ASSOCIATION FRANÇAISE DES MARCHÉS FINANCIERS

FINANCIAL MARKET PROFESSIONALS

LISTING ACT
EUROPEAN COMMISSION'S LEGISLATIVE PROPOSALS

AMAFI's position

ABOUT AMAFI

Association française des marchés financiers (AMAFI**)** is a trade organization working at national, European and international levels to represent financial market participants in France. It mainly acts on behalf of credit institutions, investment firms and trading and post-trade infrastructures and institutions, regardless of where they operate or where their clients or counterparties are located. AMAFI has 170 members operating in equities, fixed income and interest rate products, as well as commodities, derivatives and structured products for both professional and retail clients. Nearly one-third of its members are subsidiaries or branches of non-French institutions.

GENERAL OBSERVATIONS

On 8 December 2022, the European Commission published its Listing Act proposal, including a regulation amending the Prospectus and Market Abuse Regulations, a directive amending MIFID II and a directive on multiple voting shares. This proposal follows the consultation launched by the Commission in November 2021 on how to make public capital markets more attractive for EU companies and facilitating access to capital for SMEs.

AMAFI generally welcomes the reforms contained in the proposals and wishes to comment on certain points that deserve particular attention from its point of view. Before going into the details of the proposals that AMAFI intends to comment, the Association wishes to emphasise a few more general points.

Firstly, AMAFI would like to point out that legislative stability is essential. In choosing which changes to make, a balance should be struck between the expected added value of these changes, which may be minor, and the readjustments they entail for the entities concerned, which may be significant. This is true even when the changes are aimed at easing a burden. Thereby, the analysis of the costs and benefits of some of the proposals leads us to conclude that these are not desirable (see, for example, the order of presentation of the prospectus in paragraph related to the format of the prospectus).

As regards more specifically the Prospectus Regulation, AMAFI stresses the unanimous desire of the financial market professionals in France to maintain the possibility of drawing up prospectuses through the use of separate documents (the (Universal) Registration Document, a securities note and a summary). The introduction of two new simplified disclosure documents that issuers could use in certain situations, the follow-on prospectus (*art. 14b of the Prospectus Regulation*) and the EU growth issuance document (*art.*

15a of the Prospectus Regulation), should not challenge the possibility to draw a prospectus through the use of separate documents.

The Universal Registration Document is a source of good information and efficiency in the public offering process, which French financial market professionals use extensively. The time required by the national competent authority to process the review of an equity prospectus is reduced when the prospectus is made of a Universal Registration Document already filed with the authority and a securities note. As a consequence, the preparation time of such equity offering is shortened, which is a key criterion of the attractiveness of markets to raise financing. If this practice were to be called into question, it would mean a complete overhaul of the issuance process and investor information as currently practiced in France. AMAFI also stresses that the information documents published by listed issuers in the United States are very similar to the prospectuses made of separate documents of the Prospectus Regulation.

AMAFI welcomes the two new exemptions from the obligation to publish a prospectus proposed by the Commission, especially the 40% exemption of article 1.4.da and the 18 months exemption of article1.4.db of the Prospectus Regulation. These exemptions provide flexibility for issuers, who may choose to publish the necessary information in a format adapted to the transaction they are contemplating (press release, information document or voluntary prospectus), depending on the situation, when the exemption applies. They are beneficial as they do not lower investor protection since investors will benefit from information published by issuers as part of their disclosure obligations (esp. Transparency and Market Abuse Regulation) and as part of the disclosure expected towards investors who are solicited in equity funds raisings. It is important to note that the proposed scheme does not prevent listed issuers to publish a voluntary prospectus approved by the national competent authority if they consider it necessary.

To simplify and streamline the scheme, other regulations should be repealed or at least amended with requirements significantly reduced. This is the case for the delegated regulations requiring an information document to be published in case of the use of an exemption (e.g. in case of a merger). That information document is almost as extensive as a prospectus, with a requirement of prior confidential filing with the national competent authority for review. Conditions of information of shareholders are defined in other laws and regulations. Consequently, the use of the prospectus exemption should not be subject to the publication of any other document.

PROPOSED AMENDMENTS THE PROSPECTUS REGULATION

a. The format of the prospectus

The European Commission proposes to standardise the content of the prospectus and the order of presentation of the different sections. It also proposes to limit the number of pages of the prospectus. AMAFI does not support the proposal regarding the order of presentation. The Association, with the exception of one of its members who expressed a dissenting view, is also opposed to the limitation of the number of pages.

AMAFI notes that the sequence of information items provided for in the proposed changes to the EU Prospectus Regulation does not fit the usual order of items in standard international offering memoranda. Consequently, issuers may have to produce 2 different information documents which does not allow for simplification either for issuers or investors.

AMAFI notes that Article 9 of the Prospectus Regulation is not modified and therefore acknowledges that this constraint does not apply to Universal Registration Documents, which is critical especially for French issuers who use the Universal Registration Document as their annual report and, consequently, need this flexibility.

b. Risk factors

The European Commission proposes to remove the requirement that risk factors be described in order of importance in each topic (*art. 16 of the Prospectus Regulation*).

AMAFI warmly welcomes this proposal, which provides desirable flexibility for issuers and intermediaries.

c. Delays

The European Commission proposes to amend several delays in the Prospectus Regulation.

- *The publication of the prospectus from 6 to 3 days before the offer ends*

In the context of an initial public offering, the European Commission proposes to reduce the delay between the publication of the prospectus and the end of the offering from 6 to 3 working days (*art. 21.1 of the Prospectus Regulation*).

AMAFI welcomes this proposal, which increases flexibility that is critical especially in volatile markets.

- *2 to 3 days for investor's retraction in certain circumstances*

When the price or quantity of securities to be offered to the public cannot be published in the prospectus, the Commission proposes that investors have 3 days from the publication of the final price or quantity of securities to withdraw their acceptance (*art. 17.1a of the Prospectus Regulation*), as opposed to 2 days currently.

Also, the Commission proposes that in case of publication of a supplement, the investor has 3 business days instead of 2 to withdraw their acceptance (*art. 23.2 of the Prospectus Regulation*).

AMAFI believes that it is necessary to maintain the time limits at 2 days, which is more in line with the reduction of the time from 6 to 3 days between the publication of the prospectus and the end of the offering.

Moreover, the extension of the withdrawal period following the publication of the supplement from 2 to 3 days does not go well with the proposal to amend Article 3.3.a of the Prospectus Regulation, which provides that the supplement may be published on the issuer's website. Given the instantaneous nature of the information via publication on the website, the extension of the withdrawal period is not consistent.

To maintain this 2-day delay (rather than 3-day) is also critical in volatile markets.

d. Publication of a supplement

The European Commission proposes to add a paragraph to Article 17 of the Prospectus Regulation, pursuant to which, when the final offer price referred to in the first subparagraph differs by more than 20 % from the maximum price disclosed in the prospectus, the issuer will have to publish a supplement to the prospectus.

AMAFI does not support this proposal. Adding this requirement would imply a restriction on the terms of the offering, which does not fit with the simplification objective of all market stakeholders. The conditions for publishing a supplement to the prospectus as set out in Article 23 of the Prospectus Regulation, i.e. when there is a significant change to the information provided in the prospectus is sufficient and makes the addition of this paragraph unnecessary.

AMAFI suggests keeping the current provision of the Prospectus Regulation i.e. a withdrawal period limited to 2 days and no specific requirement to publish a supplement to the prospectus linked to the final price.

e. Incorporation by reference

The European Commission proposes the mandatory incorporation by reference of certain information in the prospectus, which is currently optional (*art. 19 of the Prospectus Regulation*).

AMAFI is not in line with this proposal. We would like incorporation by reference to remain optional so issuers may keep the flexibility not to incorporate by reference any information. Also, clarification is necessary in respect of the functioning of the newly introduced provisions in art. 1b and whether or not the intention of this article is to allow issuers to no longer publish any supplement for updating the annual or interim financial information incorporated by reference.

f. Grandfathering clause

The proposal does not seem to foresee a grandfathering clause allowing issuers time to adapt to the changes in the regulation. We invite the European colegislators to explicitly foresee a grandfathering clause.

PROPOSAL TO AMEND THE MARKET ABUSE REGULATION

a. Inside information

- *Obligation to disclose inside information*

The exemption to disclose inside information for intermediate stages of a "protracted process" is welcome. This is particularly true for transactions, such as mergers, which are generally long processes.

AMAFI however does not welcome the delegation to ESMA of the definition of an indicative list of information likely to constitute inside information and, for each of these pieces of information, of the moment when it can reasonably be expected to be disclosed to the market. Indeed, the Association believes that such a list is likely to bring rigidity to a process which, in essence, requires a case-by-case assessment.

Finally, for issuers of vanilla bonds only, AMAFI is of the view that the only information that can have an influence on these bonds is information that jeopardises the issuer's ability to repay them. Therefore, issuers of vanilla bonds only, should be exempted from the publication of inside information other than the latter.

- *Conditions for deferring the publication of inside information*

One of the proposed changes to the deferred publication regime is to replace the general condition that the deferral of the publication "*should not mislead the public*" (*art. 17.4.b of MAR*) with an exhaustive list made of the three cases from the 2016 ESMA guidelines on legitimate interests[1], which were meant to be illustrative. AMAFI is not in favour of this. Such a list would bring rigidity to a process that in essence requires a case-by-case assessment and is also unlikely to cover all possible cases. In addition, the proposed list of criteria introduces legally ill-defined concepts (such as "*in contrast with the market's expectations*") which are likely to generate interpretation difficulties and therefore legal uncertainty for issuers. The proposed criteria should remain of an indicative nature only.

As regards the substitution of an ex-post communication to the competent authority by an ex-ante communication of the decision to postpone the disclosure of inside information (*Art. 17.4.c*), AMAFI is concerned that this process will be cumbersome:

- for the competent Authority who will have to monitor the timing of the disclosure of the inside information and will in the meantime have to assume the burden of preserving the confidentiality of the information;

- for the issuers who, on the one hand, will have to document their decision to postpone at a time when their workload will be particularly high and, on the other hand, will have to respond to the competent authority's requests which will inevitably arise after this declaration.

It should also be added that the triggering event for the new notification obligation is very vaguely defined[2] and therefore exposes notifiers to legal risk.

[1] Taken verbatim from the 2016 guidelines (ESMA/2016/1478) on the subject (§ 46_47).
[2] « *Where an issuer or emission allowance market participant **intends to delay** the disclosure of inside Information*».

In any case, the objectives and expected benefits of this amendment are not clear to AMAFI.

AMAFI therefore urges that the paragraph on the communication to the competent authority of the decision to postpone the disclosure of an inside information should remain unchanged or be deleted, as this obligation is very burdensome for very little added value for investors (it is only made to simplify the work of regulators, who have more effective ways to detect market abuses).

Finally, AMAFI has a concern with the amendment proposed to the second paragraph of Article 17.7 relating to situations where a rumour shows that the confidentiality of an inside information is no longer ensured. Even if AMAFI understands and approves the desire to address the issue of operations carried out by certain stakeholders in order to derail ongoing negotiations, the addition of the condition that the rumour be "*reliable*" and not only "*accurate*" does not seem to be an appropriate response. The assessment of the "reliability" of a rumour is too subjective to serve as the basis of a regulatory obligation.

b. Market soundings

AMAFI welcomes the clarification of the legal effects of the provisions on market soundings (safe harbour).

The same applies to the clarification that the obligation for the market participant conducting the market sounding to inform the recipient of the information that it has ceased to be inside information does not apply when the information is publicly announced.

However, AMAFI believes that the provisions relating to market soundings should also be amended to:

- On the one hand, extend to all financial instruments, and not only to bonds, the clarification that discussions taking place strictly for the purpose of concluding a trade are not market soundings and;

- On the other hand, exclude investment products such as structured EMTNs from the scope of Article 11of MAR. For those products, the sole objective of discussions conducted by the issuer (or its advisors) with potential investors is to facilitate matching investors' expectations and do not embed any risk of disclosure of inside information. At least such scope should exclude contacts with investors aimed at adjusting the issuance terms of an investment product to their needs, as done for EMTNs. Such discussions, by essence, will not focus on any information about the issuer nor are likely to have any impact on the value of any financial instrument issued by such issuer.

c. Insider lists

First and foremost, AMAFI disagrees with giving up the requirement to draw an exhaustive insider list encompassing both permanent and occasional insiders for the sake of alleviating the burden on issuers. Insider lists are a useful tool to prevent and monitor possible market abuses. In the absence of their entry on the insiders list, occasional insiders will not be made aware of their duties attached to the possession of inside information, thus increasing the likelihood of market abuse. Therefore AMAFI advocates for the current drafting to be maintained and the proposal withdrawn.

Moreover, the requirement to draw up a list of permanent insiders has potentially very harmful consequences for the persons on this list who could be deprived of any possibility of carrying out personal transactions on a large number of financial instruments other than by entrusting a management mandate to a third party. This constraint could be particularly burdensome for certain employees of investment firms

in charge of administrative tasks, who might not be able to afford this service. It could also lead to prohibiting employees on this list from selling previously acquired financial instruments.

However, should the proposal be maintained, AMAFI suggests amending it to reduce the risk borne by persons having access to inside information on a regular basis but not on a continuous basis. The risk otherwise is that these persons would be permanently deprived of the possibility to trade on the types of financial instruments their work expose them to. Building on the current MAR Regulation, by which the permanent insider list encompasses "*persons who, due to the nature of their function or position, have access to all inside information at all times*", the insider list of the forthcoming Article 18.1.(a) should encompass all persons having "*permanent access to inside information*", and not those having only "*regular access*" as is presently proposed.

Finally, as explained above, AMAFI does not see the proposed changes as beneficial to the market and would rather advocate the following changes in order to alleviate the burden to keep an insider list:

- The scope of the information to be included in the list should be reduced (in particular the personal data of the persons included in the list) and additional information should only be provided on request of the national competent authority.
- Issuers and persons acting on their behalf (notably financial intermediaries) should be entitled to include in their own insider list only one natural person per external provider, through which they get access to the other insiders of this third party.

d. Share buybacks and stabilisation

AMAFI welcomes the proposed simplifications on the reporting and disclosure of share buybacks. The same amendments should be made with regards to stabilisation activity.

AMAFI notes that the Delegated Regulations relating to share buybacks and stabilisation activity should be amended in order to further simplify and align on the proposed changes to MAR.

e. Investment recommendations

This topic is not caught by the Listing Act package. However, AMAFI reiterates a concern it has since the first entry into force of MAR.

The current scope of application of MAR on investment recommendations is too wide. There is no rationale for including sales memos or wholesale information flows sent systematically by sales to professional clients.

More generally, their scope should be limited to information effectively distributed on a large scale. The current regime is heavy and costly, without added value for clients (especially wholesale) who do not consult the disclosed information relating to this obligation.

Therefore, it would make sense to exempt sales memos of wholesale information sent to professional clients from the scope of the provisions on investment recommendations of MAR.

PROPOSAL TO AMEND MIFID II

a. Product governance

AMAFI considers it necessary to lift or reduce product governance requirements[3] for vanilla financial instruments (such as simple bonds and shares), as they are disproportionate and constitute a hindrance to the distribution of such products, especially SMEs. AMAFI bases this position on the following arguments:

- These products are not issued to meet (retail) investors' needs and objectives or address particular risk profiles. Their aim is to raise financing for issuers, not to address investment needs. They are fundamentally different from investment products, such as funds, or from structured products that offer solutions tailored to the needs of certain categories of investors, particularly in terms of strategy, risk/return profile, maturity or nominal invested. These products' purpose is to answer investors' needs, hence they are "manufactured" for this purpose.
- The role of the investment firm in an initial public offering is not to define the objectives and investment needs of the targeted clients, but rather to assist the issuer in structuring the deal to raise the necessary financing. This is all the more critical with the new ESG provisions on product governance as investment service providers now have to analyse the ESG characteristics of a product according to the corresponding expectations of the final investors (target market) which is at odds with their role in a capital market offering of securities that should be analysed as financing products of issuers rather that investment products for investors.
- The added value of product governance requirements for vanilla products is very low or non-existent in the primary market and the current requirements on primary and secondary markets are unsuitable, in particular with regard to the following:
    - Costs. By nature, plain vanilla products do not incur a product "manufacturing" costs.
    - Regular review of products. Given their nature, it is disproportionate, unnecessary and perhaps impossible (particularly on the primary market) to conduct regular reviews.
    - Scenarios. The obligation to undertake analyses of various scenarios is not relevant for shares and bonds, whose valuation conditions are not dependent on a manufacturer' choice.
    - Reports on sales outside the target market: given the limited scope of its obligations, the "manufacturer" will not perform a regular review of the product (or its target market) and, therefore, these reports on sales outside the target market are pointless in any event.

b. Research – a 10 billion threshold for unbundling

AMAFI agrees with the Commission that the coverage of SMEs is not satisfactory as regards investment research, which weighs on the benefits they can draw from their listing. According to MiFIDVision[4]'s analysis carried out in June 2021, 59% of issuers consider that MiFID II has had an impact on the quality of financial analysis on their firms. Looking more specifically by category of companies, the strongest impact has been for SMEs (79% of investors believe that the quality of small caps research was impacted downwards).

[3] Stemming from Article 24.2 of DIRECTIVE 2014/65/EU of the European parliament and of the Council of 15 May 2014

[4] MiFIDVision was created in February 2018 when the provisions of MiFID II came into force. It brings together all the French players in the financial value chain, issuers, intermediaries, investors and authorities with the aim to pool their data on the financial market and draw up analysis of the consequences of the entry into force of MiFID II for the financial industry.

Although we understand that raising the market capitalisation threshold up to which bundling from one to ten billion euros is allowed aims to provide flexibility, AMAFI believes that such increase will not be sufficient to reverse the negative trend in the production of spontaneous research on small and mid-cap companies.

Actually, activating this mechanism would require asset managers to make a significant educational effort with their clients (i) to explain the features of the new mechanism and, even more importantly, (ii) to convince them to pay for research that they have not paid for since the implementation of MiFID II. Furthermore, it would require both brokers and asset managers to operate two parallel systems for the payment of research, one for research on companies with a market capitalisation below the 10 billion threshold and another one for research on companies with a market capitalisation above that threshold.

c. Sponsored research

AMAFI welcomes the European Commission's proposal on sponsored research and considers it would be a suitable and feasible solution to promote research on small and mid-caps.

We fully support the proposal to recognise sponsored research as investment research, provided that it complies with a code of conduct endorsed by a competent authority or a market operator. In France, a Code of conduct for sponsored research (see *AMAFI / 22-74*) was established in May 2022, with at present 210 companies covered though this type of research. This shows that this means of financing research with the help of the issuer is possible and meets market needs by setting a clear framework where sponsored research is equivalent to investment research in terms of means, content and quality, provides safeguards regarding conflicts of interests, independence and transparency as well as strict conditions for payment and dissemination of the research.