Finance Denmark response to EC Have-your-say on CMU Listing Act – amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014

FINANCE DENMARK

Memo

March 24, 2023
Doc: FIDA-1607961542-3-v1

Finance Denmark[1] welcomes the opportunity to give input on the EU Commission's Listing Act initiative and would like to provide the following comments.

Prospectus Regulation (2017/1129)

General comments

Finance Denmark supports the overall set of measures to make public markets more attractive for EU companies and facilitate access to capital for small and medium-sized companies. That said, it is important that legislators keep in mind that simplifying the listing rules for small and medium-sized companies cannot be on the costs of a high level of investor protection and the market integrity.

Finance Denmark is of the opinion that level playing field is important for issuers when it comes to the scrutiny and approval procedures of prospectuses by competent authorities. As ESMA also has stated in their Peer review report of the scrutiny and approval procedures of prospectuses by competent authorities there are some areas where issuers are not treated in the same way. It is of utmost importance, that there is an alignment and convergence in the way the national competent authorities assess the completeness, comprehensibility, and consistency of draft prospectuses for approval. For that reason, the legislator should be aware of not using words that can lead to different interpretations between the national competent authorities. For example, the proposed amended wording to Article 16 "A prospectus shall not contain risk factors that are generic, that only serve as disclaimers, or that do not give a sufficiently clear picture of the specific risk factors that investors are to be aware of", gives room for a wide interpretation, which does not strengthen level playing field and alignment.

Specific comments

We do not support the suggestion to limit the **number of pages (cf. Article 6(4))** in prospectuses that relates to shares. We do not believe that it is in the interest of investors and issuers to put restrictions on the issuer when describing the company and the risk factors. From an investor perspective, not having all the necessary information available in the prospectus due to a hard-set page limit could

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impair its informed investment decision. It is important to keep in mind that the prospectus is a legal document with legal liability attached to its content. A limitation in pages could result in an increase in litigation coming from lack of sufficient disclosure of the risk of which may mean that companies in the European Union will shun away from the capital markets and instead rely on financing provided by banks. Therefore, the issuer must not be forced to leave out important information due to restrictions on the number of pages.

Today issuers are not obliged to present the prospectus in a **standardised format**. Instead, if the issuer presents the information in a different sequence than presented in the Annexes to the prospectus regulation, a list of cross references shall be provided to the competent authorities upon request. We do not support the proposal that a prospectus shall be presented in a standardized sequence, **cf. Article 6(2)**. For example, for non-equity issues such as EMTN programmes, market participants are familiar with the current framework used for these with EMTN programmes already now following a fairly standard market practice format and sequence which have been in place for decades and it will be overly burdensome and costly to change/re-write the prospectuses into a new format, which does not seem to add any value. Alternatively, a standardized sequence can be required if the issue is targeted at retail investors with non-equity securities in low denominations, whereas for issues targeted institutional investors the issuer shall not be forced to use a specific sequence.

We are supportive to the suggestion of an **EU Follow-on prospectus (cf. Article 14b)** as a permanent replacement to the EU Recovery prospectus. On the other hand, we think SME issuers should have the option to freely choose between drawing up an **EU Growth issuance document (cf. Article 15a)** and a "normal" prospectus.

We also support the changes to **Article 20** where the Commission is empowered to adopt delegated acts, among other a **maximum timeframe** for a competent authority to finalise the scrutiny of the prospectus. We believe, this initiative will create level playing field for the issuer.

We also support the following changes:

- That issuers should no longer be required to rank the most material **risk factors (cf. Article 16).**
- The amendment of the **20% threshold in Article 1(5) to 40%** in respect of securities fungible with securities already admitted to trading and the extension of such exemption to also include offers to the public.

- That prospectuses only shall be drafted in an **electronic format (cf. Article 2)**.
- The amendment to **Article 21(1)** which shortens **the period from 6 to 3 working days** in relation to prospectus availability period with respect to initial public offers of shares.
- That issuers can draw-up the prospectus in **English only (cf. Article 27)**, except for the summary.

We support that issuer should **not be required to publish a supplement (cf. Article 19(1b))** for updating annual or interim financial information incorporated by reference in a base prospectus which is still valid. That said, we do not see the justification for requiring that information that is to be included in a prospectus, <u>shall</u> be incorporated by reference, **cf. Article 19 (1)(a)(i)**. Today it is optional to include by reference.

We also support the proposed change of increasing the **limit for exemption of prospectuses** from 8 million EUR to 12 million EUR, **cf. Article 3(2)(b)**. But again, we are concerned about giving each Member State the mandate to require other disclosure requirements at national level, since such a mandate could lead to differences between Member States.

We are not supportive of the **investor walk-away right**, **cf. Article 23(2)** in connection with supplements to prospectuses being published being extended from 2 to 3 working days since such extension may lead to uncertainty for a longer period of time about the final outcome of the relevant offer.

Further, we are not supportive with respect to the suggested new **Article 23, 4a** which **prohibits the introduction of a new type of security to a base prospectus** via a supplement. Such prohibition reduces the flexibility of issuers to issue a different kind of debt security in between updates of the base prospectus by publishing an approved supplement which includes all the necessary information with respect to such new kind of debt security and would mean that issuers would either have to do a full update of the base prospectus or prepare and publish an approved standalone prospectus for such issue with both such options meaning that the issuers will incur significant costs and require more work in preparing an updated new base prospectus or a standalone prospectus.

The proposal also touches upon **ESG** in prospectuses. We believe there is an inconsistent between **recital 23** and **Article 13(f)**. According to recital 23 the requirement only applies to equities whereas according to Article 13(f) it applies to both equities and non-equities. Further we would like to emphasize that in relation to **Article 13(g)** it is important that non-equity issuers which are covered by CSRD can refer to their CSRD reporting.

Finally, we would like to underline the importance of a sufficient **transitional period** of 24 months from the time where the delegated acts from the Commission are final. Writing a prospectus is not a trivial task, for which reason the issuers and the overall capital markets must be given sufficient time to adapt to the new regulation.

Market abuse Regulation (596/2014)

The suggested amendments to the Market Abuse Regulation are to a large extend positive and we would like to highlight the following:

- Changes to the **buy-back (cf. Article 5)** reporting obligations. Alternatively, the disclosure obligation for the issuer should remain and the reporting obligation to the competent authority should be removed, since the competent authority have access to the information from the issuer in the OAM (Official Appointed Mechanism).
- That the Commission has made it clear that the **market sounding (cf. Article 11)** regime is a mere option for the disclosing market participant to benefit from the protection form the allegation of unlawful disclosure of inside information. We would have welcomed if the Commission had taken the opportunity to further change the regulation and deleted the requirements to market sounding of information that is not classified as inside information. Information that is not inside information simply falls outside the scope of MAR.
- The increased threshold for **PDMRs (cf. Article 19)** and that certain specified transactions and activities are out of scope.
- Disclosure of **inside information** in a protracted process **(cf. Article 17)**. It is positive that it is clarified on Level 1 that issuers are not obliged to disclose all inside information to the public if the information related to intermediate steps of a protracted process and that the proposal narrow down the scope of disclosure obligation. We would also like to highlight the proposed changes to article 17(7) where it is clarified that the source must be *reliable*. We welcome and support this clarification.
- The definition of inside information **(cf. Article 7(1)(d))** which we see as a clarification of existing industry practice.

We do not support the proposed changes to **Article 17(4)(c)** and the text in **recital 61**, which requires the issuer to **notify the competent authority** immediately after the decision to delay disclosure is taken. Today the issuer is obliged to notify the competent authority immediately after the inside information has been made public. We do not see the need or the rationale for this proposal for which reason we do not support it.

Finance Denmark does not fully support the proposed changes to the **insider lists**, more specific **Article 18(1b)**. We do see a number of challenges with the practical implementation of this paragraph. For example, what are the requirements for a Member State to require an issuer to apply to the full insider list, can it be required for only a few issuers or will it have to be required for all issuers whose securities have been admitted to trading for at least 5 years, can a Member State change their opinion and not require a full insider list (in scope and out of scope)? Also, for issuers with securities listed in different jurisdictions it can be very complex to comply with different requirements in different Member States. We urge the Commission to elaborate more on this to ensure clarity for issuers and to ensure level playing field.

As we also mentioned in the MAR review in 2019, we are of the opinion that too much unnecessary information is included in the insider list and that this has resulted in administrative burden and costs. The main purpose with the information in the insider list template must be, that the information gives the national competent authorities the possibility to identify the relevant private individuals who have received inside information. I.e., only adequate, relevant data should be included in the insider list. We therefore would urge the Commission to have a closer look at all the required information in the template for the full insider list and assess whether all the information is necessary. By comparison in the TRS reporting the national identification number is assessed sufficient to identify a private individual.

Other issues - Investment firm's ability to execute client orders:
MAR Article 16(2) states that *Any person professionally arranging or executing transactions shall establish and maintain effective arrangements, systems and procedures to* <u>*detect*</u> *and* <u>*report*</u> *suspicious orders and transactions. Where such a person has a reasonable suspicion that an order or transaction in any financial instrument, whether placed or executed on or outside a trading venue, could constitute insider dealing, market manipulation or attempted insider dealing or market manipulation, the person shall notify the competent authority as referred to in paragraph 3 without delay.*

MAR recital 30 states that "*The mere fact that market makers or persons authorised to act as counterparties confine themselves to pursuing their legitimate busi-*

ness of buying or selling financial instruments or that persons authorised to execute orders on behalf of third parties with inside information confine themselves to carrying out, cancelling or amending an order dutifully, should not be deemed to constitute use of such inside information."

In Denmark we are in a situation where the Danish FSA has issued official guidelines on the interpretation of Article 16 in MAR. The Danish FSA is of the opinion that the mere execution of a client order will suffice as aiding and abetting and therefore a criminal offence where the investment firm/dealer has reasonable suspicion that the customer intent to commit market abuse. Finance Denmark believes that only an activity beyond the mere execution will suffice as aiding and abetting of a criminal offence. This view is supported in Article 16(2) where especially the obligation on dealers to report any suspicious activity by their customers in MAR Art 16 suggest that the mere execution by them of such orders cannot be illegal in itself as the reporting obligation would be contrary to the ban on self-incrimination that follows from human rights law. This understanding is further supported by recitals 30 and 39 and complements MAR Art 9, section 2, litra b. The intentions laid forth in recital (30), whereby investment firms are able to pursue their legitimate business of buying and selling financial instruments, provides a protection towards investment firms and its employees. Finance Denmark see a need that the above was explicitly expressed in an Article under MAR. This would prevent investment firms in some jurisdictions, e.g., as for Denmark, from being forced to implement more stringent order execution procedures than others, based on the fear that its employees and/or itself can be prosecuted for aiding and abetting to prohibited market abuse behavior from the mere loyal execution of client orders. By explicitly expressing the intentions laid forth in Article 16 and recitals 30 and 39 of MAR in an Article, the basis for a sufficient level of supervisory convergence will be provided.