by NCAs;
- most NCAs published guidance for issuers and their advisors regarding the process for the scrutiny and approval of the prospectus and have generally in place practices that ensure sufficient consistency of review of prospectuses and comments raised;
- for the scrutiny of prospectuses, the majority of NCAs tend to involve other departments, product governance specialists and also other supervisory authorities, and have mechanisms in place for the escalation of issues that may emerge during the process;
- in general, NCAs have in place rules or code of conducts to prevent conflict of interests concerning prospectus readers;
- in most Member States, NCAs' civil liability is considered to reasonably ensure that NCAs' staff may carry out the scrutiny and approval of a prospectus in an impartial and objective manner;
- NCAs' staff involved in the scrutiny and approval is overall proportionate to the number of prospectuses approved. However, there are divergent situations across the EU[447];
- in most NCAs the team dealing with scrutiny and approval is subject to internal audit.

*B) Efficiency*

To the question on whether the current approval times set out in the Prospectus Regulation[448] are adequate, stakeholders responses were almost equally split between a positive answer (20 stakeholders[449]) and a negative answer (19 stakeholders[450]). However, some stakeholder remarked that the review process by NCAs might result in a significant cost of producing a prospectus, given the additional information that some NCAs regularly ask issuers to provide and the multiple rounds of questions which delays the whole approval process, leading to missed opportunities for issuers in terms of offering securities at the right time.

ESMA's peer review process provides an insight into whether different approaches to scrutiny and approval may impact issuers' ability to raise capital in the EU, including the efficiency of NCAs' procedures, the experience of NCA staff, communication with issuers

446 Peer Review's mandate: "Competent Authority should have 'four-eye principle" in place to be used as appropriate and depending on, for example the nature of the structure, the type of securities, the type of issuer. If applicable, the second person should review at least what is considered by the Competent Authority to be the more sensitive parts of the prospectus document. Depending on the circumstances it might be appropriate that the second person reviewing the prospectus has more experience in scrutinising prospectus than the first reviewer".

447 The most extreme cases are relating to 2 NCAs having a ratio of about 40 prospectuses per reader and 2 other NCAs having a ratio of 2 prospectuses per reader.

448 Article 20 of the Prospectus Regulation.

449 Including 2 NCAs, 9 business associations (of banks, issuers, investors, and trading venues), 6 companies/business organisations (including 2 investment banks and 4 operators of trading venues).

450 6 NCAs, 8 business associations (of issuers, investors, banks, law firms), 4 companies/business organisations, 1 NGO.

and their advisors and the amount of time that NCAs take to provide issuers with comments and approve prospectuses. Some of the key findings are summarized below:

- NCAs tend to engage with issuers and their advisors before a formal prospectus application is submitted and communicate about desired timelines to help them plan their offering of securities (29 NCAs allow for pre-consultation with issuers).
- NCAs approving fewer prospectuses typically have longer approval procedures[451], often due to the requirement to seek their Board's approval of the prospectus. Other NCAs allow prospectus readers or a member of management (or both in a joint effort) to do so;
- the staff of NCAs approving a greater number of prospectuses tend to develop expertise (e.g. about types of securities) that appears to influence issuers' choice of the home Member State for prospectus approval (where possible);
- NCAs have different approaches about requiring issuers to make changes to the prospectus, for example to delete risk factors or amend sections not considered comprehensible (as issuers are ultimately liable for the information disclosed).
- the level of liability of NCAs and their staff can lead to a defensive approach in the prospectus supervision;
- there is a wide divergence regarding both issuers' turnaround times (i.e. deadlines for issuers to respond to comments);
- there is a great deal of variation between NCAs in relation to the additional documentation necessary for the approval of prospectuses[452];
- there is a wide range of practices concerning withdrawal and refusals.

Furthermore, the peer review report considered additional areas that might impact the issuers' ability to raise capital: the number of draft prospectuses submitted to NCAs before approval; the length of prospectuses and the length and number of risk factors in prospectuses. Some of the key findings are summarized below:

- The peer review report provided for the **average number of draft prospectuses submitted before approval** to NCAs, distinguishing amongst IPO prospectuses, types of securities and some alleviated prospectus types. Table 8 shows that the number of rounds does not decrease for alleviated prospectus types. The peer review also highlighted that issuers have the tendency to include in those drafts information that is not required by the Prospectus Regulation and that may increase the number of rounds.

**Table 8 - Average number of draft prospectuses submitted before approval.**

| | IPO | Other equity securities | Non-equity securities | EU Growth prospectus | Simplified prospectus for secondary issuances |
|---|---|---|---|---|---|

[451] In some cases it takes 3 days or more after the actual scrutiny of the prospectus has been completed.
[452] Such as a signed copy of the prospectus, signed responsibility statements, documentation to support statements in prospectuses, the minutes of board meetings authorising the offering/programme and copies of the ISIN documentation.

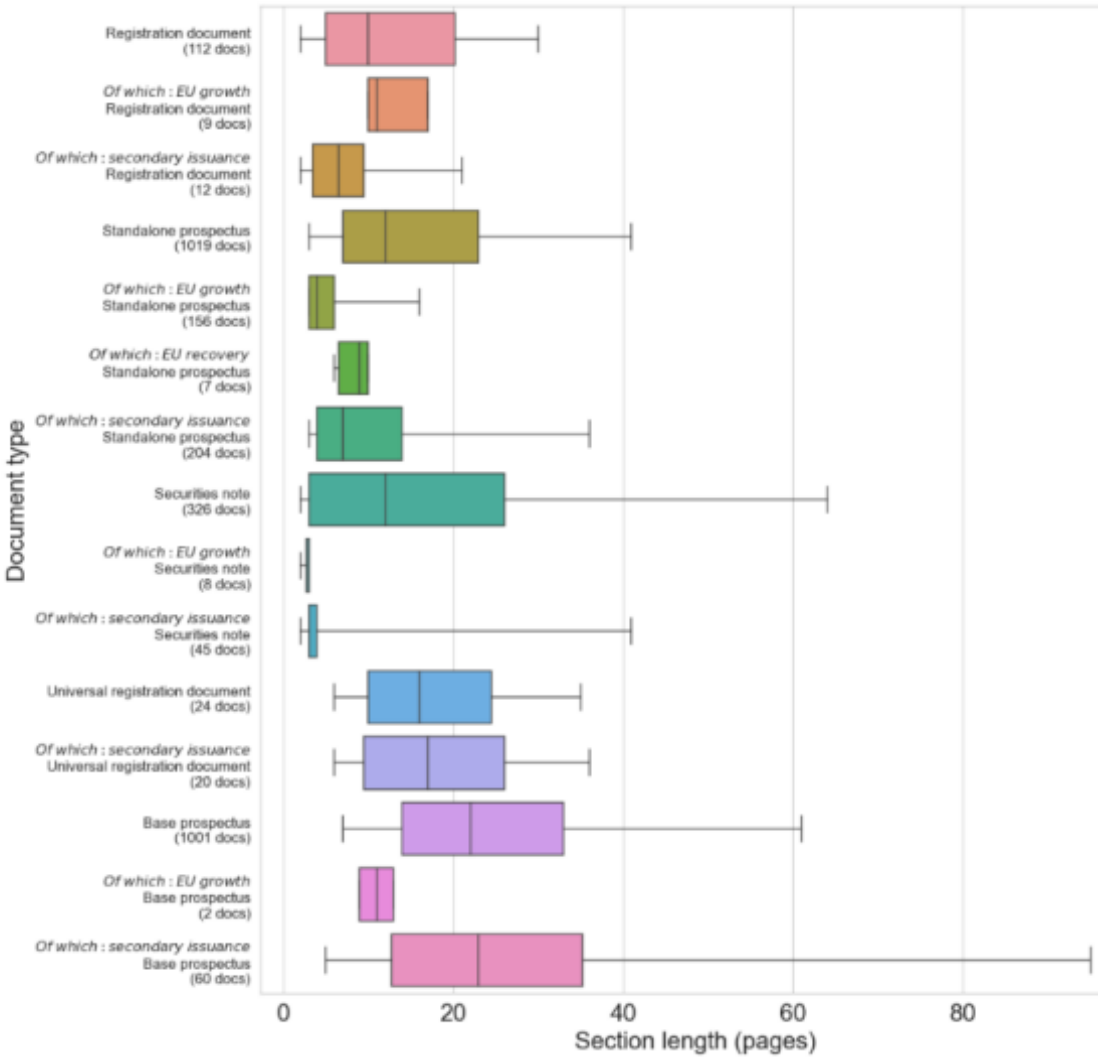
| | | | | | |
|---|---|---|---|---|---|
| **Average number of rounds** | **5.3** | **4.8** | **4.13** | **4.28** | **5.15** |

*Source: ESMA's peer review report*

- The peer review report indicates that **length of prospectuses** varies significantly across the EU, also depending on the type of document (the longest documents being base prospectuses and URDs). As previously shown in Figure 8 of section 4.1, prospectuses approved in Sweden are in the lower range, while prospectuses approved in Germany, Luxembourg and Poland feature in the upper range. Differences in civil liability (that could push issuers and their advisors to include more information in the prospectus to protect themselves against lawsuits) are mentioned as possible reasons.
- **Risk factors sections** can be particularly lengthy, especially in securities notes and base prospectuses, as shown in Figure 23, while the shortest risk factor sections are included in alleviated prospectus types (EU Growth prospectus and EU Recovery prospectus). However, in terms of proportion compared to the size of the document in which they are included, risk factors represent a significant percentage of the size of registration documents of standard prospectuses (up to 40%) and simplified prospectuses for secondary issuances (up to 30%), as well as in EU Recovery prospectuses (up to 30%). On the opposite side, risk factors sections represent a small percentage of the size of securities notes and EU Growth prospectuses, as shown in Figure 24. The peer review report also indicates that 5 Member States have the longest risk factors sections (at least 40 risk factors in more than half of the documents filed in those jurisdictions and 60 or more risk factors in more than a quarter of the documents).

**Figure 23. Length of risk factors sections in terms of number of pages[453]**

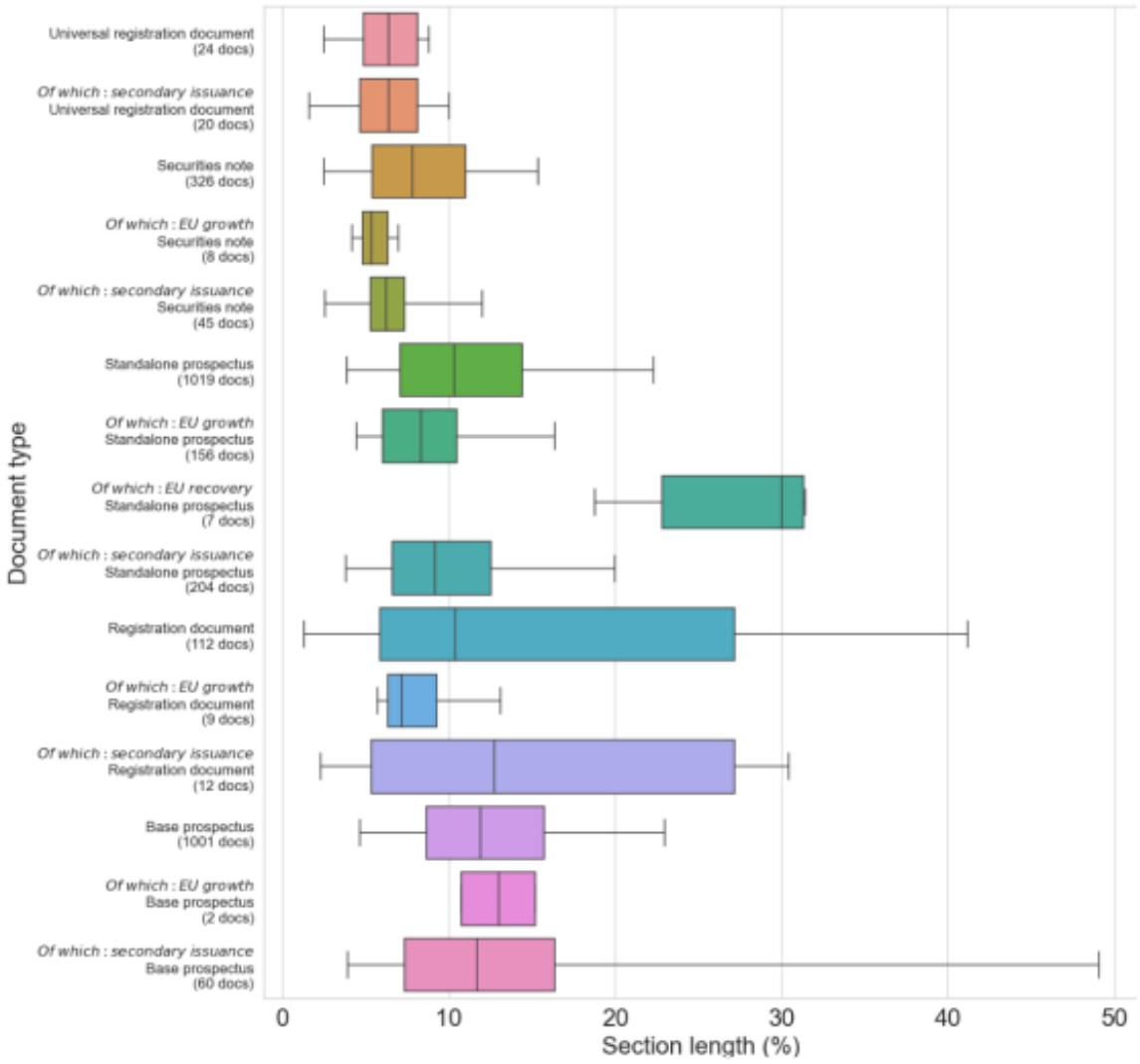
[453] Each box shows the range of the length of the risk factor section for documents of a specific type. The horizontal line in each box is the median for that respective document type. Box edges are the 25th and 75th percentiles of the length within each document type, while the whiskers represent the 5th and 95th percentiles.




*Source: ESMA's peer review report*

**Figure 24. Size of risk factors' section as a percentage of the size of the document[454]**

[454] Each box shows the range of the length of the risk factor section as a percentage of the total document length for documents of a specific type. The horizontal line in each box is the median for that respective document type. Box edges are the 25th and 75th percentiles of the percentage length within each document type, while the whiskers represent the 5th and 95th percentiles.




*Source: ESMA's peer review report.*

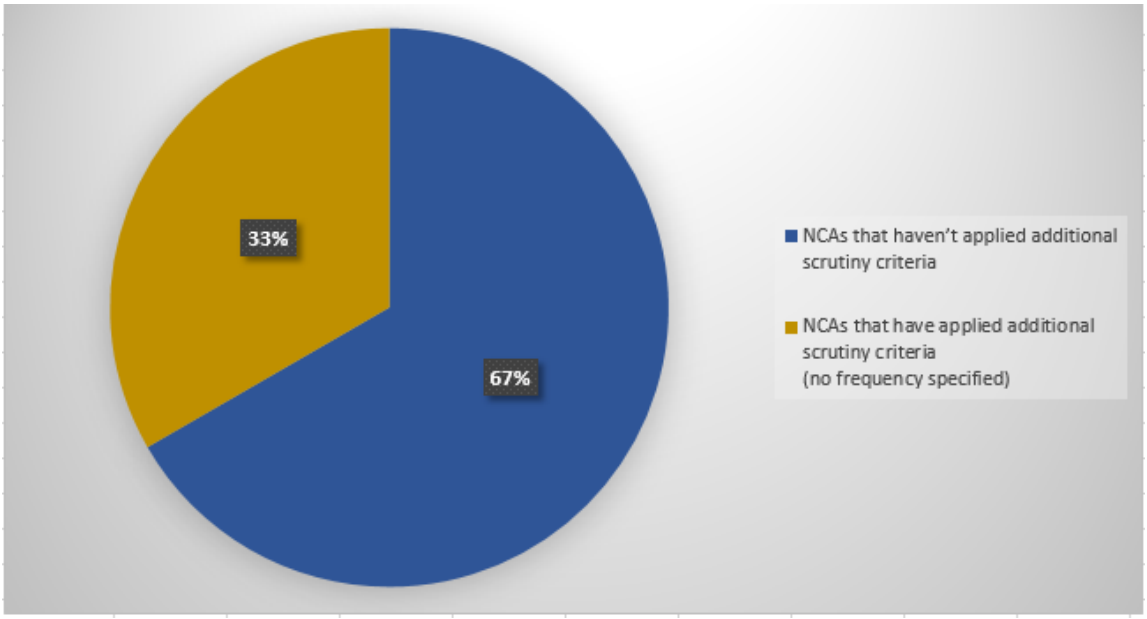
The peer review report also pointed out to areas where material differences amongst NCAs were observed, such as deadlines imposed by NCAs for issuers to respond to comments, NCAs' procedures for the approval of prospectuses and the additional criteria that NCAs apply to prospectuses under their scrutiny. Some of the key findings are summarized below:

- NCAs have a different understanding of the **additional criteria**, which can be used where necessary for investor protection, for the scrutiny of the completeness, comprehensibility and consistency of the prospectus[455]. This results in a divergent application across the EU, as shown in Figure 25, with 20 NCAs that haven't applied additional scrutiny criteria as opposed to 10 NCAs that have done so (no frequency specified). Furthermore, 8 NCAs have in place internal guidance for the application of additional criteria, and 5 NCAs

[455] Article 40 of Commission Delegated Regulation (EU) 2019/980.

mentioned to have formalised the additional criteria[456]. Finally, 1 NCA has published a communication which, inter alia, provides guidance on the application of additional criteria for the scrutiny. The publication provides a non-exhaustive list of topics that may be subject to additional checks. The peer review report also highlighted the lack of a common understanding by NCAs of the concept of "criteria" and whether the latter encompasses additional checks on an ad hoc basis or is related to internal procedures for the verification of information in the prospectus.

**Figure 25. Overview of application of additional scrutiny criteria in the EEA.**




*Source: ESMA peer review report.*

- Beyond the deadlines set out in the Prospectus Regulation[457], half of the NCAs do not have **pre-specified timeframes** and strive to return comments within a shorter deadline sometimes or regularly. The remaining NCAs either have shorter timeframes arising from national rules or as self-imposed or agree an indicative timeline with the issuer;

- There is a wide divergence regarding **issuers' turnaround times** (i.e. deadlines imposed by NCAs for issuers to respond to comments). 11 NCAs do not impose a specific deadline for issuers to respond, while a small majority of NCAs have timeframes set out in national rules (ranging from 10 to 30 working days). Where the deadline has passed without an issuer's response, some NCAs suspend or terminate the review process. As regards compliance with the deadlines, 15 NCAs indicated that it is directly monitored by the prospectus reader, however other approaches are also in place (e.g. IT system, interactive spreadsheets).

- Overall 21 NCAs reported a number of **withdrawal of applications** during the review period (ranging from 1 to 56 withdrawals), mainly concerning IPOs and EU Growth

[456] For example completeness and consistency checks with information available within the NCA or information on the issuer's website, additional measures included in the Supervisory Briefing, issuers' announcements, suitability of the product for the target group.
[457] Article 20 of the Prospectus Regulation.

prospectuses, while 8 NCAs did not experience any withdrawal within that timeframe. Several NCAs indicated possible reasons for the withdrawal[458], albeit issuers generally do not communicate in that regard. Furthermore, only 6 NCAs noticed about **refusals** occurred during the review period (18 refusals in total), mainly due to failure to adequately address the received comments within the deadline or inability to comply with regulatory requirements, while 24 NCAs did not report any refusals. All NCAs have procedural requirements in place for refusals mainly aligned with national administrative laws. However, timeframes for refusals, set out in national law or NCAs' internal procedures may vary significantly across NCAs (ranging from 5 working days to 3 months).

Finally, the peer review report makes several proposal for ESMA's possible intervention and invites the Commission to take action on five areas:

1) Review the notion of 'criteria' under Article 40 of Commission Delegated Regulation (EU) 2019/980[459].
2) Consider setting out a common approach regarding issuers' turnaround times and NCAs' deadlines placed upon issuers during the approval process.
3) Consider aligning the timelines for the refusal of prospectuses at an EU level to ensure a level playing field across NCAs.
4) Undertake a behavioural study that would look at the use of prospectuses and their comprehensibility as regards retail investors with a mind to using the outcome of this study to improve the prospectus regulatory framework and ensure consistency of comprehensibility checks by NCAs.
5) Carry out a behavioural study to look at whether and how retail investors use the prospectus summary in order to make concrete improvements to the summary regime.

*C) Coherence*

Harmonisation of criteria for scrutiny and procedures for the approval of the prospectus is coherent with other EU legislations that contribute to the objectives of the Capital Markets Union action plan.

*D) Relevance in terms of value added for the EU*

The harmonisation and convergence of the prospectus supervisory activity by NCAs provides certainty and to issuers and confidence to investors, which contributes to the overarching objectives of the Prospectus Regulation and in general to the objectives of the Capital Markets Union.

### 4.8. Supplements to the prospectus

The CMRP introduced some clarifications on supplements rules, in particular which investors shall be contacted and in which case by financial intermediaries when a supplement is published. Furthermore, the time period to contact investors as well as the time period for the latter to exercise their withdrawal rights were extended.

[458] For example: issuers deciding not to proceed with the offer/issue due to market circumstances, inability to fulfil Prospectus Regulation requirements or respond to NCAs' comments, closing of market window, changes in circumstances of the issuer or funding needs.
[459] ESMA is also invited to provide technical assistance to the Commission as needed.

*A) Effectiveness*

Table 9 shows 1915 supplements were approved by NCAs in 2021 and published by issuers.

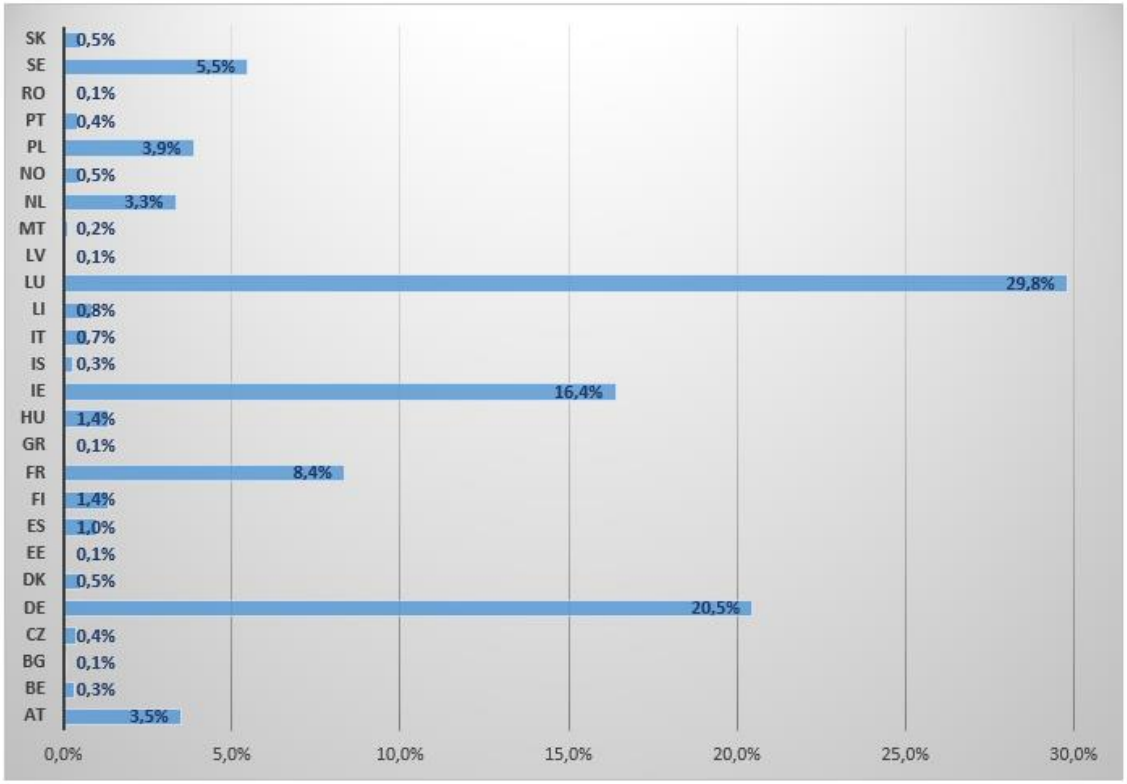
**Table 9 - Supplements approved in the EEA in 2021**

| Number of supplements approved in 2021 | Number of issuers publishing supplements | Number of supplements approved per issuer in average |
|---|---|---|
| **1 915** | **681** | **3** |

*Source: ESMA's data for 2021.*

Three quarters of supplements were approved in four Member States (Luxembourg, Ireland, Germany and France), as shown in Figure 26.

**Figure 26. Percentage of supplements approved by Member State in 2021.**




*Source: ESMA's data for 2021*[460].

Given such high numbers, in some jurisdictions (e.g. Germany) financial intermediaries were under heavy pressure given that the original version of Article 23 required them to inform 'investors' in general about the publication of a summary, which led to confusion about which investors had to be contacted. The new provisions introduced by the CMRP[461] specify that financial intermediaries shall only inform investors that purchased or subscribed

[460] Methodological note: distinct number of issuers (LEI) reported in supplements related to prospectuses approved in 2021.
[461] Articles 23(2a) and 23(3a) of the Prospectus Regulation.

securities through a financial intermediary between the time when the prospectus for those securities is approved and the closing of the initial offer period and that are enabled to exercise withdrawal rights. Furthermore, the new provisions allow financial intermediaries to contact those investors by the end of the first working day following that on which the supplement is published (instead of on the day when the supplement is published) and investors to exercise withdrawal rights within three working days after the publication of the supplement (instead of two working days).

The majority of stakeholders that responded to the dedicated question in the targeted consultation (21 stakeholders[462] accounting for 52.5%) considered that the temporary regime for supplements introduced by the CMRP has provided additional clarity and flexibility to financial intermediaries and investors, without endangering the protection of the latter, and should therefore be made permanent.

*B) Efficiency*

Some stakeholders (including ESMA) made proposals on how to improve further the provisions on supplements, such as specifying further that only clients of financial intermediaries should be contacted by the latter and via electronic means.

*C) Coherence*

The new rules on supplements are coherent with the objectives of the CMRP, as they aimed to provide breathing space to financial intermediaries that were key pillars to support the recovery of companies from the negative effects of the Covid-19 pandemic.

*D) Relevance in terms of value added for the EU*

The new rules on supplements are supporting the overall objectives of the Prospectus Regulation as they strike the right balance between market efficiency and investor protection.

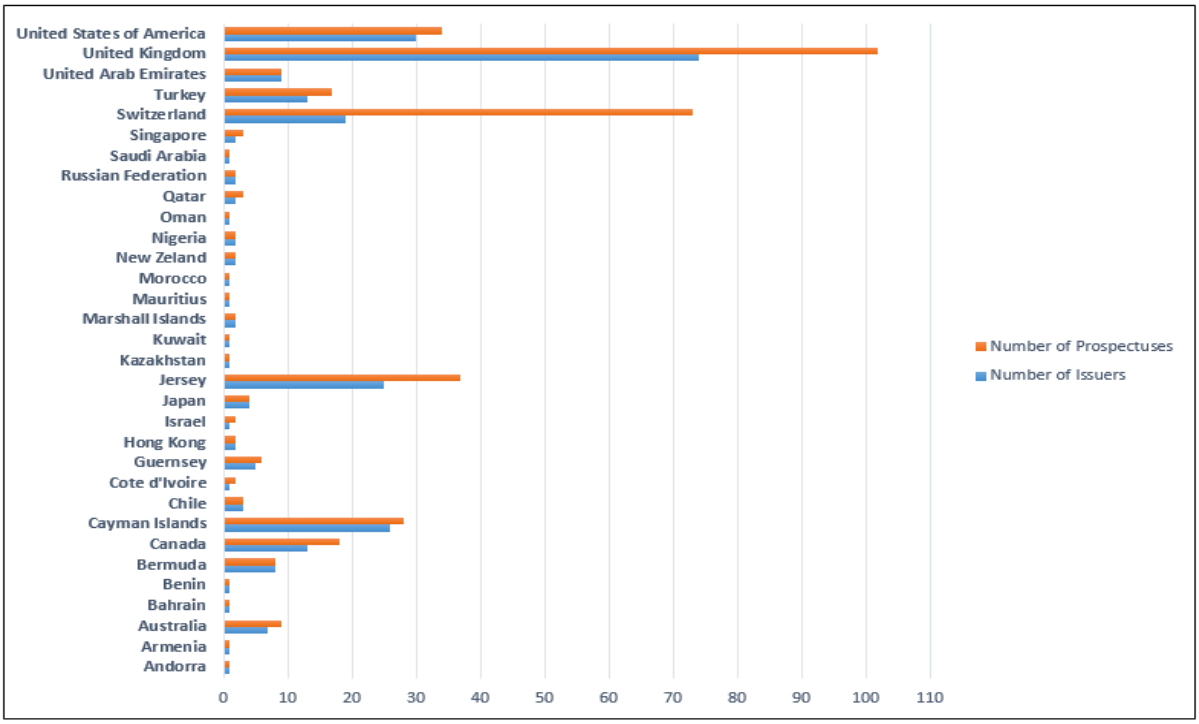
### 4.9. Equivalence regime

The Prospectus Regulation allows third country issuers to offer securities to the public or seek admission to trading on a regulated market made under a prospectus drawn up in accordance with either the Prospectus Regulation[463], or the laws of a third country[464].

Figure 27 shows the number of prospectuses from third country issuers approved in the EEA in 2021 (378 in total) and the number of issuers who drew them up (262 in total).

**Figure 27. Number of third country prospectuses approved in the EEA in 2021 and of third country issuers who produced those prospectuses.**

[462] Including 10 business associations (of banks and issuers), 4 companies/business organisations (2 law firms, 1 operator of trading venues and 1 financial research provider), 6 NCAs and 1 academic.
[463] Article 28 of the Prospectus Regulation.
[464] Article 29 of the Prospectus Regulation.



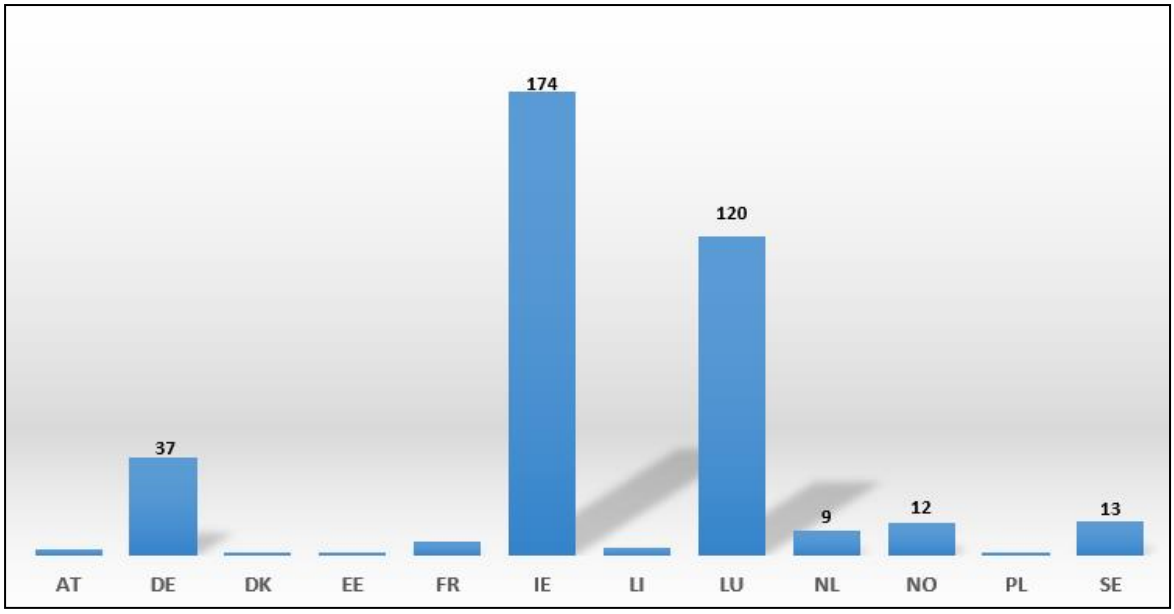

*Source: ESMA's data for 2021*[465].

Most prospectuses stemmed from the UK (27%), followed by Switzerland (19%), Jersey (10%) and US (9%). All those prospectuses have been drawn up in accordance with Article 28 of the Prospectus Regulation, as so far no equivalence decision has been taken under Article 29.

Figure 28 shows the number of prospectuses of third country issuers approved by EEA competent authorities. Overall, 3 Member States approved 88% of third country prospectuses, namely Ireland (46%), Luxembourg (32%) and Germany (10%).

**Figure 28. Third country prospectuses approved by EEA competent authorities in 2021.**

[465] Methodological note: computation of the issuers (LEIs) belonging to approved prospectuses in 2021, including related documents, as well as the issuer legal residence country.




*Source: ESMA's data for 2021.*

*A) Effectiveness*

The targeted consultation included a question on whether the equivalence regime set out in Article 29 of the Prospectus Regulation should be amended to make it possible for the Commission to take equivalence decisions in order to allow third country issuers to access EU markets more easily with a prospectus drawn up in accordance with the law of a third country. While almost half of stakeholders did not express any opinion, the number of stakeholders who responded positively (12 stakeholders[466] accounting for 37.5%) outnumbers stakeholders that responded negatively (5 stakeholders[467] or 15.6%).

The current equivalence framework has never been used, as general equivalence criteria have not been set out in a Delegated Act. In ESMA's letter to the Commission relating to the technical advice on general equivalence criteria for prospectuses drawn up under the laws of third countries[468], ESMA highlighted serious practical challenges that would stem from the current Article 29 of the Prospectus Regulation. In particular, under that provision, third country prospectuses should be drawn up according to equivalent requirements and also be scrutinized and approved under the disclosure rules of the Prospectus Regulation. In addition, ESMA pointed out that the list of articles of the Prospectus Regulation that according to Article 29(3) should form the basis of the general equivalence criteria (i.e. Articles 6, 7, 8 and 13 of the Prospectus Regulation) is not sufficient to ensure an effective equivalence regime. That list does not encompass some important aspects of the prospectus regime, such as risk factors disclosure, and does not clarify key elements, such as the rights and obligations connected to a third country prospectus in the EU.

Furthermore, one stakeholder noticed that a double approval of a third country prospectus should be avoided and that a sound equivalence regime should include the supervisory

[466] Including 4 business associations (of issuers, investors, and trading venues), 3 companies/business organisations (1 operator of trading venues, 1 investment bank and 1 financial research provider) and 4 NCAs).
[467] Including 2 business associations (of trading venues and law firms), 2 operators of a trading venue and 1 NGO.
[468] See: esma31-59-1451_letter_to_ec_on_esmas_techical_advice_on_general_equivalence_criteria.pdf (europa.eu)

framework, rules on advertisements, languages, passporting, supplements, liability and validity of the prospectus. Furthermore, equivalent rules should be in place regarding the prevention of market abuse and the periodic and ongoing reporting by issuers.

*B) Efficiency*

While the Prospectus Regulation allows third country issuers to access EU markets by drawing up a prospectus under the Prospectus Regulation and have it approved by an EU NCA[469], a functioning equivalence framework could drive efficiency especially for dual or multiple listed issuers that could use the same document to access markets in more than one jurisdiction. However, the current equivalence framework requires a double approval by the third country authority and the EU NCA, which would not have the right expertise to scrutinize a prospectus drawn up under third country rules.

Therefore, an efficient equivalence regime could allow a prospectus drawn up under the law of a third country jurisdiction for which the Commission has taken an equivalence decision, to be only filed with the EU NCA.

*C) Coherence*

A workable equivalence regime would be coherent with other EU legislations, such as MiFID II/MiFIR, under which frameworks the Commission has already taken equivalence decisions.

*D) Relevance in terms of value added for the EU*

An efficient and effective equivalence regime could contribute to improving market efficiency by facilitating third country issuers' offer of securities or admission to trading on EU regulated markets without endangering the protection of investors.

## *5.* Conclusions

Based on the analysis performed in this Annex and taking into account the feedback received from stakeholders' groups, from respondents to the targeted consultation, and studies and reports consulted, in certain key areas a legislative intervention would be merited to ensure that the Prospectus Regulation meets its overarching objectives. The key areas that should be addressed are: (i) the prospectus for primary issuances, including the disclosure regime for SMEs; (ii) the prospectus for secondary issuances; and (iii) the scrutiny and approval of prospectuses.

Furthermore, additional areas that could, for example, be subject to review are the URD regime, which could be made more efficient and effective, the prospectus exemption for small offers of securities to the public, which should be harmonized at EU level, the minimum period of 6 working days between the publication of the prospectus and the end of an offer of shares, which should be decreased to facilitate swift book-building processes, and prospectus rules on supplements (by making the CMRP rules permanent and exploring how to better frame them).

[469] Article 28 of the Prospectus Regulation.

# ANNEX 7: ANALYSIS OF IPO-PHASE: THE LISTING DIRECTIVE

## 1. *Introduction and problem description*

The Listing Directive, a minimum harmonisation directive adopted in 2001, is the legislation that provides the basis for listing on European markets. It lays down the rules on the admission of securities to official listing of a stock exchange.[470] The Listing Directive aims to coordinate the rules with regard to (i) admitting securities to official stock exchange listing and (ii) the information to be published on those securities in order to provide equivalent protection for investors at EU level. It also lays down the rules of regulatory and supervisory framework for European primary markets. This includes the designation of the NCA for listing.

The Prospectus and Transparency Directives have replaced most of the provisions harmonising the conditions for the provision of information regarding requests for the admission of securities to official stock exchange listing and the information on securities admitted to trading. MiFID introduced the notion 'admission of financial instruments to trading on a regulated market'.

According to ESMA's Securities Markets Standing Committee (SMSC) analysis on the implementation of the Listing Directive, many Member States are not applying the concepts used in the Listing Directive in national law anymore. Only 7 NCAs noticed that the Listing Directive is still in force or partially in force in their jurisdiction. Member States that still apply the concept of the Listing Directive under national law have a rather broad discretion to deviate from the rules set out in the Listing Directive to take into account specific local market conditions.

The **free float requirement** is one example where Member States are exercising their discretion. The free float describes the portion of a company's issued share capital that is in the hands of public investors**,** as opposed to company officers, directors, or shareholders that hold controlling interest. The Listing Directive sets out a minimum 25% free float. According to information received from stakeholders, the percentages in the EU-27 vary from 5% to 45% (see also Table 1).

**Table 1 - Free float requirement in the EU[471]**

| Regulated Market | Free float requirement for the regulated market | Derogation from the minimum free float requirement for regulated markets is possible. | Minimum free float requirement for the SME GM |
|---|---|---|---|
| Athens SE | Minimum free float 25% and at least 300 persons holding < 5% | Yes | Athens does not operate an SME GM[472] |

[470] The concept of "official listing" is not defined anywhere.
[471] Data comes from FESE, collected as part of a data collection exercise 2022 for the Listing Act initiative. Empty rows mean that no specification has been made.
[472] ATHEX does not operate a SME GM, only an MTF (2 segments, ENA PLUS with minimum free float requirement of 15% and 50 shareholders and ENA STEP with no minimum free flat requirements).

| | | | |
|---|---|---|---|
| BME[473] | 25% | Yes | EUR 2 million |
| Boerse Stuttgart | 10% | Yes | 10% |
| Budapest SE | 10% | Yes | No |
| Bulgarian SE | | | No |
| DBG | 25% | Yes | 20% or EUR 1 million |
| Euronext | 25% | Yes | EUR 2.5 million |
| Ljubljana | 25% | Yes | No |
| Luxembourg SE | 25% | Yes | - |
| Nasdaq | 25% | Yes | - |
| Vienna SE | 25% or 10% spread among at least 50 shareholders | Yes | - |
| Warsaw SE | | Yes | Yes[474] |
| Zagreb SE | Regular Market - Free float min. 15% Official Market - Free float min. 25 % of the shares shall be distributed to at least 30 shareholders. Prime Market - Free float min. 35%, at least 1000 shareholders | Yes | 10% |

The **foreseeable market capitalisation** is another provision in the Listing Directive where Member States exercise their discretion. The foreseeable market capitalisation of the shares for which admission to official listing is sought or, if this cannot be assessed, the company's capital and reserves, including profit or loss, from the last financial year, must be at least one million euro (Article 43(1) of the Listing Directive). Table 2 provides an overview of the rules on foreseeable market capitalization in place in the different Member States.

**Table 2 - Foreseeable market capitalisation requirement in the EU[475]**

| Regulated market | Required minimum market capitalisation | Is it possible to derogate from the minimum market capitalisation requirement for regulated markets? | Minimum market capitalisation requirement for listing shares on SME GM |
|---|---|---|---|

[473] Bolsa de Madrid
[474] No figure was provided.
[475] Data comes from FESE, collected as part of a data collection exercise 2022 for the Listing Act initiative. Empty rows mean that no specification has been made.

| | | | |
|---|---|---|---|
| Athens SE | ATHEX does not have a minimum market capitalisation requirement. The relative listing requirement is the Shareholders' Equity that must be at least EUR 3 million. | No | Athex does not operate an SME GM[476] |
| BME | No minimum required | | No |
| Boerse Stuttgart | EUR 2.5 million | Yes | EUR 2.5 million |
| Budapest SE | 250 million HUF | No | No |
| Bulgarian SE | | | No |
| DBG | EUR 1.25 million | No | EUR 30 million |
| Euronext | NOK 300m on Oslo Bors*<br>EUR 40million on Euronext Milan<br>EUR 1 million for Euronext Dublin | No | No |
| Ljubljana | EUR 10 million | No | - |
| Luxembourg SE | EUR 1 million | Yes | - |
| Nasdaq | | - | - |
| Vienna SE | No rule regarding market capitalisation | - | - |
| Warsaw SE | EUR 15 million or EUR 12 million | No | No |
| Zagreb SE | Official Market –<br>1 061 853 EUR<br>Prime Market –<br>EUR 66 365 808 | No | No |

Different rules among Member States also apply to the requirement to **publish or file annual accounts** in accordance with national law for the three financial years preceding the application of official listing. As shown in Table 3, in most Member States, the minimum number of years required with published/filed annual accounts is three years. Data show that there are also Member States that use their discretionary power and reduce the requirements to publish/file an annual account pre-IPO from three to two or one year.

**Table 3 - Pre-IPO disclosure requirements in the EU[477]**

| Regulated market | Derogation from the requirement on the minimum number of published/filed annual accounts is possible. | Minimum number of years required with published/filed annual accounts |
|---|---|---|
| Athens SE | Yes | 3 |
| BME | Yes | 2 |
| Boerse Stuttgart | Yes | 2 |
| Budapest SE | Yes | 1 |

[476] Athex operates only an MTF (2 segment, ENA PLUS, ENA STEP). There is no minimum market capitalisation or shareholders' equity requirement on ENA PLUS and ENA STEP.
[477] Data comes from FESE, collected as part of a data collection exercise 2022 for the Listing Act initiative. Empty rows mean that no specification has been made.

| | | |
|---|---|---|
| Bulgarian SE | No | - |
| DBG | Yes | 3 |
| Euronext | Yes | 3 |
| Ljubljana | Yes | 3 |
| Luxembourg SE | Yes | 3 |
| Nasdaq | - | - |
| Vienna SE | Yes | 3 |
| Warsaw SE | Yes | 3 |
| Zagreb SE | Yes | 3 |

Another major topic of the Listing directive is the concept of **official listing**. Some stakeholders pointed out in the consultation that such concept is an important aspect of public markets that needs to be maintained to provide for both options, i.e. listing with and without trading. Issuers may seek admission of their securities to official listing without being traded. Some stakeholders, in contrast, argue that the concept of "admission to the official listing" under the Listing Directive is outdated and should be aligned with the concept of "admission of financial instruments to trading on a regulated market" under MiFID II. ESMA's research on the Listing Directive shows that the majority of the Member States where the Listing Directive has been reported to be still (partially) in force still retains the concept of an official list, either for the entire regulated market or certain segments thereof. Even among NCAs, the question whether to keep the official list was split. Some NCAs (3) had no particular view whereas other NCAs (2) mentioned that they did not consider keeping the concept of official list in EU legislation to be relevant. Table 4 gives an overview whether the stock exchange has an official listing and, if so, it also shows the competent authority for the listing.

**Table 4 - Official listing and the competent authority for the listing in the EU[478]**

| Regulated Market | Competent authority for the listing in accordance with Directive 2001/34/EC |
|---|---|
| Athens SE | No |
| BME | - |
| Boerse Stuttgart | Yes |
| Budapest SE | Central Bank of Hungary |
| Bulgarian SE | - |
| DBG | - |
| Euronext | Euronext Amsterdam, Euronext Dublin, Euronext Brussels, Borsa Italiana |
| Ljubljana | Securities Market Agency |
| Luxembourg SE | Luxembourg Stock Exchange |

[478] Data comes from FESE, collected as part of a data collection exercise 2022 for the Listing Act initiative. Empty rows mean that no specification has been made.

| | |
|---|---|
| Nasdaq | - |
| Vienna SE | Vienna Stock Exchange |
| Warsaw SE | Polish Financial Supervision Authority |
| Zagreb SE | Croatian Financial Services Supervisory Agency - HANFA |

Against this backdrop, the targeted changes proposed will contribute to the harmonisation and simplification of listing rules in the Union and facilitate the access to capital markets for EU companies. The proposed options are also in line with the feedback received in the public consultation, where 60% of the respondents indicated that the Listing Directive, in its current form, is not achieving its objectives and needs to be amended. On the contrary, 18% of respondents thought the Listing Directive in its current form achieves its objective while 23% expressed no opinion.

## 2. Description of the options

### Option 1: Repeal the Listing Directive and transfer relevant provisions to another legal framework

A first option would be to repeal the Listing Directive. The few provisions identified as relevant in the consultation and stakeholder workshops would be updated and transferred to another legal framework, e.g. to the MiFID II framework. MiFID II was most frequently cited in the consultation as the appropriate legal framework where to include the provision from the Listing Directive. E.g. MiFID II RTS 17[479] contains requirements for financial instruments that are admitted to trading on a regulated market. Transferring 'relevant' requirements from the Listing Directive to MiFID II would also consolidate the rules on listing in one place.

### Option 2: Retain and revise the Listing Directive

A second option would entail retaining and revising the Listing Directive to align it to more recent legislation (e.g. Prospectus Regulation, MiFID II, and Transparency Directive). For example the revision of the definitions would have to reflect the current terminology in other legislation such as the Prospectus Regulation or MiFID II. Redundant provisions would be deleted. The thresholds for existing and relevant provisions like the foreseeable market capitalisation and/or the minimum free float requirements could be updated and/or the requirements regarding the publication or filing of the company's annual accounts could be adjusted.

### Discarded option: Repeal the Listing Directive without further amendments

The Commission services considered the possibility to repeal the Listing Directive altogether without transferring any provisions to other legislation. This option would pursue a maximum harmonisation of national legislation as it would remove an outdated piece of legislation that is not applied uniformly across the EU anyway. However, this option was discarded in order to take into account the implementation of the Listing Directive into national law in some Member States. The Listing Directive underpins certain listing regimes and is considered as

[479] Commission Delegated Regulation (EU) 2017/568 of 24 May 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the admission of financial instruments to trading on regulated markets".

particularly important in those jurisdictions that apply it as the legislative basis for listing securities on their markets. This option was therefore discarded from the outset.

**3. What are the impacts of the options?**

**Option 1: Repeal Listing Directive and transfer relevant provisions to another legal framework**

*Effectiveness in meeting the specific objectives*

Option 1 would lead to a greater harmonisation of the listing rules across the Union as MiFID II is a maximum harmonisation directive, and thereby be more effective in deepening the Capital Markets Union. Member States would still have a certain, albeit more limited, discretion in framing their national laws. The result would minimize the implementation arbitrages among Member States leading to more competition in the market.

The 'relevant' provisions that would be transferred to MiFID II and amended as necessary, include the **foreseeable market capitalisation**[480], the **minimum free float requirements**, and the requirements regarding the **publication or filing of the company's annual accounts**[481]. According to 55% of those who responded to the consultation, the expected market capitalisation is relevant or very relevant. Almost 60% stated that the requirements regarding the publication of filing of the company's annual accounts and the free float requirements are each relevant or very relevant. Even though a large majority of respondents to the consultation consider free float to be a good measure to ensure liquidity, most respondents indicate that they believe the 25% minimum free float requirement creates a barrier to listing. One argument is that the free float requirement makes new listings more difficult, as the minimum threshold of 25% only refers to the public within the EU/ECC, i.e. the requirement includes a geographical limitation. Thus, a revision of the free float measure could be considered.

The foreseeable market capitalisation requirement with EUR1 million is also seen as outdated by market participants. Some stakeholders indicated in the consultation that this requirement could be increased for regulated markets. The change (e.g. an increase) on this threshold could better reflect the current conditions of capital markets in the Union. [482] If changes are to be introduced an extensive analysis must of course be carried out. The evaluation of the received data from stakeholders also shows that the requirement pertaining to the publication or filing of the company's annual accounts that some Member States have derogations in place. In some Member States, the competent authority can accept an issuer even if the issuer does not meet the three-year requirement. Option 1 would be effective in updating and harmonising these rules and create equal conditions for all issuers.

[480] Pursuant to Article 43(1) of the Listing Directive, the foreseeable market capitalisation of the shares for which admission to official listing is sought or, if this cannot be assessed, the company's capital and reserves, including profit or loss, from the last financial year, must be at least one million euro.

[481] Pursuant to Article 44 of the Listing Directive, a company must have published or filed its annual accounts in accordance with national law for the three financial years preceding the application for official listing (…).

[482] The UK Financial Conduct Authority (FCA) for example raised its minimum market capitalisation to GBP 30m from GBP 700.000. The UK FCA argued that their analysis showed that over 85% of cases where high share price volatility was observed and alerts of suspected suspicious trading from 2018-2021 were revived were from companies with a market cap of below GBP 50m. A GBP 30m threshold captures a 75% of a majority of the smaller number of companies where FCA is investigating cases of serious misconduct.
(see https://www.fca.org.uk/publication/policy/ps21-22.pdf)

*Cost-benefit analysis*

*Cost-benefits for issuers:* Option 1 would result in a maximum harmonised rules in Europe. This would be beneficial for issuers as currently different rules apply across Europe. This option would remove the possibility to apply more stringent conditions to issuers by NCAs which would give issuers more clarity and certainty when listing. It would also eliminate the additional legal advisory costs for issuers that choose to list in another Member State.

*Cost-benefits for investors:* Option 1 is unlikely to have a direct impact on investors.

*Cost-benefits for exchanges:* Exchanges would have to adapt their rules. Some exchanges operating in several Member States could benefit from harmonised rules in the medium to long run, even if the adaptation would initially involve costs.

*Cost-benefits for NCAs:* NCAs would have to adapt their rules, which would entail costs for the NCAs. In Member States where the Listing Directive has not been transposed into national law, the rules transferred to MiFID II would have to be implemented by Member States depending on how the rules are ultimately drafted. This would also incur costs.

**Option 2: Retain and revise the Listing Directive**

*Effectiveness in meeting the specific objectives*

Option 2 would be less effective in harmonising the rules. Member States would still have broad discretion on how to frame the rules in their respective jurisdiction. Discrepancies of market practices would still exist. Therefore, the effects to pursue CMU objectives and deepen the CMU would be limited with this option. On the other hand, amending the Listing Directive to update old, outdated concepts and terminology would provide clarity to market participants.

The provisions that would be revised in Option 2 would also include those described in Option 1 as 'relevant' options. Therefore, Option 2 would have the same effects as Option 1 regarding the provisions that would be updated and adjusted (if necessary) (see effectiveness in meeting specific objective for Option 1).

*Cost-benefit analysis*

*Cost-benefits for issuers:* Issuers would benefit from clarification of terminology that is inconsistent with that used in other recent legislation.

*Cost-benefits for investors:* Option 2 is unlikely to have a direct impact on investors.

*Cost-benefits for exchanges:* Some exchanges may need to adapt their rules. The adjustments would be minor keeping the costs within reasonable limits.

*Cost-benefits for NCAs:* In the Member States where the Listing Directive is applied, some NCAs would have to adapt their rules, which in turn would create costs for NCAs, but these would be limited.

Other economic, environmental, social and fundamental rights impacts of the two options:

It is considered that option 2 does not have any relevant impact on other economic, environmental, social and fundamental rights.

Coherence with other initiatives of the two options:

Both options are coherent with other initiatives, especially in the context of the CMU Action Plan, which aims to facilitate companies' access to public markets by harmonising rules, and ensure the protection of investors.

**4. How do the options compare**

When assessing which option is better suited to address the lack of harmonisation and convergence across Member States, Option 1 is considered more effective than Option 2. While Option 2 revises an outdated directive and contributes to an extent to aligning outdated rules and terminology with those used in current legislation, Option 1 would be more effective in aligning rules in all Member States. MiFID II, which would be the legislation to incorporate the 'relevant' rules of Listing Directive in Option 1, is a maximum harmonisation directive that limits the possibility for Member States to put forward additional requirements at national level.

**5. Preferred option**

When it comes to harmonising and simplifying listing rules, and facilitating the listing for issuers as well as with regard to the CMU objective to tackle market fragmentation, Option 1 should be considered as the preferred option. The Listing Directive has not been transposed in all Member States into national law. The rules are applied differently from one Member State to another. Option 1 could drive market harmonisation at EU level and be beneficial with regards to the applicable listing requirements (that would be maintained).

# ANNEX 8: ANALYSIS OF THE POST-IPO PHASE: MAR

## 1. Overview of MAR

MAR replaced the Market Abuse Directive in 2014 to further harmonise measures preventing market abuse throughout the EU. It is accompanied by the Market Abuse Directive on criminal sanctions ("CS MAD"), which provides sanctions for the most serious infringements of market abuse.

## 2. Analysis of the key measures

This analysis is based, to a large extent, on ESMA's assessment of the functioning of the MAR framework. In 2019-2020, ESMA conducted a review of this legislative framework and, in September 2020, following a formal request from the Commission, provided its technical advice in its MAR Review report[483]. In summary, ESMA concluded that the MAR framework was working well overall and excluded that a major overhaul of the legislative framework would be necessary, while proposing a number of adjustments of a rather technical nature. The Report also identified some areas for which ESMA deemed additional guidance as beneficial/necessary.

ESMA's report is based on extensive feedback received from market participant representatives in reply to a public consultation, including from the Securities and Markets Stakeholder Group. The public consultation was published on 3 October 2019 and ran until November 2019 (ESMA70-156-1459)[484]: 97 responses were received from a wide range of respondents (i.e. credit institutions, asset managers, issuers, legal and accountancy firms and trading venues). Some of the Report's conclusions are, however, contrasted by the conclusions of the CMU HLF and of the TESG, as well as by the feedback received from stakeholders in the context of the targeted consultation on the Listing Act and during the technical meetings.

The sections below summarise the assessment carried out by the Commission in relation to the most relevant MAR provisions for which ESMA's conclusions are not in line with the feedback received from experts and stakeholders, namely: the definition of inside information (Article 7), delayed disclosure (Article 17(4)), administrative sanctions (Article 30) market soundings (Article 11), and insider lists (Article 18). This Annex also contains a section on cross market order book surveillance (Article 38) which is further elaborated in Annex 11.

### 2.1. Definition of inside information

Inside information is defined in Article 7(1)(a) of MAR as "*information of a precise nature, which has not been made public, relating to the issuer or to a financial instrument, and which, if it were made public, would be likely to have a significant effect on the price of that financial instrument or on the price of a related derivative financial instrument.*"

On the basis of this definition, all inside information has to be:

a) of a precise nature; Article 7(2) clarifies that the information is of a precise nature if it "*indicates a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to*

[483] https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf
[484] https://www.esma.europa.eu/sites/default/files/library/mar_review_-_cp.pdf

*occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of the financial instruments or the related derivative financial instrument, the related spot commodity contracts, or the auctioned products based on the emission allowances*"[485];

b) not public, and
c) likely, if it were made public, to have a significant effect on the relevant prices of financial instruments, derivative financial instruments, related spot commodity contracts, or auctioned products based on emission allowances (as identified in Article 7(1) of MAR). As regards the likelihood to have a significant effect on the above prices, it concerns information a reasonable investor would be likely to use as part of the basis of his or her investment decisions.

Currently, the notion of inside information as defined in Article 7 makes no distinction between its application in the context, on the one hand, of market abuse (e.g. insider dealing) and, on the other hand, of the obligation to publicly disclose inside information. This means that the same definition constitutes the basis for both:

a) the issuers' disclosure obligation according to Article 17(1);
b) as well as the insider dealing prohibition[486] (Article 8).

While the broadness of the notion of inside information allows to cater for a wide and very early prohibition of insider dealing, it also implies that issuers are required to disclose information at a very early stage, when information on circumstances or events have not yet reached a high degree of certainty.

*A) Effectiveness*

In the MAR review report, ESMA considered whether the definition of inside information in Article 7 MAR is sufficient to cover all information relevant for competent authorities to effectively combat market abuse. It came to the conclusion that such definition is sufficiently broad to combat market abuse cases and that it allows for adequate protection of investors and of market integrity. According to ESMA, such definition appears to strike a good balance between being sufficiently comprehensive to cater for a variety of market abuse behaviours, and overall sufficiently prescriptive to enable market participants, in most cases, to identify when information becomes inside information.

Weighting the information received from NCAs, on the one hand, and market participants, on the other hand, on the application of the current definition against the risks arising from amending it, ESMA recommended the Commission to leave the definition of inside information in Article 7 unchanged. One exception to this recommendation is an amendment proposed to Article 7(1)(d) of MAR. The application of "front running" conducts only to persons charged with the execution of orders is too limited. ESMA therefore considers the option of removing the words "for the persons charged with the execution of orders

[485] The same paragraph also specifies that "*in the case of a protracted process that is intended to bring about, or that results in, particular circumstances or a particular event, those future circumstances or that future event, and also the intermediate steps of that process which are connected with bringing about or resulting in those future circumstances or that future event, may be deemed to be precise information*." In addition, Article 7(3) of MAR provides that an "*intermediate step in a protracted process shall be deemed to be inside information if, by itself, it satisfies the criteria of inside information as referred to in this Article*".

[486] Insider dealing occurs when a legal or natural person in possession of inside information takes unfair advantage of that information by entering into market transactions or by amending or cancelling an existing order, to the detriment of third parties who are unaware of such information.

concerning financial instruments, it also means" from Article 7(1)(d). With this change, the definition would also include other categories of persons that may be aware of a future relevant order.

However, ESMA also acknowledged that the broadness of the definition comes at a cost and results in some elements of the text being unclear. Respondents to the ESMA's consultation requested guidance on elements, such as on when information is sufficiently precise to trigger disclosure, intermediate steps, the moment when the information may be considered as public, etc. In light of the concerns raised by the respondents to the public consultation, ESMA expressed its willingness to provide guidance on the notion.

*B) Efficiency*

In contrast to ESMA's position, the TESG, the CMU HLF as well as the stakeholders' feedback to targeted consultation on the Listing Act, pointed to the need for alleviation in the MAR definition of inside information.

In the public consultation, 64% of respondents considered the definition to be burdensome for issuers, which contrasted with only 25% of respondents who considered it not to be burdensome or neutral.[487] Similarly, the CMU HLF concluded in its final report that the existing MAR definition of inside information is too broad and should be further clarified at EU level, given that the same notion triggers at the same time and at the same "threshold" an insider dealing prohibition and an immediate disclosure obligation. According to the CMU HLF, this raises several problems, notably, (i) the issue of identifying when the information becomes "inside information" and (ii) the risk of publishing information which is not yet mature enough. The CMU HLF concluded that the definition should be narrowed down in a manner that improves legal certainty about what constitutes inside information and market abuse, while reducing unnecessary disclosure. At the same time, the CMU HLF indicated that amendments to MAR should seek to reduce compliance costs without sacrificing the primary objective of fair, orderly and transparent public markets.

The TESG also disagreed with the current definition of inside information. According to the TESG, MAR should distinguish between a definition of inside information for the purposes of market abuse prohibition, and a more 'advanced' notion of inside information, typically linked to a higher degree of certainty of the information, triggering the disclosure obligation. In their final report, they recommended to clarify the notion of inside information, by applying a two-step approach, and to better identify the moment when this information should be disclosed. They indicated that this would reduce issuers' expenses associated with the disclosure procedure, as well as the risk of sanctions for non-compliance.

ESMA collected data on the number of public disclosures in Q1 2022 (see table 1 below). The highest number of public disclosures per issuers took place in France (6.76 information disclosed per issuer per quarter), followed by Romania (6.14), the Netherlands (5.91), Slovenia (5.29), Lithuania (2.59) and Ireland (2.44). The number of public disclosures of inside information in other Member States is much lower, with the lowest levels in Slovakia (0.02), Czech Republic (0.21), Spain (0.27), Sweden (0.46) and Belgium (0.58). Such

[487] Out of 28 respondents who replied believes that the definition of the inside information is burdensome for all companies, 11 are company/business organisation, 11 business associations, 2 academic/research institutions, 1 public authority, 1 non-governmental organisation and 2 other. Out of 11 respondents who are of the opposite view (or opted for "neutral"), 5 are company/business organisation, 3 are business associations, 2 are public authorities and 1 is an academic/research institution.

divergences may be indicative of discrepancies in how the notion of inside information is interpreted across the EU.

**Table 1 - Number of public releases of inside information in each Member State in Q1 2022, ESMA data**

| | Member State | Number of public disclosures[488] | Comments (if any) | Number of Issuers[489] | Number of public disclosures in Q1 2022 per issuer |
|---|---|---|---|---|---|
| 1 | **AT** | 89 | Ad hoc reports (public disclosures of inside information) | 111 (regulated market: Amtlicher Handel) | 0.80 |
| 2 | **BE** | 114 | | 196 | 0.58 |
| 3 | **BG** | 240 | Including notifications for managers transaction | 293 | 0.81 |
| 4 | **CY** | 75 | | 58 | 1.29 |
| 5 | **CZ** | 24 | | 110 | 0.21 |
| 6 | **DE** | 523 | This figure relates to regulated market and open market (Freiverkehr) as BaFin does not provide a breakdown by regulated market. | 574 (including government and municipal bonds) | 0.91 |
| 7 | **DK** | 344 | | 174 | 1.97 |
| 8 | **EE** | 79 | | 31 | 2.54 |
| 9 | **EL** | 108 | | 143 | 0.75 |
| 10 | **ES** | 134 | In 17 public disclosures of inside information, the same piece of inside information was contained in other disclosures of inside information from the issuer. Therefore, the net number of public disclosures of inside information during Q1 2022 is 117. | 481 | 0.27 |
| 11 | **FI** | 129 | | 167[490] | 0.77 |
| 12 | **FR** | 2 925 | | 433 [issuers whose shares are admitted to trading on a regulated market] | 6.76 |
| 13 | **HR** | 87 | | 104 | 0.84 |

[488] The figure reported refers to the first quarter of the year (Q1 2022) and relates to issuers whose instruments are admitted to trading on a regulated market.
[489] The figure reported refers to issuers whose instruments are admitted to trading on a regulated market on January 1st, 2022.
490 135 issuers who have issued shares and additional 32 bond issuers who have not issued shares bringing the total number to 167 issuers

| | Member State | Number of public disclosures[488] | Comments (if any) | Number of Issuers[489] | Number of public disclosures in Q1 2022 per issuer |
|---|---|---|---|---|---|
| 14 | **HU** | - | | 46 | |
| 15 | **IE** | 78 | - Caveat: this is an estimate<br>- No info available on double counting | 32 | 2.44 |
| 16 | **IT** | 264 | | 241 | 1.1 |
| 17 | **LT** | 75 | | 29 [Instruments traded on Nasdaq Vilnius] | 2.59 |
| 18 | **LV** | 63 | | 22 issuers [13 equity issuers, 9 bond issuers]. | 2.86 |
| 19 | **LU** | 351 | Including 5 cancellations<br>According to the manual checks which CSSF carried out for certain issuers whose shares are admitted to trading on the regulated market of the Luxembourg Stock Exchange, instances of double or multiple disclosures of the same piece of inside information seem to be rare, but CSSF cannot totally exclude this. | 453 issuers [for which LU is the home Member State under the TD. Almost 400 of those issuers are debt issuers (as opposed to share issuers)] | 0.77 |
| 20 | **MT** | 67 | | 72 | 0.93 |
| 21 | **NL** | 762 | | 129 | 5.91 |
| 22 | **PL** | 1387 | | 501 | 2.77 |
| 23 | **PT** | 108 | Only inside information disclosures, not including other disclosures such as managers' transactions or other types of disclosures; the English versions of the press releases have not been counted. | 66 | 1.64 |
| 24 | **RO** | 522 | | 85 | 6.14 |
| 25 | **SE** | 281 | Single counting | 609 | 0.46 |
| 26 | **SI** | 164 | | 31 [3 Jan 2022] | 5.29 |
| 27 | **SK** | 2 | | 84 | 0.02 |

While the legislation needs to be effective in achieving its policy objectives (i.e. of market integrity in the case of MAR), it should also strive to do so in the most efficient manner. Wide divergences across Member States in the number of disclosures of inside information

are indicative of the fact that the rules are not designed in an efficient manner, as they do not appear to be interpreted consistently by stakeholders across different Member States (i.e. in the opposite case, the data on disclosures across Member States would be comparable). As the notion of inside information triggers a varying level of disclosure, it is likely to give rise to costs of legal interpretation, rendering the current rules costly for issuers.

*C) Coherence*

Clarifying the notion of inside information at EU level would reduce divergent interpretations of the moment of disclosure and increase the level of comparability of the information. This result would be coherent with the objectives pursued by the Commission proposal on the ESAP[491] which, among others, seeks to provide access to comparable disclosure information by companies across the EU.

*D) Relevance in terms of value added for the EU*

Streamlining the process of identifying inside information for the purposes of disclosures will increase harmonisation of the application of MAR and ensure a higher level playing field, thereby supporting the single market and thus contributing to the CMU.

### 2.2. Delayed disclosure of inside information

Once the issuer identifies inside information, MAR requires it to be disclosed as soon as possible (Article 17(1)). However, Article 17(4) MAR allows for a delay of such disclosure, as long as certain conditions are met. The delay mechanism comes into play when immediate disclosure is likely to prejudice the legitimate interests of the issuer (for instance, when the issuer is conducting negotiations and the outcome of such negotiations would likely be jeopardised by immediate disclosure).

Article 17(4) of MAR in particular allows issuers and emission allowance market participants to delay on their own responsibility the disclosure of inside information provided that all the three conditions below are met:

(a) immediate disclosure is likely to prejudice the legitimate interests of the issuer or emission allowance market participant;

(b) delay of disclosure is not likely to mislead the public; and

(c) the issuer or emission allowance market participant is able to ensure the confidentiality of that information.

In terms or procedure, Article 17(4) of MAR requires the issuer or emission allowance market participant to inform the relevant NCA that the disclosure was delayed immediately after such disclosure occurred. The issuer / emission allowance market participant must also provide a written explanation of how the three conditions listed above were met, unless the relevant Member State opted to require that the record of the explanation can be provided only upon request of the competent NCA.

[491] The overall objective of establishing a European single access point (ESAP) is to provide for seamless, EU-wide access to all relevant information disclosed to the public by companies. By providing investors with a user-friendly, EU-wide mechanism to access information disclosed by companies, the ESAP would foster access to capital markets, including by SMEs, and promote cross-border investments.

The provisions on disclosure of inside information and related delay require issuers and emission allowance market participants to perform an assessment where information they possess meets the requirement of inside information. A further assessment is required if the issuer or emission allowance market participant intends to delay the disclosure of such information, in which case the assessment is performed under the responsibility of the issuer or emission allowance market participant (under Article 17(4)).

*A) Effectiveness*

ESMA collected data on the number of delays in each Member State from July 2016 to June 2019.

**Table 2 - Number of cases of delayed disclosure according to Article 17(4) of inside information in each Member State (and Norway) per year, ESMA data, July 2016-June 2019**

| | 2016 2H | 2017 FY | 2018 FY | 2019 1H | Total | Average number of delays per quarter |
|---|---|---|---|---|---|---|
| **Austria** | 0 | 0 | 0 | 0 | 0 | 0 |
| **Belgium** | 15 | 35 | 52 | 14 | 116 | 9.67 |
| **Bulgaria** | - | - | - | - | 4 | 0.33 |
| **Croatia** | 13 | 4 | 3 | 2 | 22 | 1.83 |
| **Cyprus** | 0 | 0 | 0 | 0 | 0 | 0 |
| **Czech Republic** | 1 | 2 | 0 | 0 | 3 | 0.25 |
| **Denmark** | 49 | 84 | 117 | 67 | 317 | 26.42 |
| **Finland** | 96 | 183 | 177 | 108 | 564 | 47 |
| **France** | 21 | 141 | 154 | 71 | 387 | 32.25 |
| **Germany** | 231 | 484 | 532 | 300 | 1 547 | 128.92 |
| **Greece** | - | - | - | - | 10 | 0.83 |
| **Hungary** | 0 | 3 | 10 | 8 | 21 | 1.75 |
| **Ireland** | 12 | 27 | 41 | 22 | 102 | 8.5 |
| **Italy** | 70 | 260 | 362 | 165 | 857 | 71.46 |
| **Lithuania** | 29 | 23 | 5 | 2 | 59 | 4.92 |
| **Luxembourg** | 0 | 7 | 0 | 0 | 7 | 0.58 |
| **Malta** | 0 | 0 | 0 | 0 | 0 | 0 |
| **Netherlands** | 0 | 0 | 0 | 0 | 0 | 0 |
| **Norway** | 157 | 324 | 351 | 171 | 1 003 | 83.58 |
| **Poland** | 67 | 167 | 142 | 73 | 449 | 37.42 |
| **Portugal** | 2 | 9 | 2 | 1 | 14 | 1.17 |
| **Romania** | 1 | 4 | 2 | 1 | 8 | 0.67 |
| **Slovakia** | 0 | 0 | 0 | 0 | 0 | 0 |
| **Slovenia** | 1 | 1 | 2 | 0 | 4 | 0.33 |
| **Spain** | 0 | 2 | 0 | 4 | 6 | 0.5 |
| **Sweden** | 319 | 1 639 | 2 367 | 2 072 | 6 397 | 533.08 |

*Data collected by ESMA in the review process.*

**Table 3 - Comparison between public releases of inside information in each Member State (and Norway) per issuer and number of delays per issuer, ESMA data**

| | Average number of delays per quarter for 2H2016 – 1H2019 | Number of delays per issuer | Number of public disclosures in Q1 2022 per issuer |
|---|---|---|---|
| **Austria** | 0 | 0 | 0.80 |
| **Belgium** | 9.67 | 0.05 | 0.58 |
| **Bulgaria** | 0.33 | 0.001 | 0.81 |
| **Croatia** | 1.83 | 0.004 | 0.84 |
| **Cyprus** | 0 | 0 | 1.29 |
| **Czech Republic** | 0.25 | 0.009 | 0.21 |
| **Denmark** | 26.42 | 0.15 | 1.97 |
| **Finland** | 47 | 0.28 | 0.77 |
| **France** | 32.25 | 0.07 | 6.76 |
| **Germany** | 128.92 | 0.22 | 0.91 |
| **Greece** | 0.83 | - | - |
| **Hungary** | 1.75 | 0.04 | - |
| **Ireland** | 8.5 | 0.27 | 2.44 |
| **Italy** | 71.46 | 0.3 | 1.1 |
| **Lithuania** | 4.92 | 0.17 | 2.59 |
| **Luxembourg** | 0.58 | 0.001 | 0.77 |
| **Malta** | 0 | 0 | 0.93 |
| **Netherlands** | 0 | 0 | 5.91 |
| **Norway** | 83.58 | - | - |
| **Poland** | 37.42 | 0.07 | 2.77 |
| **Portugal** | 1.17 | 0.02 | 1.64 |
| **Romania** | 0.67 | 0.008 | 6.14 |
| **Slovakia** | 0 | 0 | 0.02 |
| **Slovenia** | 0.33 | 0.01 | 5.29 |
| **Spain** | 0.5 | 0.001 | 0.27 |
| **Sweden** | 533.08 | 0.88 | 0.46 |

As the data in tables 2 and 3 show, in some Member States, issuers regularly rely on the mechanism for delaying the disclosure of inside information, while in others issuers do so only on an exceptional basis. From July 2016 to June 2019, the possibility to delay has been evoked in about 14 000 cases with significant discrepancies across the EU. Member states where issuers most often delay disclosure are Sweden (0.88 per issuer within quarter), Italy (0.3), Finland (0.28) Ireland (0.27) and Germany (0.22).[492] However, even among those 5 countries significant differences persist. Swedish issuers use delays four times more than German issuers. In some Member States, in a 3-year period, issuers have never notified delay

[492] Not all Member States transmitted data allowing for calculation.

to their respective NCAs (Austria, Cyprus, Malta, Netherlands, and Slovakia), in others, issuers barely used delay (Czech Republic, Bulgaria, Slovenia, and Luxembourg).

To summarise, there are clear divergences among Member States, stemming from the data presented above, on how often issuers disclose inside information and how often they delay disclosure. It is possible that differences in the interpretation of the notion of inside information as well as of the conditions for the delay of disclosure among Member States might be among the reasons behind this variation.

Despite these differences, in the MAR review report, ESMA found that no amendments to the conditions to delay disclosure of inside information were necessary, as the delay of disclosure of inside information is mostly clear for issuers. According to ESMA, amending the conditions to delay disclosure would risk opening loopholes, increasing legal uncertainty. ESMA, however, acknowledging that those conditions pose interpretative challenges, committed to review the existing guidelines adopted pursuant to article 17(11) to provide clarity on the conditions for delay, as well on the moment when the disclosure should be made.

Most market participants who responded to the Commissions consultation, disagree with ESMA's assessment.

With respect to ESMA's conclusion that the delay of disclosure of inside information is mostly clear for issuers, the feedback to the targeted consultation on the Listing Act show that a significant majority finds the requirements burdensome (68% of respondents find it burdensome for all companies, and 76% of respondents find it burdensome for issuers listed on SME growth markets specifically). A significant portion of these respondents indicates that these requirements are 'very burdensome', especially in relation to issuers listed on SME growth markets. Several respondents indicated the requirement to disclose "as soon as possible" to be extremely challenging in particular for SME issuers due to their limited compliance resources.

In a similar vein, the TESG report suggests to amend the conditions regarding the delay of disclosure by removing the reference to the possibility that investors are misled (if the information is "price sensitive", delay is inherently misleading).

Clarifying conditions for delays would represent a more effective solution to achieve the objective of adequate and non-misleading disclosures for investors. Furthermore, changes to the notion of the inside information would limit the necessity to delay disclosure and render the overall disclosure regime both more efficient and effective.

B) *Efficiency*

Proposed changes would make the regime for delays more cost efficient for issuers and, ultimately, for NCAs reviewing notifications for delay.

C) *Coherence*

The proposal to clarify the conditions for delay is overall coherent with other EU legislation that aim to ensure effective investor protection and market integrity.

D) *Relevance in terms of value added for the EU*

The effective and efficient framework for delays shall protect the legitimate interests of issuer and thus contribute to the overall objectives of this initiative by striking the right balance between market efficiency and investor protection.

## 2.3. Administrative measures and sanctions

With respect to sanctions, ESMA expressed the view that there is no need to amend Article 30(1) MAR. In addressing the concerns, voiced during the public consultation, that sanctions are calibrated for big issuers, ESMA stated that, although no maximum administrative sanctions is set, NCAs are still obliged to take into account relevant circumstances like the size of the issuer.

In the targeted consultation on the Listing Act, half of the respondents (50%) find that the punitive regime is not proportionate to the objective sought by the legislation. According to some respondents, the regime does not differentiate between the issuer size and the market size. The majority of respondents also express a preference for a decrease of the maximum administrative sanctions for infringements of Article 17 (disclosure of inside information and delayed disclosure), 18 (insider list), 19 of MAR (managers' transaction) by issuers listed on SME growth markets and for infringements of Article 17 also by issuers listed on other venues. Stakeholders were also in favour of decreasing the maximum administrative pecuniary sanctions for conducts defined in Article 30(1)(a), other than for infringements of Articles 17, 18 and 19 of MAR, by issuers on SME growth markets. Respondents also point out that sanctions ought to be administrative and not criminal.

Following the CMU HLF's advice, the TESG proposes that the sanctions provided in Art. 30, and, in particular, the infringements by issuers and managers of Articles 17, 18 and 19 should be alleviated.

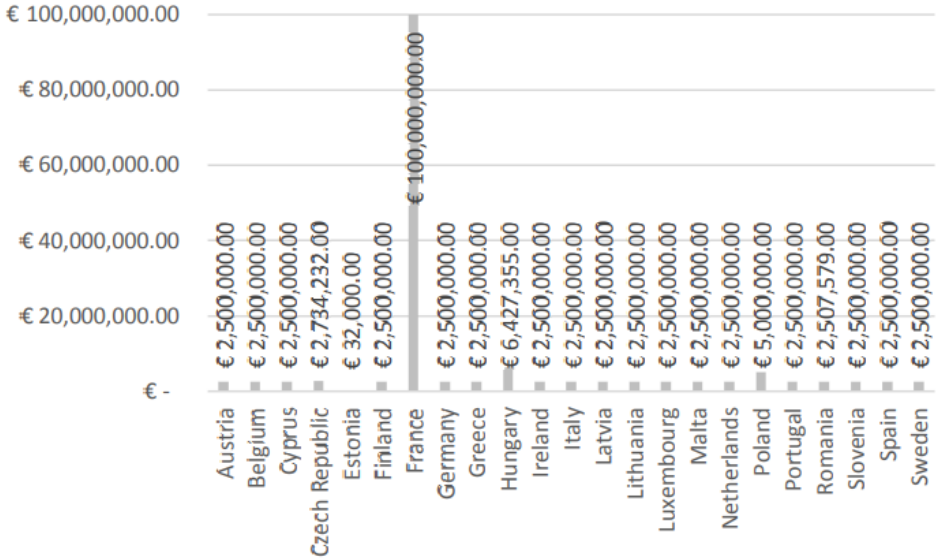
*A) Effectiveness*

### Overview of sanctions in Europe

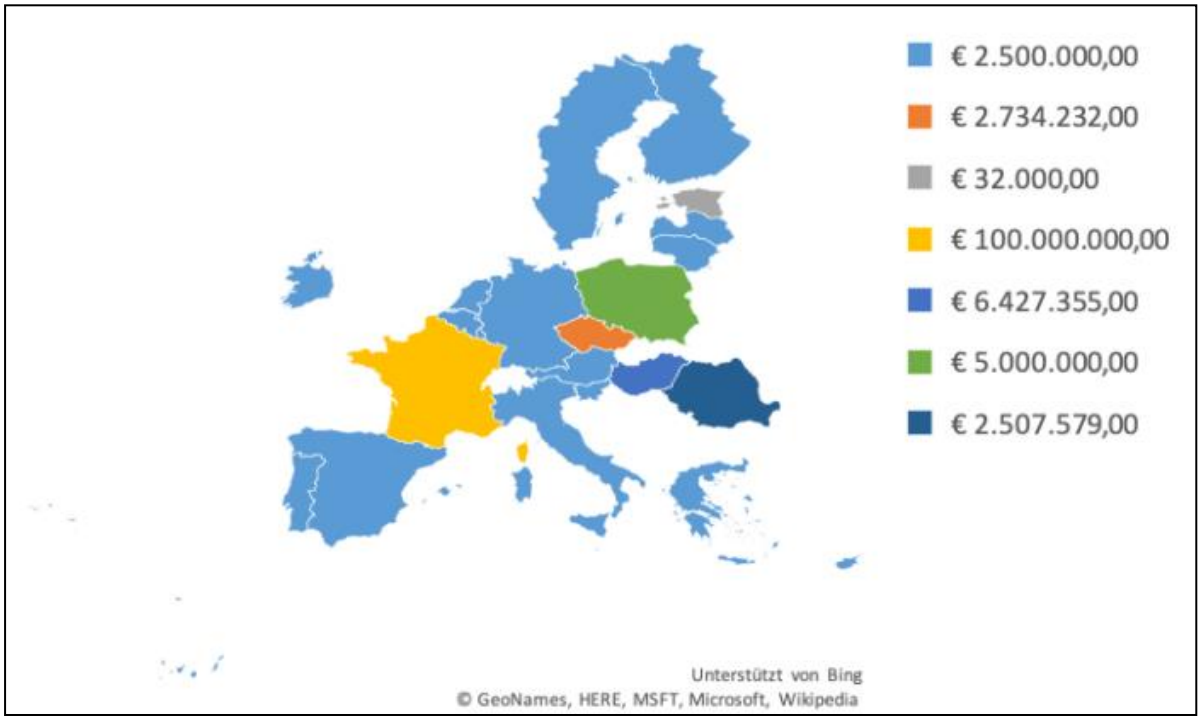
The ESMA Enforcement Network Working Document of December 2019 contains an overview of the transposition of the MAR by the Member States (see Figure 1 below).

**Figure 1. Transposition of the MAR by the Member States**

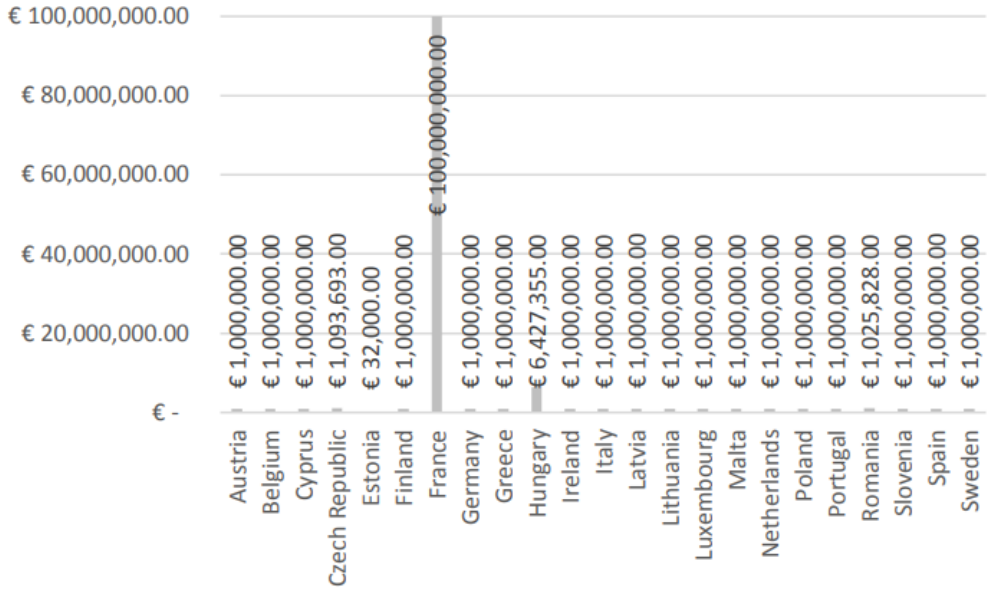
**2.** Articles 30 (2) (j) ii), 16, 17: **2,5m €**



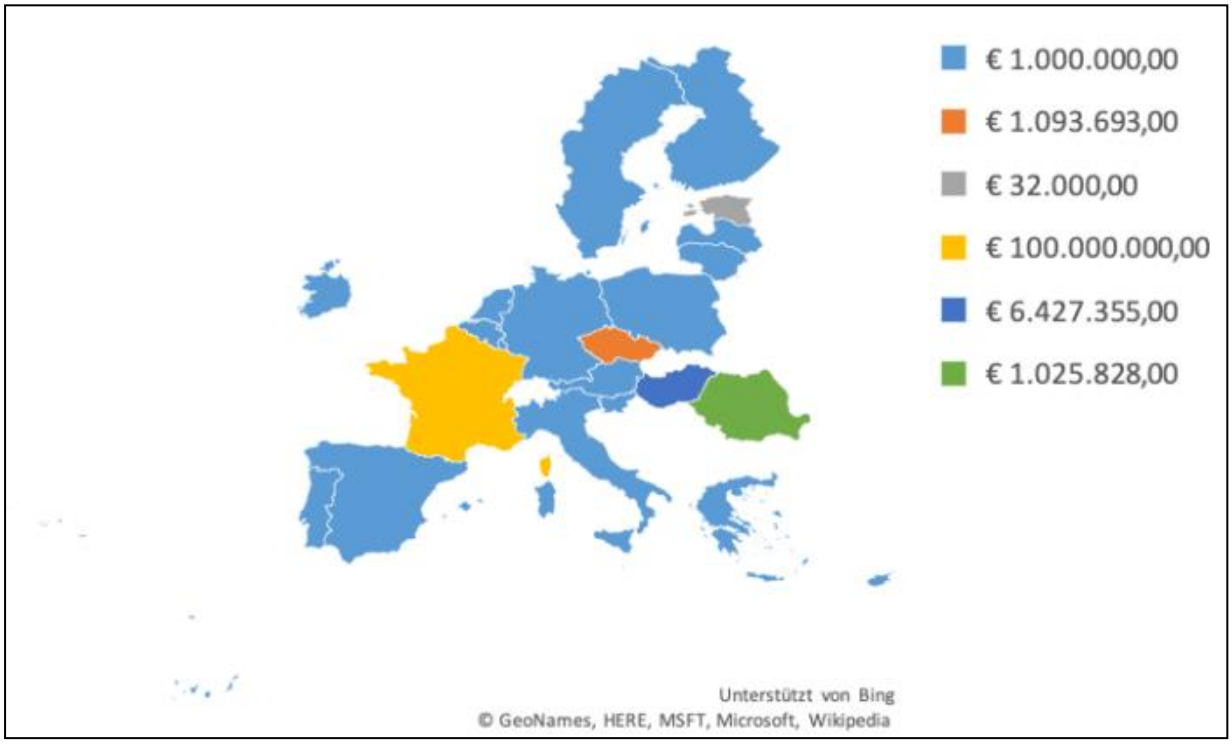

17 member states transposed Articles 30 (2) (j) ii), 16, 17 of the MAR with a maximum amount of 2,5m €. 5 member states transposed the provision with a higher maximum amount. 1 member state transposed the provision with a lower maximum amount. The provision is not transposed in Iceland and Malta.



**3.** Articles 30 (2) (j) iii), 18 – 20: **1m€**




18 member states transposed Articles 30 (2) (j) iii), 18-20 of the MAR with a maximum amount of 1m €. 4 member states transposed the provision with a higher maximum amount. 1 member state transposed the provision with a lower maximum amount. The provision is not transposed in Iceland and Malta.




*Enforcement Network Working Document, Overview of the transposition of the Market Abuse Regulation (MAR) ((EU) 1031/2010) by the Member States, ESMA43-388-690, 4 December 2019.*

In the majority of Member States, the maximal penalty expressed in absolute amounts for infringements of Articles 17, 18 and 19 of MAR corresponds to the minimum of the maximal sanctions prescribed by MAR for these infringements. This indicates that the majority of the Members States opted for the lowest level of maximal pecuniary sanctions.

There are also some (limited) differences between Member States on the maximum of pecuniary sanctions. In the case of the infringement of Article 17 of MAR, it ranges from EUR 2.5 million (the majority) to EUR 100 million (one Member State). In the case of infringements of Article 18 and 19 of MAR it ranges from EUR 1 million (the majority) to EUR 100 million (one Member State).

Table 4 below shows data on the imposition of administrative sanctions for all MAR infringements other than infringements of Articles 14 and 15 of MAR from the ESMA Report on Administrative and criminal sanctions and other administrative measures imposed under the Market Abuse Regulation in **2020.**

**Table 4 - Imposed administrative sanctions for all MAR infringements (other than infringements of Articles 14 and 15), ESMA Report, 2020**

| MAR Article | Penalties/measures | Austria | Belgium | Bulgaria | Denmark | Germany | Greece |
|---|---|---|---|---|---|---|---|
| **Other infringements** | Number | 11 | 7 | 186 | 16 | 7 | 4 |
| | Amount | EUR 475,800 | EUR 955,000 AGGREGATED FIGURE | BGN 194,000 [EUR 98,940] | N/A | EUR 1,377,000 | EUR 15,000 |

| MAR Article | Hungary | Italy | Luxembourg | Malta | Portugal | Romania | Sweden |
|---|---|---|---|---|---|---|---|
| **Other infringements** | 20 | 12 | 1 | 1 | 94[20] | 2 | 81 |
| | HUF 35,800,000 [EUR 100,240] | EUR 420,000 | EUR 41,050 | EUR 5,000 | N/A | RON 23,000 [EUR 4,700] | SEK 68,572,700 [EUR 6,720,124] |

Table 5 below shows data on the imposition of administrative sanctions for all MAR infringements other than infringements of Articles 14 and 15 of MAR, from ESMA Report on Administrative and criminal sanctions and other administrative measures imposed under the Market Abuse Regulation in **2019**.

**Table 5 - Imposed administrative sanctions for all MAR infringements (other than infringements of Articles 14 and 15), ESMA Report, 2019**

| MAR Article | Penalties/measures | Austria | Belgium | Cyprus | Denmark | Finland | France | Greece | Hungary | Italy | Lithuania | Luxembourg |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Other infringements | Number | 6 | 5 | 1 | 24 | 1 | 1 | 5 | 6 | 1 | 1 | 2 |
| | Amount | EUR 466,000 | EUR 1,450,000 AGGREGATED FIGURE | EUR 20,000 | NA | EUR 1,450,000 | EUR 20,000,000 | EUR 61,000 | HUF 7,000,000 [EUR 20,041] | EUR 20,000 | EUR 25,000[15] | EUR 203,568 |

| MAR Article | Netherlands | Poland | Spain | Sweden |
|---|---|---|---|---|
| Other infringements | 18 | 6 | 2 | 113 |
| Amount | NA | PLN 3,150,000 [EUR 713,475] | EUR 165,000 | SEK 15,167,900 [EUR 1,480,993.756] |

There is no indication that MAR sanctions are currently ineffective (i.e. fail to deter infringement). On the contrary, many stakeholders consider that the level of sanctions for "technical" infringements is too high and should be lowered. A lower level of the minimum of the maximal sanctions would aim to make sanctions regime more proportionate, without rendering it less effective.

B) *Efficiency*

The level of sanctions imposed depends on many factors. When determining the type and level of administrative sanctions, NCAs are obliged to take into consideration relevant circumstances, including, where appropriate, those indicated in Article 31(1) of MAR (as well as comply with thresholds set out in law).

The rationale of the sanctioning regime is to enable NCAs to punish the misbehaviour of market participants, as well as to dissuade them from committing infringements of MAR provisions. The current level of sanctions is considered to be inefficient (see the stakeholders'

responses in Annex 2), as it reaches the policy objective at a too high cost. In fact, the excessive sanctioning regime for SMEs' infringements of disclosure provisions had an unintentional consequence in deterring issuers from going public altogether.

*C) Coherence*

The proposal to review the sanctions is overall coherent with other EU legislation that aim to ensure effective investor protection and market integrity.

D) *Relevance in terms of value added for the EU*

An efficient and effective sanction regime would contribute to facilitating the access of SMEs to public markets without endangering the protection of investors and market integrity.

### 2.4. Market soundings

MAR provides for a prescriptive regime to regulate the interactions between a seller of financial instruments and one or more potential investors, prior to the announcement of a transaction, conducted in order to gauge the interest of potential investors in a possible transaction and its pricing, size and structuring (so called "market sounding"). Market soundings are extremely useful for issuers to ensure that deals run smoothly, and that the views of issuers, existing shareholders and potential new investors are aligned. However conducting market soundings may require disclosure of inside information to the potential investors. MAR introduces obligations on issuers (or investment firms acting on their behalf) carrying out such soundings, as well as on the investors who are sounded out, aimed at maintaining record of the information disclosed and avoiding they could be exploited for insider dealing purposes.

According to many stakeholders, the obligations provided in MAR have a deterrent effect on both potential issuers and potential investors. Although the market sounding regime was already alleviated under the SME Listing Act to exempt private placements of bonds addressed to qualified investors, the majority (59%) of market participants in the public consultation considered those provisions in MAR very burdensome.

*A) Effectiveness*

ESMA, in its report, pointed to the existence of two different readings of the market sounding regime, one according to which those obligations are mandatory and another one which considers those rules a mere safe harbour, the compliance with which would grant the protection from allegations of unlawful disclosure of inside information by disclosing market participants.

Despite the fact that the majority of stakeholders consulted by ESMA interpreted the rules as a safe harbour and considered a compulsory market sounding regime too burdensome and disproportionate, ESMA concluded that the current market sounding regime is compulsory and that an optional regime it should not be changed. According to ESMA, under the reading where the market sounding regime were a safe harbour (i.e. optional), different investors would run the risk of information asymmetries among investors to go undetected, leading to selective disclosures without the relevant record keeping obligation. Such a requirement may be viewed as an incentive for. The other reading, whereby the regime were mandatory, would in contrast encourage proper management of inside information. ESMA's recommendation to the Commission was to amend Article 11 MAR, so that it is clear that there is an obligation

for an issuer (or seller) to comply with the relevant prescriptions (including record keeping), when carrying out market sounding. ESMA also recommends to the Commission to introduce sanctions for the violation of the sounding requirements.

In parallel, ESMA also stressed the need to keep the broad definition of market sounding to be able to adapt it to different typologies of soundings and different practices across the EU. According to ESMA, the scope of Article 11 should be extended to clarify that it applies also to cases of transactions eventually announced, as the announcement does not really impact the nature of the soundings.

In light of respondents' concerns, ESMA was however of the opinion that procedures and requirements for carrying out market soundings could be simplified, putting forward a number of recommendations for limited technical amendments. ESMA recommended that, in cases where no inside information is passed on, Article 11 of MAR should be amended to state that Article 11(5)(a) to (d) and Article 11(6) of MAR should not apply. ESMA recommended that in cases of inside information, the Commission should amend Article 11 of MAR to clarify that the requirement to cleanse contained in Article 11(6) could be waived wherever the transaction is publicly announced. ESMA further recommended to ensure that written minutes as well as emails and other electronic means should suffice where recording facilities are unavailable. Finally, ESMA suggested to delete repeat reminders of the wall crossing requirements for follow up calls after the initial one.

Most respondents in the public consultation for the Listing Act considered that ESMA's limited proposals to amend the market sounding procedure were not sufficient to provide a balanced solution to the need to simplify the burden and maintain the market integrity.

*B) Efficiency*

A majority of respondents to the Commission public consultation, consider the market sounding regime as burdensome, with 59% of respondents considering it burdensome for all companies and 53% of respondents considering it burdensome for issuers listed on SME growth markets.

Contrary to ESMA, the TESG recommends to review the market sounding regime under MAR, finding it too burdensome and hence inefficient for achieving the objective. More specifically, TESG would prefer to see the market sounding regime repealed and replaced by the clarification that inside information for market sounding purposes may be disclosed, provided that adequate non-disclosure agreements are in place.

As second best options, the TESG supports the proposal (a) to clarify that the market soundings may be applied only in presence of inside information being passed on, and (b) to simplify the burdensome procedure for both disclosing market participants and persons receiving market soundings, while recognising that the regime is a mere option to benefit from the protection of the allegation of unlawful disclosure of inside information.

Finally, the TESG proposes to extend the exemption introduced for private placements of bonds addressed to qualified investors to equity placements and to include, for both types of placements, external funding providers (who may not qualify as qualified investors).

*C) Coherence*

The proposal to clarify the market sounding regime is overall coherent with other EU legislation that aims to ensure effective investor protection and market integrity.

*D) Relevance in terms of value added for the EU*

An efficient and effective market sounding regime would contribute to market integrity by allowing the gauging of investors' interests, while limiting the risk of market abuse.

### 2.5. Insider lists

Insider lists have to be drawn up by issuers and persons acting on their behalf or on their account pursuant to Article 18 of MAR, so as to serve as a tool at the disposal of NCAs that they can request when investigating market abuse cases. ESMA assessed the usefulness of such lists in the context of its review report. From the evidence gathered, ESMA concluded that insider lists remain a key tool in market abuse investigations undertaken by NCAs and, accordingly, is widely used by them. It can then be considered as an **effective** tool.

However, the feedback received from market participants in the public consultation shows that an overwhelming majority of respondents considers this requirement burdensome for all companies and in particular for issuers listed on SME growth markets, hence questioning the **efficiency** of the tool. Most market participants would be in favour of removing such a requirement altogether, while the TESG recommended to remove the obligation for SME Growth Market issuers to keep an insider list or as a second-best scenario to further reduce and simplify the content of the insider list for all issuers.

Considering the stakeholders' feedback, and despite the fact that some simplifications to the regime for insider lists for issuers listed on an SME growth market have been introduced only recently under the SME Listing Act[493], there is merit in considering ways to alleviate the obligations for other issuers (i.e. non-SMEs).

### 2.6. Cross-market order book surveillance

In its Final Report, ESMA has analysed the framework for cross-market order book surveillance and deems necessary to set a reinforced cooperation framework in order to facilitate exchange of order book data between NCAs whose markets are more interconnected. It would be beneficial for certain NCAs to more easily get access to data requested for their investigations. The Commission has confirmed these findings after several interviews with different trading venues and NCAs.

Currently, under Article 25 of MIFIR, investment firms are required to keep their orderbook data at the disposal of NCAs. In turn, NCAs have different approaches to request such data from trading venues under their jurisdiction: they either do it on an ad hoc basis or systematically, by requiring them to regularly submit delayed or real-time orderbook data. Furthermore, while the content of the data to report has been harmonized through an RTS, with precise fields specifying the information that trading venues need to keep at the disposal of NCAs, trading venues are not required to use a specific technical template or message standard when they send data to NCAs, as the empowerment for the RTS was not considered including this possibility.

[493] Regulation (EU) 2019/2115 of the European Parliament and of the Council.

Order book data is exchanged, where appropriate, between NCAs on the basis of Article 25 of MAR where such exchange is necessary to get a full view of the order book in relation to the trading activity in one or several financial instruments. The interviews that the Commission conducted with several trading venues and NCAs shows that, while NCAs do submit requests for non-domestic orderbook data to other NCAs, this process can often be lengthy and burdensome, with received data sets of varying quality. This information gathering also showed that there are differing approaches to orderbook analysis; while some NCAs receive continuous real-time or delayed data on orders from trading venues, others rely on STORs and transaction data analysis to uncover instances which warrant further analysis of related orders. In general, order book data, whether exchanged cross-border or analysed intra-jurisdiction, is quite voluminous and can be said to be a large multiple of the transaction data itself.

Several NCAs also consider that the existing framework is not working **effectively and efficiently**. The recording of order book data in an electronic and machine-readable form and in a common XML template, in accordance with ISO 20022 methodology, appears as a prerequisite for improving such surveillance, according to ESMA.

Further developments in this area, by reinforcing market integrity at a European level, would be **coherent** with the objectives of MAR and would be **relevant in terms of value added to the EU**, while the current framework seems insufficient in respect of these criteria.

Since the implementation of the standardization of order data and of the measures to ensure data quality need to be achieved first, ESMA does not consider at this stage the recommendation of mandatory reporting for order book data appropriate.

A more in-depth assessment of cross-market book surveillance is provided in Annex 8, section 1, with a potential way forward on how to enhance the framework.

## 3. Conclusions

Based on the analysis performed in this Annex and taking into account the feedback received from stakeholders' groups, from respondents to the targeted consultation, and studies and reports consulted, in certain key areas a legislative intervention would be merited to ensure that MAR meets its overarching objectives. The key areas that should be addressed are: the clarification of the notion of inside information with respect to the moment of its disclosure and to the conditions for delaying it, a disproportionate sanctions regime for SMEs (for disclosure breaches only). Other areas evaluated in this Annex may also be considered, notably the excessively burdensome rules for the market soundings and, possibly, insider lists.

Furthermore, the current framework for surveillance of cross-market order book was considered insufficient, due to a lack of harmonisation of the format of order book data and the absence of a strong cooperation mechanism.

# ANNEX 9: ANALYSIS OF RULES ON INVESTMENT RESEARCH

## 1. Introduction

This annex assesses the impact of the MIFID II rules on the provision of research, in particular on SMEs, and hence the visibility of listed companies to investors in the EU. It also sets out possible additional measures that could accompany the main set of measures presented in the main body of the impact assessment to make listing more attractive in the EU (by making companies more visible and, hence, more attractive to investors).

Investment research plays an essential role in the valuation of companies and financial instruments and in guiding investment decisions (research can help in particular to determine an investment valuation or the value of an asset or to spot trends and may also include a recommendation to buy or sell securities). Investment research is particularly important to achieve greater visibility and inform potential investors about the prospect of investing in SMEs. Investment research is produced by investment firms, investment banks, independent research providers and, when it comes to SMEs, also by issuers themselves. Diversity in research is essential to the investment markets to ensure that investors can tap different sources of information and can make better informed investment decisions.

If an issuer, in particular a SME, does not get investment research coverage, investors will not have information on the company readily available and will need to engage in own research in order to establish a valuation. The time and costs involved can act as a deterrent to investing in these companies. In consequence, trading turnover (liquidity) in this company will suffer (be lower)[494]. This usually implies higher spread between quoted buy and sell (bid/ask) prices in the market (quoted spreads) and a reduced depth of posted quotes. In effect, investors will face worse execution prices and increased price slippage (disadvantageous price move when executing a market order) thus making the entity not covered by research an even less enticing prospect[495]. In consequence, the ability of this company to raise capital in public markets is likely to weaken and also become less attractive due to lower amounts of capital that can be raised (as increased liquidity risks will negatively impact pricing through the illiquidity premium that would need to be factored in). This may lead to companies relying more on non-market-based sources of financing with possible negative consequences for their growth potential (and for the development of capital markets more broadly).

[494] AMF: Reviving research in the wake of MIFID II_ January 2020 "… *Yet research, the appeal of small and midcaps for investors and their liquidity are all closely linked. The risk is the formation of a negative spiral: less followed companies have a lower degree of visibility among investors, who turn away from them, thus further weakening them in their ability to obtain financing. Such a situation seems especially prejudicial at a time when the French and European authorities share the strong ambition of strengthening means for financing the economy*.".
In a SEC working paper (Staff Report on the Issues Affecting the Provision of and Reliance Upon Investment Research Into Small Issuers (sec.gov), of 18 February 2022, it is reported that "*…Broadly speaking, research and its prompt and fair dissemination to investors has been recognized as valuable to an efficient system of securities markets. There is substantial evidence that research coverage of issuers is beneficial.5 Research coverage may be particularly important for a small issuer that seeks to increase its stock liquidity or gain investors' recognition*."

[495] Investors/traders may not execute as often when the spread is large. The quoted spread constitutes a hidden cost for investors when they trade stocks.

Studies in the US have shown that research coverage of an issuer is positively related to its stock liquidity[496] and that a reduction in research coverage of an issuer may reduce its stock liquidity[497]. Research coverage contributes to liquidity by increasing investors' recognition of issuers[498]. A recent SEC paper suggests that "*research and its prompt and fair dissemination to investors has been recognized as valuable to an efficient system of securities markets*" 499 and that there is substantial evidence that research coverage of issuers is generally beneficial and particularly important for smaller issuers that seek to increase stock liquidity and gain investors' recognition.

## 2. The EU regulatory environment

In April 2016, Commission Delegated Directive (EU) 2017/593 supplementing Article 24(9) of MiFID II, introduced rules applicable to the provision of investment research by third parties to investment firms providing portfolio management or other investment services to clients. The Delegated Directive required investment firms to clearly distinguish payments received as brokerage commissions from the compensation perceived for the provision of investment research and to assess the quality of the research purchased based on robust quality criteria and its ability to contribute to better investment decisions[500].

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[496] See, e.g., Tung L. Dang et al., Analysts and Stock Liquidity – Global Evidence, COGENT ECON. & FIN. (2019), available at https://www.tandfonline.com/doi/full/10.1080/23322039.2019.1625480 (finding that firms' analyst coverage is positively related to stock liquidity, which confirms "*the notion suggested in previous studies that analyst activities provide public information that reduces information asymmetries between firms and market participants*"); see also Beyer et al., (discussing empirical evidence finding that "*firms with sustained improvements in analysts' ratings of disclosure quality ... show an increase in stock liquidity, analyst following, institutional ownership, and stock performance*").

[497] For instance, one study found that issuers that lose analyst coverage for at least one year suffer a "*significant deterioration in bid-ask spreads, trading volumes, and institutional presence*." Simona Mola et al., Is There Life After the Complete Loss of Analyst Coverage?, 88 ACCT. REV. 667, 670 (2013) ("Mola et al.") (finding that "*firms that lose all analyst coverage for one year are significantly more likely to delist than their covered peers*"). See, e.g., Inv'r Advisory Comm., Recommendation of the SEC Investor Advisory Committee Structural Changes to the US Capital Markets Re Investment Research in a Post-MiFID II World, SEC, 3 (Jul. 25, 2019), https://www.sec.gov/spotlight/investor-advisory-committee-2012/investment-research-post-mfid-ii-world.pdf ("*A reduction of Research coverage has a knock-on effect on liquidity, which is also an essential component of our capital markets ecosystem* ...."); Merton, (finding that the loss of analyst coverage for a stock will reduce investor interest, with adverse effects on liquidity); see also The IPO Task Force, Rebuilding the IPO OnRamp: Putting Emerging Companies and the Job Market Back on the Road to Growth, SEC (Oct. 20, 2011) ("IPO Task Force"), https://www.sec.gov/info/smallbus/acsec/rebuilding_the_ipo_on-ramp.pdf ("Lack of research coverage adversely impacts trading volumes, company market capitalizations and the total mix of information available to market participants."); Jeffrey M. Solomon, Cowen, Inc., Capital Formation, Smaller Companies, and the Declining Number of Initial Public Offerings, SEC, 14 (Jun. 22, 2017) ("Cowen Presentation"), https://www.sec.gov/spotlight/investor-advisory-committee-2012/jeffrey-solomon-presentation.pdf ("Little or no research coverage generally corresponds with lower stock liquidity.").

[498] See, e.g., Mola et al., ("[W]*e find that the loss of analyst coverage reduces the number of investors who recognize and trade the firm's stock, with attendant effects of widening the bid-ask spread and decreasing trading volume and institutional presence*.").
For example, one study found that market reactions to coverage changes are significantly correlated with the time and effort analysts devote to directing investors' attention to issuers that they are covering, suggesting that coverage changes affect issuer value because they affect investors' recognition.

[499] Staff Report on the Issues Affecting the Provision of and Reliance Upon Investment Research Into Small Issuers (sec.gov), February 2022. See also SEC, Future Structure of Securities Markets, 37 Fed. Reg. 5286 (Mar. 14, 1972) ("1972 Commission Statement". The SEC suggests that a number of factors may have impacted the low decline of research coverage of small issuers, including legislative and regulatory measures, MiFID II. The SEC, among those variables, mentions: the rise of client commission arrangements ("CCAs"), a decline in the overall number of IPOs until 2020, falling equity commissions, fewer institutional investors that invest in small issuers, a shift from active to passive investment strategies, an increase in reliance on in-house research and an increase in alternative data sources. For instance, small issuers are less likely to be covered by research coverage than large issuers. Specifically, the availability of research coverage and the number of analysts covering an issuer correlate with market capitalization. In recent years, approximately 60% of small issuers have received research coverage versus approximately 90% of large issuers. Furthermore, small issuers received coverage by approximately two analyst firms on average while large issuers were covered by approximately nine analyst firms on average.

[500] Article 13 of Commission Delegated Directive (EU) 2017/593 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits states that the

The aim of those rules, which became applicable as from 3 January 2018, generally referred to as the "**unbundling rule**", was twofold.

On the one side, they served the purpose of ensuring transparency by investment firms providing both execution and research services on the costs of investment research (requiring to price that service separately[501]) as well as of managing the conflicts by avoiding that (positive) research is used by such investment firms to entice investors to trade more with the aim of increasing brokers' commissions on trading.

On the other hand, the unbundling rule was also meant to reduce barriers to entry for independent research providers (i.e. entities providing research services only, and not also execution services) in order to ensure a higher level of research quality (which was at the time considered very low). Independent research providers persistently complained that the inability to properly price research led to investors consuming almost exclusively research provided by brokers, as the latter appeared to be provided essentially for free as part of the brokerage service (this approach to the provision research originated in the US, where it is commonly referred to as "soft dollars").

After a few years of application, the success of the unbundling rule is contestable.

The objectives to better manage the conflicts of interest, to limit the over production of research and to improve transparency on the costs associated to the provision of research the rules seem to have been largely met[502].

However, it appears that the MiFID II "unbundling" rules have not resulted in favouring the access of more independent investment research providers. On the contrary, further to the introduction of MIFID II unbundling rules, independent research became unsustainable due the low price charged by some larger research providers[503]. As brokers have "unbundled" research and brokerage – essentially advertising how "cheap" their research actually is – research boutiques are even more struggling. The independent

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provision of research by third parties to investment firms providing portfolio management or other investment or ancillary services to clients are not be regarded as an inducement where received in return for either of the following:
(a) direct payments by the investment firm out of its own resources;
(b) payments from a separate research payment account controlled by the investment firm, provided that the following conditions relating to the operation of the account are met:
(i) the research payment account is funded by a specific research charge to the client;
(ii) as part of establishing a research payment account and agreeing the research charge with their clients, investment firms set and regularly assess a research budget as an internal administrative measure;
(iii) the investment firm is held responsible for the research payment account;
(iv) the investment firm regularly assesses the quality of the research purchased based on robust quality criteria and its ability to contribute to better investment decisions.
In addition, such provision requires that, where an investment firm makes use of the research payment account (point (b) above), it should also provide the clients with: (a) information about the budgeted amount for research, before the provision of an investment service to clients, and the amount of the estimated research charge for each of them, before the provision of an investment service; as well as with (b) annual information on the total costs that each of them has incurred for third party research.

[501] Recital 26 of Commission Delegated Directive (EU) 2017/593 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to safeguarding of financial instruments and funds belonging to clients, product governance obligations and the rules applicable to the provision or reception of fees, commissions or any monetary or non-monetary benefits states that investment firms providing both execution and research services should price and supply them separately in order to enable investment firms established in the Union to comply with the requirement to not accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients set out in Article 24(7) [i.e. advice provided on an independent basis] and 24(8) [portfolio management service] of Directive 2014/65/EU

[502] ESMA working paper on MIFID II research unbundling: assessing the impact on SMEs – February 2021

[503] SEC Staff working paper on investment research – February 2022 : "*…In at least two other studies, 75% of those surveyed believed that the low prices charged by research providers at the time were not sustainable, particularly for small independent research providers…..Boutique or independent research providers in the EU, including the U.K. before its withdrawal from the EU, have complained that larger research providers have engaged in predatory pricing and unfair competition, with some rivals charging as little as $10 000 annually for access to all written research*".

research community, as well as some regulators[504], allege that this resembles some form of "price dumping", i.e., systematically selling research below the cost of producing it[505].

Evidence further suggests that the unbundling rules might have impaired the overall availability of research, especially for SMEs, and that it produced a shrinking in market research infrastructure[506] which would seem to be detrimental to a healthy competitive environment and a sufficiently diversified analysts' market[507]. EU brokers, that had in the past provided SME research as part of their "bundled" investment services, scaled back SME capacities following their decision not to pass the costs of research to their clients[508]. The first "victim" of cost-cutting in research expenditure was the listed SME segment. SME research suffered, notably due to the disappearance of the cross-subsidies that previously existed (with bundled payments) between large and small cap research (brokerage fees on large cap partially subsidized research on small cap, building on brokers' expectations to potentially raise fees on small cap brokerage in the future). Overall, several surveys show that the SME coverage has significantly shrunk or even disappeared altogether in the years after the "unbundling" MiFID II rules took effect. It is considered that MIFID II unbundling rules favoured selling investment research

[504] In its February 2021 report, ESMA indicates that a "*possible area for future research concerns an evaluation of the actual price of research, with a view to examine whether any 'dumping' of research prices is taking place. Data limitations make this a challenging area to investigate, but material on this perspective would also contribute another element to this rich area for future study*.".
In the AMF paper: several firms consider that the prices at which research is sold are highly competitive, with no common comparison to those offered previously, and even resemble dumping practices.

[505] This is also recognised by ESMA: "*A final possible area for future research concerns an evaluation of the actual price of research, with a view to examine whether any 'dumping' of research prices is taking place. Data limitations make this a challenging area to investigate, but material on this perspective would also contribute another element to this rich area for future study*." ESMA MIFID II research unbundling: assessing the impact on SMEs – February 2021.

[506] CFA Institute (2017) "*MIFID II: a new paradigm for investment research*", Chartered Financial Analyst Institute and AMF: Reviving research in the wake of MIFID II January 2020. The AMF in particular has found that MiFID II has led to the development of a supply of research services at extremely low prices, which would seem to be detrimental to a healthy competitive environment. Several firms consider that the prices at which research is sold are highly competitive, with no common comparison to those offered previously, and even resemble dumping practices.
In literature there is no consensus on this issue and there are also studies finding no correlation between the unbundling rules and the volume or quality of research on SMEs (ESMA's study). A study commissioned by FISMA showed that indeed research has fallen, but this is partly attributed to cyclical effects and the study shows a somewhat stronger decline for the large firms, which the contractor attributes to the fact brokers are cutting costs and reduce the overproduction of research.

[507] While the decline of investment research is objectively recognised, there is no consensus on the extent to which the "unbundling" has played a role in this decline. In a SEC paper of February 2022, on "the issues affecting the provision of, and reliance upon, investment research into small issuers", the SEC suggests that a number of factors may have impacted research coverage of small issuers, including legislative and regulatory measures, MiFID II. While some NCAs (AMF : Reviving research in the wake of MIFID II January 2020, and other stakeholders (https://www.cfainstitute.org/-/media/documents/survey/cfa-mifid-II-survey-report.pdf) included those consulted by ESMA found that the unbundling rules constitutes a major hurdle for more research on SMEs issuers, ESMA, in 2021, found no evidence that the unbundling requirement had any impact on the relative breadth and quality in research for SMEs compared to large firms. ESMA's report (ESMA MIFID II research unbundling: assessing the impact on SMEs – February 2021) concluded that in absolute terms, SMEs continue to be characterised by lower amount of analyst research, higher probability of losing coverage, worse quality of research and limited secondary market liquidity. However ESMA found that this situation appears to have been neither improved nor worsened by the MiFID II research unbundling provisions. The report in particular highlights that, since MIFID II, (i) the quantity of research per SME has not declined relative to larger firms, (ii) the probability of an SME completely losing research has not increased relative to a larger firm, (iii) the quality of SME research has not worsened relative to a larger firm and (iv) SME liquidity conditions have worsened relative to larger firms. The report highlights nonetheless that other academic data based studies and industry surveys did conclude that the MIFID II research unbundling rules has led to a general reduction in the number of analysts producing research per company. ESMA did not explore the consequences of this phenomenon, including the consequence of the actual price of research (and the possible dumping) nor did they explore whether those provisions had had an impact on firms' decision to list on exchanges in the first place. The report acknowledges, nonetheless, that other academic data based studies and industry surveys did conclude that the MIFID II research unbundling rules has led to a general reduction in the number of analysts producing research per company.. In a different report released one month later (March 2021) and focusing on the functioning of the rules applicable to SME growth Markets, ESMA looked at ways to increase research coverage of SMEs, highlighting that market participants believe that availability of research in SMEs is an issue: "*All but two respondents expressed the view that the unbundling rules in MiFID II represent a major hurdle for the production of research on SME issuers*". In its March 2021 report, where the answers to the ESMA consultation are detailed, it clearly appears that nearly all the respondents (except 2) view this as the most important focus point.

[508] CFA Institute 2019 - "*With clients (asset owners) of large investment firms expecting research costs to be paid by their managers, competitive pressures have forced most asset managers to absorb research costs."*

unbundled but at a price far below the cost of producing it. The consequence was further concentration in the now "unbundled" research market and a reduction in the diversity and breadth of the research on offer.

While the MiFID II provisions on investment research in the delegated directive were designed to break the nexus between brokerage commissions and investment research as well as to create a "price" for investment research, unbundling has not actually allowed to independently price research and has also not opened up this market to independent (non-brokerage) providers[509]. Most importantly, the unbundling rule has not stemmed the negative trend in SME research coverage and has not led to the promised emergence of independent, small cap focused research providers. If anything, there has been a drastic cut in research provision, as well as brokers focusing all of their research capacities on providing "cheap" coverage for large cap (blue chip) companies. Some studies already suggest that "*the complete removal of the unbundling rule should be considered*" (OECD, 2022[510]).

In 2021, the "un-bundling rules" were amended, as part of a more general effort under CMRP[511] to help the recovery from the COVID-19 crisis which forced companies to rely more heavily on debt, weakening their funding structures. In circumstances when companies needed urgent re-capitalization, the need for more visibility of EU companies, in particular SMEs,[512] was considered even more fundamental and the implicit cost of not having the research coverage even higher. In that context, the CMRP, applicable since 28 February 2022, introduced a first attempt to improve the SMEs' research coverage[513] by providing an exemption from the "unbundling rules" for research covering issuers whose market capitalization does not exceed EUR 1 billion for the period of 36 months preceding the provision of the research, hence allowing in such cases for joint payment for trade execution and research.

While this measure was widely welcomed by some brokers that specialize in investment services pertaining to this small- and mid-cap market segment, all bigger brokerage houses that provide services across all segments stated in their answers to the consultation[514] that they would not make use of the new "joint payment" rule, as it proved too cumbersome to run two payment schemes for investment research in parallel. Also

[509] CFA Institute , 2019 "dependent *research providers have not benefitted from MiFID II. A more competitive research marketplace is squeezing research providers; in particular, 57% of buy-side respondents report sourcing less research from investment banks than before MiFID II, and most respondents cite a reduction in sell-side analyst jobs*". "*….The results also suggest that independent research providers have not benefitted much from the introduction of MiFID II. More transparency and separate pricing of research are intended to create a more level playing field among research providers, yet it appears independent houses have not been able to grow their market share. As shown in Figure 6, only 17% of respondents source relatively more research from independent providers, which is little changed from expectations before MiFID II. As bulge-bracket investment banks have cut prices to maintain client business and squeeze competitors, independent providers appear to have realized little, if any, market share gains at this stage.*".

[510] OECD working paper "Fostering cyclical convergence in the Euro area" , 03 January 2022.

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

[512] AMF: Reviving research in the wake of MIFID II, January 2020.

[513] Recital 8 of the CMRP (Directive (EU) 2021/338 of the European Parliament and of the Council of 16 February 2021 amending Directive 2014/65/EU as regards information requirements, product governance and position limits, and Directives 2013/36/EU and (EU) 2019/878 as regards their application to investment firms, to help the recovery from the COVID-19 crisis) states, "*In the immediate aftermath of the COVID-19 pandemic, issuers, and in particular small and middle-capitalisation companies, need to be supported by strong capital markets. Research on small and middle-capitalisation issuers is essential to help issuers to connect with investors. That research increases the visibility of issuers and thus ensures a sufficient level of investment and liquidity. Investment firms should be allowed to pay jointly for the provision of research and for the provision of execution services provided certain conditions are met*".

[514] The Commission consultation on the Listing Act launched in November 2021: https://ec.europa.eu/info/consultations/finance-2021-listing-act-targeted_en.

other respondents to this consultation argued that while the adjustments brought by the CMRP were viewed as positive, their real impact was considered to be extremely limited. Many admitted that the new regime has not been used as it adds to operational complexity and costs (too many business models) and would see merit in alleviating the MiFID II regime on research even further.

### 3. Developing an investment research of quality for SMEs: the way forward

While, there is no consensus on the underpinning causes, the decline of investment research is objectively recognized[515].

The consultation on the Listing Act also looked into **measures that could be adopted in the EU to revitalise the market for investment research**.

While several respondents, in particular NCAs, considered that it might be too early to assess whether the alleviation introduced by the CMRP has already produced any meaningful results, other participating stakeholders already qualified the measure as not sufficiently far-reaching. Those respondents considered that **the market capitalisation of SMEs below which the exemption applies should be increased to between EUR 5 billion and 10 billion to properly cover the SMEs (including mid-cap) segment**. This measure, according to them, should support the re-bundling of payments (for research and execution services) in those firms which mostly suffered from the decline in research over the last years. It would in particular better capture the medium-cap companies which are companies that have already proven their credibility and that may stand a better chance to attract potential investors. It is however, widely recognised that unless investment firms are ready to cross-subsidise the SMEs research coverage with the (higher) revenues deriving from execution of orders on large-caps/blue chips, the effectiveness of this measure may remain low. Many respondents, however, signalled that a dual payment system (for research covering SMEs and non-SMEs) would be too burdensome and too costly. To ensure the effectiveness of the measure, the threshold should therefore be adequately calibrated to allow for the exclusion of some smaller markets (and the respective brokerage community) in their entirety.

Also considering that the EU is the only major jurisdiction to have adopted unbundling of research and brokerage fees[516], several business associations[517] participating in the consultation requested to go back entirely on the **unbundling regime for payment of research,** arguing that it would be the only way to boost research also for SMEs. The MiFID II regime is seen as an indirect incentive to allocate a larger part of research services value in the hands of a few big players, with the number of research publications on SME having dropped to an almost non-existent level. If MiFID II has succeeded in increasing transparency in the procurement of market research for investors, many

[515] ESMA working paper on MIFD II research unbundling Feb 2021 and MIFID II Review report on the functioning of the regime for SME growth Markets, March 2021: ESMA found no evidence that the unbundling requirement had any impact on the relative breadth and quality in research for SMEs compared to large firms. ESMA, acknowledging market participants' concern on the availability of SME research, looked into ways to increase research coverage of SMEs, seeing merit in assessing the possibility of developing a pan-European Program or programs at the level of trading venues that could participate to the funding of SME research.

[516] The UK, which was at the time of its adoption, one the main proponent of such a rule has however maintained it even after Brexit. In the United States, the largest global research market, regulators maintained payment of research via brokerage fees, periodically adopting no-action letters allowing their broker-dealers to cope with the differences among the two systems (the "soft dollar" rule) .

[517] In the consultation on Listing Act, the following business associations were in favour of a re-bundling: Finance Finland, European Issuers (Belgium), BVI (Germany – for fixed income research ), Association Française de la Gestion Financiere (for fixed income research), Bundesverband der Wertpapierfirmene e. V. (bwf) (Germany), FESE.

market actors[518] consider that it had a negative impact on the overall availability of research, especially for SMEs. Several respondents to the public consultation argue that re-bundling of payments on research and execution services could boost the production of research, allowing the emergence of more analysts and more competition between research providers. More research should, in turn, support more visibility of the issuers, especially of SMEs, and more interest of investors to invest in those companies. It may however take some time to restore the SME research capabilities considering that many[519] have observed that MIFID II had altered the competition environment in the research area. At the moment, investment research is often sold at a price below the cost of producing it, leading in some cases to what is known as "dumping"[520], making it uneconomical for companies to produce research and also impacting on the quality of the research delivered.

A majority of respondents to the consultation recommended to exempt the **independent analysts from the MiFID II research payment regime** on the basis that those analysts do not face conflict of interest like analysts belonging to groups that provide both investment research and execution services. This is an approach that has been recently adopted in the UK[521]: research providers are exempted from the inducement rules where they do not provide execution services and are not part of a group that includes a firm offering execution services[522]. In 2019, the Chief Executive of the UK CFA[523] clarified that those independent research providers can offer sample material on an ad-hoc basis without it being an inducement for an asset manager. In the answers to the consultation on Listing Act, there were however a few respondents strongly opposed to this arguing that this would create an unacceptable un-level playing field between research provided by investment firms and other research producers.

**Flanking measures**

MIFID II reinforced measures to manage the conflicts of interest, in particular by introducing organisational requirements in relation to investment research. In order to ensure a good level of transparency (avoiding falling into the situation pre-MiFID II), both the measures of increasing the threshold for "re-bundling" payment on research and the total "re-bundling" of such payment could be accompanied by **flanking measures aimed to enhance transparency on the cost of the service**.

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[518] AMF: Reviving Research in the wake of MIFID II – January 2020, CFA Institute, To Bundle or Not to Bundle? A Review of Soft Commissions and Research Unbundling (Summary) (cfainstitute.org) - 23 June 2021

[519] AMF: Reviving Research in the wake of MIFID II – January 2020 - The AMF in particular has found that "*MiFID II has led to the development of a supply of research services at extremely low prices, which would seem to be detrimental to a healthy competitive environment. Several firms consider that the prices at which research is sold are highly competitive, with no common comparison to those offered previously, and even resemble dumping practices."* and also CFA Institute (2019) "MIFID II: a new paradigm for investment research", Chartered Financial Analyst Institute . Literature is however not consensual on this issue and there are studies finding no correlation between the unbundling rules and the volume or quality of research on SMEs (ESMA's study). A study commissioned by FISMA showed that indeed research has fallen, but this is partly attributed to cyclical effects and the study shows a somewhat stronger decline for the large firms, which the contractor attributes to the fact brokers are cutting costs and reduce the overproduction of research.

[520] In its February 2021 report, ESMA indicates that a "*possible area for future research concerns an evaluation of the actual price of research, with a view to examine whether any 'dumping' of research prices is taking place. Data limitations make this a challenging area to investigate, but material on this perspective would also contribute another element to this rich area for future study*."

[521] PS21/20: Changes to UK MiFID's conduct and organisational requirements | FCA

[522] Andrew Bailey keynote speech on MiFID II at the European Independent Research Providers Association | FCA: "*We have heard loudly and clearly your views that, as independents, you cannot induce an asset manager to do anything except – hopefully – purchase your research services… For example, we have already said that, irrespective of trial periods, independent providers can pitch for business and offer sample material on an ad-hoc basis without it being an inducement for an asset manager."*

[523] Ibid

**Encouraging more research sponsored by the issuers** could also be seen as a possible flanking measure to develop research on SMEs and increase their visibility. Safeguards would be however necessary: issuer-sponsored research could, also in this case, be regulated by a **"code of conduct",** setting out the minimum standards of independency and objectivity that providers of such research should respect. A mandate could be given to ESMA to develop such code of conduct. This would incentivize the research coverage of SMEs by making sponsored-research more transparent on the relations between issuers and analysts and on the independence of each party. If this may initially increase costs for the production of such research, ultimately this may create more opportunities for SMEs issuers to attract investors and support liquidity in their stock. Getting more financing via the capital markets may hence become cheaper for SMEs (e.g. due to a lower illiquidity premium). On the investors' side, it would allow them to potentially better spot investment opportunities (in SMEs) and better diversify their portfolio. Some respondents to the consultation on the Listing Act, including some NCAs, consider however that it cannot be seen as a substitute for independent research produced by the financial industry for the investors and that issuers-sponsored research would continue to suffer from a bad stigma and the belief that the investment research paid by the issuer is prepared in view of promoting its own company.

Respondents to the consultation on the Listing Act, but also by other stakeholders[524], raised a possibility of other solutions to support SMEs research. Amongst the frequent suggestions, public funding (at national or EU level) or private and public funding to finance SMEs research are evoked. Regulators seem to favour this solution less. Some also suggest that stock exchanges could organise investor presentations in such a way that all SMEs could present themselves to analysts. In the same spirit, some suggest to create platforms where written research could be openly available. Finally, some respondents to the consultation considered that **research should be considered as a minor non-monetary benefit** and would thus avoid the application of the unbundling rule.

[524] AMF "Reviving research in the wake of MIFID II" – January 2020

# ANNEX 10: ACCOMPANYING MEASURES

## 1. Other MAR measures

According to the key findings of the evaluation of the key measures of the MAR conducted in Annex 8[525], it is appropriate to consider further simplifications of the MAR rules in addition to those described in the policy options of the impact assessment.

### *A) Review of the rules on Market soundings.*

Although alleviated through the SME Listing Act, the procedure for carrying out market sounding in the EU is still considered very burdensome by most stakeholders.

Amendments to this regime should, hence, go further than ESMA's recommendations. Firstly, by simplifying the procedure for both disclosing market participants (DMPs) and persons receiving market soundings and clarifying that this regime is to be applied only when inside information is actually passed on. Secondly, by making the regime clearly optional as a safe harbour, and not mandatory as it is currently perceived.

In terms of implications, the effects of a simplified and optional regime are considered together, noting that quantifications prove difficult due to data limitations as regards previous soundings and recordkeeping practices. Gearing the safe-harbour clause towards most sensitive soundings decreases regulatory costs, without compromising market integrity. On the contrary, envisaged changes will foster more relevant soundings by focusing on (i) inside information, hence cases presumably posing higher risks, and (ii) situations where DMPs opt in to seek additional legal protection as regards their normal exercise of profession. Against this background, envisaged changes are of streamlining nature, leading to negligible impacts on the cost of compliance and market integrity compared to the status-quo. Notwithstanding, ESMA highlighted different readings with respect the optionality of the safe-harbour clause. By clarifying that the sounding regime is strictly optional and by restricting it to inside information, the regulatory burden arguably is reduced, both at the level of the industry as well as the supervisor. The clarifications remove over-compliance of DMPs who previously filed market soundings, despite no presence of inside information. Another potential measure to simplify the market sounding would be to exempt private placements of shares, extending the existing exemption introduced by the SME Listing Act[526] for private placement of debt instruments. This would entail that communication of information to qualified investors for the purposes of negotiating the contractual terms and conditions of their participation in an issuance of equity would not constitute market sounding and shall not constitute unlawful disclosure of inside information. An explicit exemption implies a more equal treatment of equity and debt. It will furthermore save private equity issuers and investors the cost of applying MAR with respect to market soundings requirements.

### *B) Extension of the alleviations on insiders lists to all types of markets.*

While ESMA assessed the usefulness and effectiveness of insider lists in the context of its review report, in particular for authorities in the investigatory tasks,[527] the efficiency

[525] See section 2.5 and 2.6 of Annex 8.
[526] Regulation (EU) No 2019/2115 on promotion of the use of SME growth markets, Article 1(1)
[527] Showing that 24 NCAs requested insider lists in the observation period running from July 2016 to the end of June 2019.

of the tool is questioned by most market participants that highlighted the burden of drawing up such lists, with in particular the difficulty to collect personal data. This feedback, confirmed by the analysis of the TESG, justifies to look at ways to simplify this requirement. A possibility could be to extend to all issuers the approach of the SME Listing Act whereby issuers also on regulated markets and MTFs would only have to draw up permanent insider lists, limiting the costs for issuers who would only have to include in the lists those persons with regular access to inside information. By way of derogation, and where justified by specific national market integrity concerns, this amendment could also provide Member States with an option to require issuers on regulated markets and MTFs to include any persons[528] having access to insider information, but imposing in this case a less burdensome format with a limited number of information. This approach reconciles the need to keep the insider list for enforcement purposes, while in the meantime ensuring a proportionate approach for issuers when drawing up such lists.

**2. Other prospectus measures**

The following are additional areas of more limited intervention (i.e. not to be impact assessed) that will be explored as part of this initiative.

***A) Simplify and alleviate the universal registration document (URD) regime.***

According to the key findings of the evaluation of the key measures of the Prospectus Regulation conducted in Annex 6[529], the current framework relating to the URD could be improved in order to make the 'shelf-filing' system more efficient and effective. Possible measures would be to streamline the content of the URD, allow to draw up the document in English and considering whether grant the status of frequent issuer after one year of approval. Furthermore, as the URD is built on the registration document which is part of the standard prospectus for equity securities, by streamlining the latter the URD will automatically become a more efficient document as well.

Data from 2021 show that 35 URDs have been approved by NCAs530 (and 56 URDs were approved in 2020531). The Commission Services expect that more URDs could be approved or filed after the introduction of the improvements to the URD framework. More issuers could benefit from the 'fast-track' approval time. In the long term, this could lead to a steady increase in URD approvals. However, this process is expected to take time as so far the use of URDs is mainly concentrated in one jurisdiction (France) where, before the introduction of the URD, issuers were used to using a similar type of document532. This suggests that a cultural change may also be needed in other jurisdictions before issuers start adopting the URD. Furthermore, as highlighted in section 4.1 of Annex 6, issuers who issue non-equity securities in a continuous or repeated manner or as part of an offering programme tend to prefer the base prospectus, which is a more flexible document (i.e. within the validity of the base prospectus, issuers only have to file final terms with the NCA for any issuance of non-equity securities).

[528] All the persons that are referred to in Article 18(1)(a) of MAR
[529] See section 4.5 of Annex 6.
[530] See section 4.5. of Annex 6. Data from ESMA do not include the number or URDs that are filed every year. The number of new approvals is higher relative to the number of URDs which are eligible for filing only.
[531] ESMA report on EEA prospectus activity in 2020.
[532] See section 4.5 of Annex 6.

Furthermore, the URD is built on the registration document for equity securities, which is more onerous than the registration document for non-equity, which is mainly used in base prospectuses. Therefore, in the short term, improvements in the URD framework are expected to only marginally improve the take up of URDs.

***B) Harmonise the upper prospectus exemption threshold for small offers of securities to the public (no national discretion) and remove lower threshold.***

According to the key findings in Annex 6[533], the dual threshold regime for exempting small offer of securities to the public could be improved. According to the feedback received by stakeholders a possible measure would be to set out a unique threshold harmonized at EU level, taking as reference the average threshold proposed by stakeholders (EUR 12 million), also considering that about half of the EEA Member States are already aligned to the current upper threshold (EUR 8 million) and about an additional quarter set out a threshold at EUR 5 million. Furthermore, rules on how the threshold applies should be clarified, also taking into account the explanation provided by ESMA in its response to the targeted consultation. In that regard, the lack of clarity of the current provision resulted in some Member States exempting every single offer of securities that an issuer makes below the applicable threshold. It should therefore be clarified that the new harmonised exemption threshold refers to the total aggregated consideration of all offers of securities to the public that an issuer has made in the 12 months preceding the start date of a new offer. In the MS that are currently exempting any issuer's offer below the applicable threshold, this clarification is expected to reduce the overall number of offers exempted, even if the harmonised threshold is increased.

Having the same rules in place across the EU concerning the threshold for exempting small offers of securities to the public would contribute to the Capital Markets Union project, as the current system based on a dual threshold is fragmented and extremely confusing, as reported by several stakeholders. Furthermore, 47% of Member States have already adopted the maximum threshold of EUR 8 million and 27% of Member States the second highest threshold of EUR 5 million[534]. Most Member States tend to favour the upper threshold range. It is not possible to quantify how many offers to the public and their total consideration are being exempted below the various thresholds set out by the Member States, as the ESMA's prospectus register only gathers data relating to offers for which a prospectus was approved. However, it is considered that aligning the lower threshold to the upper one would not have an impact to large issuers who do not generally offer securities on such a small scale. On the contrary, small issuers, including SMEs, could benefit from substantial lower regulatory costs. Based on ESMA's data for 2021 on the considerations of offers of both equity and non-equity securities with an approved prospectus, and limiting the analysis to Member States that have set an exemption threshold below EUR 8 million, it emerges that the number of cases where the average consideration of offers reported as a single value[535] for each currency is less than EUR 8 million[536] is very marginal compared to the total number of offers approved in those Member States. This is in line with the analysis that was carried out in the IA for the proposal for a Prospectus Regulation[537], which indicated that at least 3% of approved

[533] See section 4.6 of Annex 6.
[534] See section 4.5 of Annex 6.
[535] Not as a maximum value or as a range.
[536] Values in currencies other than euro were converted in Euros and subject to fluctuations linked to the evolving exchange rate
[537] SWD(2015) 255 final (pages 21 and 45), available at: EUR-Lex - 52015SC0255 - EN - EUR-Lex (europa.eu)

prospectuses in 2013-2014 would have fallen out of scope with an exemption threshold set at EUR 10 million, percentage that would increase to at least 6% with a threshold set at EUR 20 million. Therefore, aligning the existing lower threshold to the upper threshold is considered to strike the right balance between reducing burden and excessive costs for issuers while preserving investor protection.

***C) Reduce the current minimum six day-period between the publication of a prospectus and the end of an offer of shares.***

According to the key findings in Annex 6[538], and the recommendations of the CMU HLF, minimum six day-period between the publication of a prospectus and the end of an offer of shares could be reduced to three days. The purpose of this change would be to facilitate swift book-building processes, especially in fast moving markets. Several stakeholders that responded to the dedicated question on the targeted consultation argued that the current six day-period reduces flexibility for an IPO and might push some issuers to choose private placements and therefore exclude retail investors. Therefore, decreasing the six day-period to three days may increase the attractiveness of the inclusion of retail investors in the IPOs. While it is not possible to quantify the potential increased retail participation to IPOs, this change does not add costs or burden to issuers or other market participants and it is expected to contribute to facilitating book building processes, reducing execution risk for many issuers particularly under volatile market conditions. Furthermore, this change is not expected to endanger investor protection, also in light of the increasing virtual issuers' interaction with investors that helps taking faster investment decisions.

***D) Make the CMRP amendments to the supplement regime permanent.***

According to the key findings in Annex 6[539], the temporary measures on supplements introduced by the CMRP (namely Articles 23(2a) and 23(3a) of the Prospectus Regulation) should be made permanent. As these measures are already in place, albeit being temporary, there is no cost associated with this action. The amendment will provide clarity for investors and for financial intermediaries regarding the fulfilment of the obligation to make contact concerning a supplement to the prospectus. Furthermore, it could be envisaged to consider whether further clarify the obligation for financial intermediaries to contact investors when a supplement is published, taking into account the feedback from the targeted consultation of both stakeholders and ESMA, including the possibility to specify that financial intermediaries are required to contact investors, under the conditions laid down in Article 23(3a), only by electronic means (given the short timeline to do so).

***E) Introduce a reference to environmental, social or governance (ESG) matters in the empowerment for the Commission to adopt delegated acts to lay down the format and content of the prospectus.***

Taking into account recital 7[540] of the Regulation (EU) 2021/337 of the European Parliament and of the Council (CMRP Regulation) that amended the Prospectus

[538] See section 4.1 of Annex 6.
[539] See section 4.8 of Annex 6.
[540] Information on environmental, social and governance (ESG) matters by companies has become increasingly relevant for investors in order to measure the sustainability impact of their investments and to integrate sustainability considerations in their investment decision-making processes and risk management. Companies, as a result, face increasing pressure to respond to demands from both investors and credit institutions on ESG matters and are required to comply with multiple standards for ESG disclosures, which are

Regulation, a reference to potential ESG features could be introduced in the empowerment for the Commission to adopt delegated acts to lay down the format and content of the prospectus, in particular in cases where such features are foregrounded and the security is advertised as taking into account the ESG factors or pursuing the ESG objectives. This would provide a sound legal basis for the Commission to develop a Delegated Act amending Commission Delegated Regulation (EU) 2019/980 to set out a list of additional information ("a building block") to be included in the prospectus for securities that are advertised as taking into account the ESG factors or contributing to the ESG objectives (e.g. requirement to disclose in the use of proceeds section how the proceeds are used to finance or re-finance, in part or in full, new or existing ESG-related assets or projects). The purpose of such disclosures, which should be targeted and light touch to avoid creating excessive burden to issuers, would be to enhance the comparability, transparency and harmonization of information provided for such instruments and to help fight greenwashing. Such additional disclosures are considered to be mainly suitable for non-equity securities (in particular structured products), while for equity securities it is considered sufficient to require the incorporation by reference of the sustainability-related information published, where applicable, under Articles 19a and 29a of Directive 2013/34/EU, as amended by the upcoming Corporate Sustainability Reporting Directive (CSRD). This action would be in line with the announced action on prospectus disclosures[541] within Action 1(e) of the Strategy for Financing the Transition to a Sustainable Economy[542], published in July 2021.

While at this stage it is not possible to quantify the additional costs stemming from the introduction of the above-mentioned additional disclosures for non-equity securities, which will have to be laid down in a future Delegated Act, with the possibility to request a technical advice from ESMA, there is a clear objective to keep additional costs for issuers of non-equity securities as low as possible. On the other hand, issuer of equity securities will only be required to incorporate by reference information that they have already published and therefore additional costs are expected to be minimal, also compared to the importance of such information for investor protection and to fight against greenwashing.

***F) Amend the currently unworkable equivalence regime.***

It would be considered whether, in accordance with the key findings in Annex 6[543], the current equivalence framework laid down in Article 29 of the Prospectus Regulation should be amended, for example by adjusting equivalence criteria. Furthermore, it could be reflected on whether the equivalence regime should be made more efficient by allowing third country issuers, in presence of an equivalence decision, to only file a prospectus approved by a third country authority with the relevant EU national competent authority. This would allow third country issuers to achieve significant cost

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often fragmented and inconsistent. Therefore, for the purpose of improving companies' disclosure of sustainability-related information and harmonising the requirements for such disclosure provided for in Regulation (EU) 2017/1129, while also taking into account other Union financial services law, the Commission should, in the context of the review of Regulation (EU) 2017/1129, assess whether it is appropriate to integrate sustainability-related information in Regulation (EU) 2017/1129 and assess whether it is appropriate to make a legislative proposal in order to ensure coherence with sustainability objectives and the comparability of sustainability-related information across Union financial services law.

[541] "Within the framework of the Prospectus Regulation and over the course of 2022, the Commission will introduce targeted prospectus disclosures for green, social and sustainable securities to enhance the comparability, transparency and harmonization of information provided for such instruments and to help fight greenwashing."

[542] SWD(2021) 180 final. See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0390

[543] See section 4.9 of Annex 6.

savings by filing with the relevant EU NCA an already approved and valid prospectus for offering securities in the EU or seeking admission to trading on an EU regulated market, (e.g. dual listed issuers). An increased presence of third country issuers on EU markets might render them more attractive for investors. Furthermore, in the event of reciprocity of an equivalence decision, EU issuers could also more easily offer securities or dual list on a third country market by using an approved and valid EU prospectus.

The impact of a workable equivalence regime cannot be estimated, however it is considered to be rather marginal. This consideration is based on the fact that Article 28 of the Prospectus Regulation already allows third country issuers to offer securities to the public in the EU or seek admission to trading of securities on EU regulated markets by drawing up a prospectus in accordance with the Prospectus Regulation and request its approval by the relevant EU NCA[544]. Consequently, there might be limited appetite from third countries to go through the process to request an equivalence decision, especially in case third country prospectus rules are significantly different than EU rules. Nevertheless, there is merit in making the equivalence regime workable in order to provide the Commission with the possibility to take an equivalence decision, which is currently impossible due to several shortcomings affecting Article 29 of the Prospectus Regulation.

**3. Clarify dual listing**

The rules on dual listing in MiFID II are currently unclear and not fully understood by issuers. In their final report the TESG recommended to provide 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 SME growth market may on their own request demand to be admitted to trading on another SME growth market. Furthermore, in the public consultation, a large majority (60%) of respondents stated that Article 33(7) of MiFID II would benefit from further clarification in level 1 to ensure an interpretation whereby the issuers themselves can request a dual listing. A clarification to Article 33(7) of MiFID II may therefore be considered to increase the legal clarity regarding dual listing for issuers.

[544] See section 4.9 of Annex 6.

# ANNEX 11: ACCOMPANYING MEASURES ON MARKET INTEGRITY – CROSS-MARKET SURVEILLANCE OF ORDERBOOK DATA

## 1. Introduction

While not narrowly related to regulatory impediments for issuers on capital markets, the targeted measures proposed in this annex nonetheless directly contribute to improving the integrity of capital markets in the EU by improving the level of cross border market surveillance and therefore increasing the trust in EU market and, ultimately, their attractiveness for investors.

Increasingly, enforcement cases by national competent authorities show that market manipulation schemes are no longer limited to the reference market of financial instruments. It appears, therefore, appropriate for competent authorities to be in a position to actively monitor behaviours on financial instruments under their jurisdiction regardless the location of the trading platform across Europe on which the activity is conducted. This in turn makes the EU a more attractive listing market. Trends in trading patterns clearly show that cross-market activity will continue to increase in the coming years. Without order book information from platforms located in other jurisdictions, it would be virtually impossible to tackle cross-border cross-market manipulation. Manipulation can increasingly take place via several instruments (cross product) and via platforms (cross market) located in several countries (cross border).

Under Article 38 of MAR, the Commission was specifically required to assess the possibility of establishing a Union framework for cross-market order book surveillance in relation to market abuse. To support the Commission's assessment, ESMA has provided an analysis of possible policy actions in its report on the review of MAR[545]. Building on that input, the Commission has conducted further analysis on the subject matter and conducted a series of interviews with stakeholders relevant for this initiative.

To better understand the issue of cross-border sharing of data, it is useful to have a good overview of the current state of play – how order book data is currently handled intra-jurisdiction, and how it is exchanged cross-jurisdictionally. This is provided in Annex 6, section 2.4, of the evaluation. In a nutshell, under the current regulatory framework, order book data is stored by trading venues and can be requested by their NCAs. However, order book data is only standardised in terms of content and not format, which is neither effective nor efficient for supervisory purposes. This was confirmed by interviews with several NCAs.

In line with its mandate to explore the establishment of cross-market order book surveillance framework, having received advice on the subject matter from ESMA[546], the Commission is considering to propose the measures set out below, with the reasoning as follows. The proposed framework, by strengthening the integrity of European financial markets, can make a positive contribution to the objectives of the Listing Act initiative.

## 2. Standardisation of orderbook data formats

This measure would go beyond the current requirement to standardize of the content of orderbook data by also mandating that trading venues share such data with NCAs in an

[545] ESMA Report on the MAR review, 23 September 2020, ESMA70-156-2391, p 128 et seq
[546] ESMA Report on the MAR review, 23 September 2020, ESMA70-156-2391, see in particular p 128 et seq

electronic and machine-readable form, using a prescribed format (to be specified in a delegated act). Concretely, standardization would be achieved by broadening the current mandate for RTS 24, stipulating that in addition to the details of order data to be maintained by trading venues, ESMA should now also specify the format that should be used for sharing such data.

The standardization of the format has been unequivocally recommended by ESMA, which deemed it a necessary first step for any future initiatives relating to mandatory reporting of orderbook data. As such it is an essential element of any framework for an efficient cross border exchange of that data. ESMA noted that standardization of data format would make it easier for NCAs to analyse order data requested from non-domestic NCAs and has already started work in this field. And while trading venues would have to invest human and technological resources to establish process for complying with mandated data formats, standardization would have the positive effect of allowing them to use uniform recording and reporting systems with any NCA in the EU, thus avoiding having to comply with divergent national practices across the EU. The impact of the adaptation of the current reporting systems cannot be precisely estimated.

**3. Mandatory exchange of orderbook data for markets with a cross-border dimension**

Level 1 would need to be amended to lay down mandatory sharing of order data between those NCAs whose markets in specific financial instruments are interconnected (and therefore more prone to cross-market manipulation). The financial instruments in scope of such mandatory sharing scheme could be initially limited to only those for which there is more interconnections (e.g. shares, bonds and futures). Level 2 would have to set out the criteria for establishing that specific markets are demonstrably linked, and potentially further specify the exact scope of the instruments covered. ESMA could be mandated to make the assessment of which markets are demonstrably linked. NCAs supervising interconnected markets would have to establish arrangements to share order data between them. This could be paired with a possibility for NCAs that might receive data to opt out from the mandatory data sharing scheme, where they provide a reasonable justification to do so. ESMA could be attributed the role of facilitating and coordinating exchange of order data, which will arguably become more important in view of the expected uptick in sharing order data cross border.

This approach would imply moving away from the current model of exchange of information under Article 25(2) of MIFIR[547] and Article 25 of MAR[548]. In practice, this framework has resulted in a system whereby NCAs typically exchange information on orderbooks on an *ad hoc* basis when such data is related to a specific investigation into a suspected market abuse case. The Commission Services have conducted interviews with several NCAs[549] and concluded that this mechanism is not without frictions, with anecdotal evidence showing that requests often need to be related to and justified by a specific investigation – whereas NCAs need this data precisely to be able to detect indicative signs of market abuse that will form a basis for a more in-depth investigation into potential market abuse.

[547] Specifies ESMA's coordination role in cross-border sharing of orderbook data.
[548] Establishing a general framework for cooperation between NCAs for the purpose of market abuse surveillance.
[549] These NCAs were from Member States with larger capital markets. They were selected because due to the size of their markets and the economy, the instruments issued in those countries or related instruments (derivatives) are more likely to be also traded on non-domestic markets. These NCAs are therefore more likely to request non-domestic data for market surveillance purposes.

Consequently, the Commission Services is of the opinion that adjustments to the current mechanism for exchange of information between NCAs are needed to allow those NCAs that wish to analyse such data systematically can obtain it more easily – without needing to justify such data requests with an ongoing investigation. The Commission Services are also mindful that different NCAs employ diverging market surveillance processes and that not all of them have the capacities or the need to systematically analyse order data. On the other hand, a number of NCAs have bilaterally signalled that regularly receiving both domestic and related cross-border order data would help them in carrying out a more robust supervision of their markets. In its report on the review of MAR[550], ESMA itself highlighted that a reinforced cooperation framework to facilitate exchange of order book data between NCAs whose markets are more interconnected would be appropriate, recognizing the importance of facilitating these data flows cross-border to improve the level of market surveillance in the EU. At the time the report was issued, in 2020, ESMA stopped short of recommending mandatory reporting of data. However, the Commission Services are of the opinion that two years after, and in the context of increased digitalization of the economy spurred by the COVID pandemic, the time is ripe to take a meaningful step forward stepping up the level of cross market order data surveillance. In a world where an increasing number of NCAs is using automated surveillance tools, it is important to equip them with the necessary data to perform their mandate. Several NCAs with experience in orderbook data surveillance have bilaterally flagged that granting them a more regular access to order data on fungible or related instruments[551] which are traded in multiple markets and jurisdictions would be an important tool to detect cross border manipulative behaviour. Therefore, the proposed regime would require NCAs to establish arrangements to exchange order data for markets in financial instruments that are demonstrably linked. Level 2 legislation should further specify what type of correlations between markets in specific products should exist to show demonstrable link, focusing in particular on same securities (notably shares, bonds and futures) traded across different jurisdictions or situations where derivatives are traded in one jurisdiction and their underlying in another. Level 1 legislation could further ensure proportionality by specifying that data should be exchanged only with regards to a limited set of instruments – focusing on most liquid ones, which can be gradually expanded over time, as NCAs gain more experience and ameliorate processes for data sharing and analysis, and for those markets that have a cross-border dimension.

While it is difficult to measure is the impact of the creation of such framework, though the expected costs seem reasonable.[552]It seems important to note also that within ESMA a pilot project is already being established on this topic, and that a majority of authorities have expressed interest and support for such a development.

[550] ESMA Report on the MAR review, 23 September 2020, ESMA70-156-2391, paragraph 569.

[551] For example, the price of a share traded in one jurisdiction can be manipulated to affect the price of the same share traded on a different trading venue in another jurisdiction. In the same vein, bad actors can manipulate price the price of a security with the specific goal of affecting the price of its derivative instrument, traded in a different jurisdiction. Being able to detect patterns in orderbook activity on both markets can therefore be essential in identifying market abuse.

[552] According to an NCA, the order of magnitude of development of such a system could be, between 75k€-200k€. Then storage costs are no longer a substantial cost at the time of Big Data (<20 k€). There are also "on the run" operating costs (operational monitoring of files, IT problems) but not major either (<20k€).

# ANNEX 12: OUT-OF-SCOPE DRIVERS

## 1. Tax treatment

The TESG noted that it is up to national governments to put in place tax incentives that could favour the development of capital markets, as they are deemed essential for the growth of the companies that drive the EU economy. Many studies[553] echoed the TESG's conclusions and the Commission recognises their potential benefits for the attractiveness of public markets for companies.

Furthermore, the Commission recognised[554] in its 2020 CMU Action Plan[555] that a significant burden ascribed to taxation is caused by divergent, burdensome, lengthy and fraud-prone refund procedures for tax withheld in cases of cross-border investment and proposed, subject to a positive impact assessment, to address the problem by introducing a common, standardised, EU-wide system for withholding tax relief at source. This action, if and when taken, should contribute to more cross-border investment in the EU and a wider investor base for listed companies, positively affecting companies' liquidity on EU public markets.

## 2. Debt/equity bias

Equity is particularly important for fast-growing innovative companies in their early stages and scale-ups willing to compete globally. The debt bias in taxation needs to be addressed to remove undue fiscal incentives for debt financing. The asymmetric tax treatment of financing costs induces a bias in investment decisions towards debt financing which can contribute to an excessive accumulation of debt for non-financial corporations. Data shows that in 2019[556], total indebtedness of non-financial corporations represented 99.8% of the EU-27 GDP. Over-indebtedness could threaten the stability of the financial system and increase the risk of bankruptcies, which would in turn increase unemployment.

The CMU HLF highlighted that as long as debt continues to be subject to preferential tax treatment, all other conditions being equal, market operators would continue to favour debt over equity. Following an unsuccessful attempt to address the issue as part of a bigger package of measures in the CCCTB proposal[557] back in 2016, in May 2022 the Commission tabled a new proposal to introduce deductibility of equity allowance from taxable profits. If (unanimously) agreed by Member States, the proposal would considerably lower the debt-equity bias and make equity financing – including through public listing – more attractive for companies. Over time, this should translate into more listings in the EU.

## 3. Access to company information

Fragmented access to scattered company information dissuade cross-border and global investment and puts in particular smaller national capital markets at a disadvantage. In

[553] Oxera study, 5417__How_to_make_Stock_Markets_more_attractive_for_companies__(bolsasymercados.es), European-IPO-Report-2020.pdf (fese.eu)
[554] Similarly, the Oxera study notes that inconsistent and complex national rules and procedures in applying the withholding tax can be burdensome for investors wishing to engage in cross-border securities transactions.
[555] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Capital Markets Union for people and businesses-new action plan, COM(2020) 590 final
[556] the_debra_initiative_dg_taxud.pptx (live.com)
[557] Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB), COM(2016) 683 final 2016/0336 (CNS)

the ESAP Impact assessment[558], published together with a proposal to create the ESAP, the stakeholders consulted (preparer-users, users, regulators and other stakeholders) reported that they experienced difficulties in accessing information of relevance for the financial services and capital markets, including information which market participants and other entities must publish pursuant to EU law. Furthermore, the Business Registers Interconnection System (BRIS), set up by the Company Law Directive, is a mandatory interconnection of the EU business registers that allows EU business registers to exchange information on cross-border company events. It allows citizens, entrepreneurs and entities to obtain company information on more than 20 million limited liability entities, including a set of information free of charge, in all EU languages.

The CMU HLF[559] noted that the lack of easily accessible, reliable, understandable and comparable public information is one of the reasons why companies, in particular in smaller Member states, struggle to attract investors. Furthermore, in the Oxera study[560], visibility of companies associated with being a public company was recognised as a potential benefit of listing.

Once agreed on by the co-legislators, the proposal on ESAP (Action 1 of the 2020 CMU Action Plan), together with BRIS, should contribute to a better access to company data, including on SMEs, for investors, allowing for more and more cross-border investment in the EU and underpinning stronger liquidity in publicly traded securities of EU companies.

**4. Lack of retail investor participation**

Level of retail investor participation in capital markets remains very low compared to other economies, which, in turn, deprives EU companies of much needed long-term investment. The lack of retail investor participation is linked to the insufficiently developed risk culture among EU citizens who are known to be more risk-averse than citizens in some other jurisdictions are.

The TESG[561] emphasised that the EU legislators should give priority to measures incentivising savers to turn into investors, supporting the emergence of an investment culture, and giving access to segments of capital markets currently hardly accessible to retail investors. The Commission's ongoing efforts to increase the level of financial education in the EU, including by developing an EU financial competence framework for adults, should foster EU citizens' better understanding and hence higher trust in EU capital markets (Action 7 of the 2020 CMU Action Plan). Furthermore, the upcoming Retail Investment Strategy, scheduled for adoption in 2023, would aim to adapt the EU retail investment rules, for example, to enable these investors to make better-informed investment decisions, have access to more suitable products and benefit from a higher quality of advice (Action 8 of the 2020 CMU Action Plan). Jointly, these measures should increase retail participation and strengthen the investor base for companies listed on EU public markets.

[558] EUR-Lex - 52021SC0344 - EN - EUR-Lex (europa.eu)
[559] 200610-cmu-high-level-forum-final-report_en.pdf (europa.eu)
[560] Oxera-study-Primary-and-Secondary-Markets-in-the-EU-Final-Report-EN-1.pdf
[561] Final report of the Technical Expert Stakeholder Group (TESG) on SMEs - Empowering eu capital markets - Making listing cool again (europa.eu)

## 5. Narrower institutional investor base compared to other developed markets

A number of studies and stakeholders[562] point to a sub-optimal investment situation for SME IPOs. In the Commission public consultation accompanying the SME growth markets proposal[563], a large majority of respondents already identified the lack of retail and institutional investors as an important or very important factor when trying to explain the weakness of the SME IPO stage. A study[564] found that a further constraint is that SME IPOs on many markets are 'below the radar' for many large institutional investors, i.e. the risk-reward ratio and the costs of research to identify and screen investments in smaller firms may not be justified by the likely returns.

The set-up of the SME IPO fund[565], under the InvestEU programme, aims at anchoring institutional investment in SME IPO in the EU and should underpin stronger investors' interest in small-cap listings.

Furthermore, the relative lack of size of institutional investors in the EU, including pension funds and investment funds, when compared to other jurisdictions, also represents an issue. For example, pension assets in the EU27 are a third as big relative to GDP as in the UK and one fifth as large as in the US.[566]

## 6. Re-equitisation of funding structures

The CMU Action Plan noted that the strength of the post-COVID-19 economic recovery will crucially depend on the availability of sufficient funding for EU companies. The IMF and ECMI estimated that Europe has an equity deficit of €600 billion, which is significant compared to other jurisdictions, notably the US.[567]

The corporate sector will enter the recovery with higher debt levels and will need more equity investment. A re-equitisation of Europe's companies and financial landscape is one of the immediate priorities, especially in the face of the Covid-19 crisis.[568] It would ensure EU firms are put on a structurally sound footing and help avoid overreliance on debt, which could cause financing issues for companies in the future. Incentivising institutional investors to make more long-term investments is instrumental to supporting re-equitisation in the corporate sector.

The Commission's amendments to CRD/CRR[569] and Solvency II[570] put forward last year, among others, aim to encourage more long-term and equity financing from institutional investors in line with the objectives of the 2020 CMU Action Plan (Action 4).

[562] See for instance: Kraemer-Eis, Helmut; Lang, Frank (2017): Access to Funds: How Could CMU Support SME Financing?; FESE Blueprint, Capital markets Union by 2024 – A vision for Europe (2019); European IPO Report 2020 European-IPO-Report-2020.pdf (fese.eu); Bruegel EU support for SME IPOs should be part of a broader package that unlocks equity finance EU support for SME IPOs should be part of a broader package that unlocks equity finance | Bruegel

[563] Public consultation on building a proportionate regulatory environment to support SME listing | European Commission (europa.eu)

[564] Microsoft Word - DG ECFIN Revised final report_EC template (CSES 23 Nov 2020) updated.docx (europa.eu)

[565] annex-iv-ipo-addendum-termsheet.pdf (eif.org).

[566] Asimakopoulos P, Hamre E.& Wright W, a new vision for eu capital markets.

[567] cmu-implementation_the-eurofi-high-level-seminar_paris_february-2022.pdf.

[568] Time to deliver on the Capital Markets Union | AFME.

[569] Banking package | European Commission (europa.eu).

[570] Insurance rules' review: encouraging solid and reliable insurers to invest in Europe's recovery | European Commission (europa.eu).

## ANNEX 13: OTHER ONGOING INITIATIVES CONTRIBUTING TO IMPROVING PUBLIC MARKETS' ECOSYSTEM

Previous attempts to address the regulatory impediments that hold back companies' access to public markets were either limited in scope or aimed at providing companies with a temporary relief in the Covid-19 context. The 2019 SME Listing Act was strictly confined to SME growth markets to respond to the MiFID II objective of 'facilitating access to capital for smaller and medium-sized companies' through SME growth market. The SME Listing Act therefore only introduced technical amendments to ensure that the 'SME growth market' label is used by multilateral trading facilities with a focus on SMEs across the EU. For this reason, the review carried out in 2019 did not consider regulatory conditions for all SMEs or other companies listed on regulated markets. It thus did not include a comprehensive assessment of the legislation applicable to regulated markets. Later, the CMRP introduced targeted amendments to encourage investments and facilitate a more rapid re-capitalisation of companies, however only in the Covid-19 context. Given the strong recovery focus of the package, in some cases, the amended rules apply only for a limited period of time. Moreover, given its urgency, the CMRP was not accompanied by a full-fledged Impact Assessment.

Therefore, there is still a need for legislative intervention that has been outlined in the main body of the IA. However, the identified preferred policy options cannot fully revive public capital markets in the EU on their own. They should be considered only one part of a broader package of measures outlined in the CMU Action Plan and put forward in recent months with a view to contributing to improving public markets' ecosystem. Any changes proposed as a result of this analysis should therefore be understood as a step in the right direction, and not as a single remedy in itself.

| Out of scope driver | Ongoing initiative | Description[571] |
|---|---|---|

[571] The table aims to show how the ongoing measures would address the out of scope drivers and help increase the attractiveness of public markets. It also explains how the ongoing measures contribute in solving the problem of low attractiveness of public markets.

| | | |
|---|---|---|
| Debt/equity tax bias | **The Debt Equity Bias Reduction Allowance (DEBRA)** | DEBRA aims to mitigate the tax induced debt-equity bias in corporate investment decisions. The initiative will introduce an allowance for equity-financed new investment, to mitigate debt bias. The whole scheme will incorporate a number of robust anti-tax avoidance rules to ensure tax fairness. This would further incentivise investment in equity instrument as opposed to debt, which would, in turn, bring more liquidity to public markets. |
| Access to company information | **European Single Access Point (ESAP)** | ESAP aims to tackle the lack of accessible and comparable data for investors, which would make companies more visible. Seamless, EU-wide access to company data in comparable digital formats aims to reduce information search costs for cross-border investors and aims to widen the investor base for companies. This would enhance companies' visibility towards investors. |
| Low level of retail investor participation | **The retail investment strategy for the EU** | The retail investment strategy for the EU will focus on ensuring a coherent regulatory framework to empower consumers to take financial decisions and benefit from the internal market. It aims to address the challenge of low capital market participation rates in the EU. The strategy aims to assess the entire retail investor journey and will put the investor at the heart of EU policies in the spirit of "an economy that works for the people". This would in turn ensure that retail investors are equipped to access capital markets. |
| Narrower institutional investor base compared to other developed markets | **The EU SME IPO Fund** | The EU SME IPO Fund would help address a number of issues identified, such as lack of investors and liquidity in SMEs' public equity and the reluctance of institutional investors to invest in IPOs that are under a certain level of market capitalisation. The added liquidity in small tickets could address another challenge, namely the limited involvement of retail investors and pension funds in SME IPOs. |
| | **CRR/CRD** | The role of banks as institutional investors can be further increased by facilitating their investment and enhancing their ability to build on their large customer bases. Allowing for a more adequate interpretation of the Basel III definition of 'speculative unlisted equity exposures' would ensure banks' ability to invest in long-term equity on terms which are economically efficient and prudentially appropriate. |
| | **Solvency II** | The participation of insurers in long-term investments, in particular equity, can be supported by ensuring that the prudential framework appropriately reflects the long-term nature of the insurance business and mitigates the impact of short-term market turmoil on insurers' solvency. Lowering equity capital charges under Solvency II should remove one important bias against equity investment and ensure institutional investors can |

| | | |
|---|---|---|
| | | invest in equity. |
| Tax treatment | **Withholding tax** | The objective is to make a standardised relief at source system the principal mechanism for withholding tax relief. Where relief at source is not impossible, withholding tax reclaim procedures will be further standardised and simplified to facilitate reclaim. In addition to becoming more efficient, the improved and streamlined procedures should also enable national tax authorities to better fight tax avoidance and tax fraud. |

# ANNEX 14: PAST INITIATIVES

In order to support jobs and growth in the EU, facilitating access to finance for companies, especially SMEs, has been a key goal of the Capital Markets Union (CMU) from the outset. Since the publication of the CMU Action Plan in 2015[572], some targeted actions were taken to develop adequate sources of funding for SMEs through all their stages of development. In its Mid-term Review of the CMU Action Plan[573] published in June 2017, the Commission chose to raise its level of ambition and strengthened its focus on SME access to public markets. Importantly, the Commission also recognised that there was no *'silver bullet'* to restore the markets of SME initial public offerings (IPO) across the EU. The Commission has committed to publishing *'an impact assessment that will explore whether targeted amendments to relevant EU legislation could deliver a more proportionate regulatory environment to support SME listing on public markets'* which constituted the regulatory framework for the SME listing package. In May 2018, the Commission published a proposal[574] aiming to reduce the administrative burden and the high compliance costs faced by SME growth market issuers while ensuring a high level of market integrity and investor protection; foster the liquidity of publicly listed SME shares to make these markets more attractive for investors, issuers and intermediaries; and facilitate the registration of multilateral trading facilities as SME growth markets. The package was adopted in November 2019.

The legislative proposal "SME listing package" mandates the Commission to set up an expert stakeholder group to monitor the functioning and success of SME growth markets. In May 2021, the Technical Expert Stakeholder Group on SMEs (TESG) published their final report[575] with twelve concrete recommendations to the Commission and Member States to help foster SMEs' access to public markets. It builds on the work already undertaken by the CMU High Level Forum (HLF)[576], the Oxera study on Primary and Secondary Equity Markets in the EU[577], as well as ESMA's MiFID II review report on the functioning of the regime for SME growth markets[578]. It is also worth noting that the UK has identified similar issues and a need for action in the UK Listing Review[579], led by Lord Hill and published in 2021.

[572] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Action Plan on Building a Capital Markets Union COM(2015) 468 final
[573] Communication from the Commission on the mid-term review of the capital markets union action plan ({SWD(2017) 224 final} and {SWD(2017) 225 final} – 8 June 2017)
https://ec.europa.eu/info/sites/info/files/communication-cmu-mid-term-review-june2017_en.pdf
[574] Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets COM(2018) 331 final
[575] Final report of the Technical Expert Stakeholder Group (TESG) on SMEs - Empowering eu capital markets - Making listing cool again (europa.eu)
[576] 200610-cmu-high-level-forum-final-report_en.pdf (europa.eu)
[577] Oxera-study-Primary-and-Secondary-Markets-in-the-EU-Final-Report-EN-1.pdf
[578] ESMA publishes Final Report on SME Growth Markets (europa.eu)
[579] UK Listings Review - GOV.UK (www.gov.uk)

In the meantime, progress has also been made in the context of CMU to make it easier and cheaper for smaller companies to access public markets, notably with the creation of the alleviated 'EU Growth Prospectus' through the revised Prospectus Regulation[580].

Furthermore, following the COVID-19 crisis, the Commission published the Capital Markets Recovery Package (CMRP)[581], which comprised of targeted amendments to capital markets and bank regulation, with the overarching aim to make it easier for capital markets to support European businesses to recover from the COVID-19 crisis. The suggested changes to the capital market rules also aimed at alleviating regulatory burden and complexity for investment firms and issuers. To facilitate capital raising, issuers and investors were equipped with the right tools to easily raise new capital on the one hand (achieved through the implementation of a new and shorter EU Recovery Prospectus) and easily get access to an increased investor base on the other hand (achieved through targeted changes to MiFID II).

Nevertheless, stakeholders expressed through various dialogues and previous public consultations[582] that more needed to be done on the regulatory side to ensure that SMEs could reap the full benefits of public markets.

In this context, the Listing Act should not be understood as a standalone measure that seeks by itself to make EU public capital markets more attractive. It should rather be analysed in conjunction with other existing and proposed initiatives (see Annex 13 for more details).

[580] EUR-Lex - 02017R1129-20211110 - EN - EUR-Lex (europa.eu)
[581] Capital markets union: Commission adopts package to ensure better data access and revamped investment rules | European Commission (europa.eu)
[582] Bilateral meetings with AFME, FESE, EuropeanIssuers, ICMA, SMEUnited, ICI Global, InvestEurope; TESG, CMU HLF, public consultations on the listing act, stakeholder workshops with issuers investors and exchanges.

# ANNEX 15: ANALYSIS OF SPACS

As part of this initiative, it was considered whether the Prospectus Regulation should be supplemented with additional disclosure requirements for SPAC issuers and with product governance rules for the sale of the SPAC securities to retail investors. Thanks to its distinctive features, mainly the need for to-be-merged companies not to comply with the full burden of an IPO listing process, SPACs could potentially be a means to foster better and quicker access to capital for companies with a growing potential, including SMEs, start-ups and scale-ups.

While in principle EU rules' harmonisation could foster more certainty for investors which would in turn improve the uptake of SPACs, this option was discarded at an early stage for the following reasons:

1. If globally the SPAC phenomenon has developed rapidly against the backdrop of declining small company IPO levels, its size remained fairly subdued in the EU. The number of SPAC IPOs have been steadily declining over the last decade in the EU, despite hikes in more recent years. In particular, 2021 saw a considerable (relative) increase in SPAC IPOs to 39 from 4 the year before[583] (with an issuance totalled around 8.56 billion USD in 2021 as opposed to 496.05 million USD in 2020584). However, this trend already came to a halt in the first half of 2022. It could be argued that market interest in SPACs has receded mainly because of deluded investors' expectations on non-realised acquisitions, fees, share dilution, too overstated financial promises and some scandals in the US[585].

   The EU SPAC IPO market is dwarfed by the size of the US SPAC IPO market that saw a total of 613 SPAC IPO listings in 2021, raising a total of 145 billion USD[586]. At this juncture, there are no indications that the EU market is likely to grow rapidly in the near future. It would thus appear disproportionate to put forward additional requirements on disclosures (and other investor protection measures), where SPAC securities concern only a limited number of investors and lacking clear evidence that the current EU SPAC disclosure in prospectuses falls short to sufficiently cater for their needs. Such an approach would also be contrary to the purpose of the proposed changes in the listing rules, which are aimed at reducing burden for issuers. Imposing new requirements would lead to an extra burden for SPAC issuers (with an unclear benefit to investors) and may ultimately stifle the prospect of any future growth of SPAC IPOs in the EU. On the other hand, a further relaxation of rules for sponsor companies does not seem to be aligned with the current trends in international markets where e.g. in the US the SEC is considering stricter rules for sponsors[587].

[583] https://www.whitecase.com/publications/insight/european-spacs-data-hub.
[584] Ibid.
[585] Spac boom is creating 'castles in the sky', Jim Chanos warns | Financial Times (ft.com) – June 2021
[586] https://www.statista.com/statistics/1178249/spac-ipo-usa/
[587] E.g. by suggesting to give SPACs an 18-month deadline to find a target and two years to close the deal.

ii) The option not to intervene should be further seen against the background of the recent ESMA's action in this area. In 2021, considering the temporary rise in SPAC IPOs at the time, ESMA took the initiative to release a statement[588] reminding the obligations of SPACs to satisfy the relevant existing regulatory requirements. ESMA's statement did not only aim to encourage coordinated action by NCAs regarding the scrutiny of the disclosure included in the SPAC prospectus, but also drew attention to the need to properly comply with the existing product governance requirements set out in MiFID II for manufacturers and distributors of SPAC shares and warrants.

In its statement, ESMA listed the relevant disclosure requirements under the Prospectus Regulation that a SPAC issuer would have to comply with. The statement further added four disclosure requirements arguably necessary to allow investors to make an informed assessment of the issuer and the securities and to ensure compliance with the Prospectus Regulation. It encouraged NCAs to focus their scrutiny on those requirements e.g. on alerting investors about possible risks linked to investing in SPACs (conflicts of interest; governance and possible dilution; shares, warrants and shareholder rights; information on the proceeds of the offer, on remuneration of the sponsors etc.).

ESMA concluded the statement by noting that both ESMA and NCAs would continue to monitor the SPAC activity in the EU to determine if additional initiatives were necessary to promote coordinated supervisory action aimed at preserving investor protection. Since the adoption of the statement back, however, no material issues related to investor protection have emerged, triggering no further action from ESMA or NCAs. Introducing additional disclosure in the Prospectus Regulation without clear evidence of any material issues or risk of a material nature related to SPACs in the EU would thus appear premature and disproportionate. Nevertheless, it would be important for ESMA and NCAs to continue monitoring SPAC activity in the EU to ensure that the current rules and guidelines remain appropriate.

2. The answers to the public consultation on the Listing Act show that, if a large majority of respondents consider that SPACs are an effective and efficient alternative to traditional IPOs, there are mixed views on whether additional measures should be taken, especially in the area of investor protection. While SPACs may potentially present some risks, especially for retail clients, these have not yet materialized. Some respondents stated in their responses that investment firms are already required under MiFID II to ensure that SPACs are not distributed to those investors for whom this product is not suitable. It would be important, however, that ESMA and NCAs keep on monitoring closely the sale and marketing of SPAC securities to ensure that investment firms rigorously comply with the current product governance rules and supervisory guidelines, and to properly detect any possible issues that would need further intervention.

   On the basis of these considerations, the Commission decided not to take action in this field as it considers that, in the current environment, the existing approach on SPACs

[588] ESMA statement on SPACs: prospectus disclosure and investor protection considerations. 15 July 2021

strikes the right balance between investor protection while not discouraging issuers/sponsors.