

POSITION PAPER

Proposal for Regulation on a prospectus to be published when securities are offered to the public or admitted to trading

EFAMA¹ welcomes the decision of the Commission to review the prospectus regime with the objective to make it easier and simpler for companies generally and in particular SMEs in Europe to access capital markets, to provide all types of issuers with further simplification and flexibility and to ensure adequate information for investors. It also welcomes that this review is a part of the Capital Markets Union action plan and its short term priorities, as facilitating new securities' issuance, while at the same time safeguarding investors' access to key information, is necessarily linked to the main CMU goals of providing alternative sources of financing for business and more opportunities for investors in the EU.

Prospectuses are relevant for the EU asset management industry as they allow access to information on the material risk factors pertaining to the issuer and its securities, which is also scrutinized by the national supervisors - even if only for their completeness and consistency. Thus, they are an additional tool supporting managers' informed investment decisions. Moreover, they hold a particular interest for asset managers, as the Prospectus Directive² includes a number of investment funds in its scope, which, therefore, need to prepare a prospectus (closed-ended funds, article 1, paragraph 2 (a)). Moreover, AIFMD³ makes reference to the disclosure requirements of AIFs that are required to publish a prospectus in accordance with Directive 2003/71/EC or in accordance with national law (article 23 paragraph 3).

The majority of the concrete provisions foreseen in the Proposal for a Regulation on the prospectus⁴ (hereafter "the Proposal") is following the main principle of ensuring the right balance between cutting

¹ EFAMA is the representative association for the European investment management industry. EFAMA represents through its 26 member associations and 61 corporate members almost EUR 19 trillion in assets under management of which EUR 12.1 trillion managed by 55,700 investment funds at end September 2015. Just over 29,500 of these funds were UCITS (Undertakings for Collective Investments in Transferable Securities) funds, with the remaining 26,100 funds composed of AIFs (Alternative Investment Funds). For more information about EFAMA, please visit www.efama.org.

² Directive 2003/71/EC of the European Parliament and of the Council 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, page 64)

³ Directive 2011/61/EU of the European Parliament and of the Council on Alternative Investment Fund Managers (OJ L 174, 1/7/2011, page 1)

⁴ Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, COM (2015) 583 final.

unnecessary administrative burdens and maintaining investors' access to adequate information. In concrete, we are supportive of

- ✓ The "simplified Prospectus" for secondary issuances and its conditions, as well as the Universal Registration Document for frequent issuers;
- ✓ The free and searchable online access to all prospectuses approved in the EEA and to their supplements, that is to be provided by ESMA via a single portal, as well as their timely publication by the home Member States on a dedicated website; Moreover, we would welcome that a prospectus is publicly available for the duration of the issued instrument;
- ✓ The abolition of EUR 100,000 denomination currently used in the Prospectus Directive to distinguish wholesale disclosures;
- ✓ The extension of the information that can be incorporated by reference to include information published under the Transparency Directive.

EFAMA wishes, therefore, to focus only on a limited number of points, on which we consider the abovementioned balance is not yet met and further improvements can be envisaged. Please see below our concrete comments and suggestions on those points.

A. Units of closed-ended funds and definition of collective investment undertakings

Article 1 of the Proposal (purpose and scope) foresees in paragraph 2 (a) that the Regulation will not apply to units issued by collective investment undertakings other than the closed-ended type.

At the same time, the AIFMD, which covers managers of all AIFs regardless of their open or closed-ended type, entails concrete requirements for information to be made available to investors before the investment, which must be kept up to date afterwards (article 23 of the AIFMD). The multiple disclosure requirements coming from different sources of legislation that closed ended funds need to comply with impedes legal clarity as to which legislative framework applies for that type of funds and what is the appropriate information to be provided to the investor.

At the time of the Prospectus Directive, which the current Proposal intends to repeal, the inclusion of such type of funds might have been justified as UCITS was the only regulation covering fund managers and funds (including investor information) and AIFMD was not in force. Since AIFMD and its delegated acts now foresee the appropriate level of information to be given prior to investment to the investor, we believe a wider exemption of all investment funds is justified, including closed-ended funds.

In addition, the definition of "units of a collective investment undertaking other than the closed-end type" proposed in article 2 paragraph 1 (o) is not consistent with the definition under AIFMD and its delegated

acts⁵, which will lead to legal inconsistencies and further risks for double burden for particular types of investment funds.

In order to ensure legal clarity and to avoid any unnecessary duplicative burden when it comes to the prospectus of particular types of investment funds, EFAMA suggests to at least align the definition of a collective investment undertaking to the latest AIFMD provision, as well as to foresee that this Regulation will not cover closed-ended funds which fall in the scope of AIFMD.

B. Treatment of non-equity securities

EFAMA supports the proposal to remove the current favorable treatment to non-equity securities that meet the threshold of a minimum of EUR 100,000 denomination per unit, at least in the case of offer of bonds. We agree with the rationale of the Commission that this may lead to investors having access to only a smaller and pool of potential investments, thus limiting the possibilities for portfolio diversification. Abolishing this threshold for bond issuances can provide access of retail investors to debt with better credit quality, which may also increase the liquidity of the debt security markets.

For asset managers the existing threshold can also have implications on their duty for fair treatment of investors and the allocation of non-equity securities, such as bonds, across their investment funds. The minimum denomination increases also concentration risks, with only few large funds being able to take on such large denomination sizes. It should be also kept in mind that the threshold for a minimum denomination in the US is set at \$1,000.

While supportive of the abolition of the minimum denomination, EFAMA also considers that alternative ways (non-nominal thresholds), which can ensure proportionate disclosure requirements taking into account differences between wholesale and retail markets, can respond to the need for a more proportionate approach for wholesale markets, as well as the need for enhanced investor protection in the case of complex non-equity securities.

- EFAMA would also like to propose the inclusion of the information concerning the appointment of a representative for bond holders in the prospectus of a bond. This is of particular importance in cases of collective engagement, such as in times of restructuring, where bond owners have difficulties to act collectively.

C. Lighter prospectus for SMEs

⁵ Commission delegated Regulation (EU) No 694/2014 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to regulatory technical standards determining types of alternative investment fund managers (OJ L 183, 24.6.2014, page 18)

EFAMA supports the goal of facilitating access of SMEs to capital markets, which includes simplifying the process for the preparation of a prospectus and bringing down the costs in order to be proportionate to the size of their fundraising. In that context, we understand the need to foresee simpler formats and standardized documentation for SMEs, such as the “question and answer format”.

However, in terms of the content of the prospectus, having access to the right amount and the appropriate information is key for the investor’s decision and the asset manager’s ability to properly assess the risks. In addition, the amount and the type of information appropriate for such an assessment, are not always the same. Therefore, it is very difficult to suggest a priori what the concrete information to be included in the prospectus should be and if any particular components can be left out in the case of the SMEs.

What should be kept in mind is that investors wish and should be always well-informed on the securities they are investing in, which means that decreased disclosures or simplified prospectuses in terms of content entail high risks for less investor appetite, which often means higher cost of capital for the issuing company.

In the case of SMEs, the prospectus is one of the few sources of information for an asset manager, which makes its relevance even higher.

Reducing the amount of required information in the prospectus will lead to lower (visible) regulatory burden, but not necessarily to lower overall burdens for the issuing company. In the future, many prospective buyers of the issued financial instrument are likely to ask questions pertaining to information that is not in the (lighter) prospectus anymore, but is relevant to the institutional investor’s investment analysis and thus their decision. In these cases, a lighter prospectus may well lead to a lower regulatory burden, but also to additional efforts from the issuer to answer non-standardised questions by prospective investors.

As an indication for the relevant content of the prospectus when it comes to investment risks, we could refer to the minimum standards for bond communication as presented by the European Federation of the Financial Analysts Societies (EFFAS)⁶.

EFAMA considers that this point is to be further analysed and determined in details at level 2 via the delegated and implementing acts. Still, an appropriate balance between investor information and protection and alleviating the administrative burden on SMEs should already be reflected at the text of the Regulation – level 1.

D. Dilution Thresholds for share issues

⁶ http://effas.net/pdf/setter/Minimum_standards_bond_Website%5B1%5D.pdf

The Proposal foresees in article 1 paragraph 4 (a) that securities fungible for securities already admitted to trading on the same regulated market over a period of 12 months are excluded from the scope of the Regulation and thus the need to prepare a Prospectus, if they represent less than 20 per cent of the number of securities already admitted to trading. The Proposal attempts to increase the existing 10 per cent threshold, which will necessarily affect also the rights of existing shareholders that are applicable in the case of share issues and capital increase.

There are currently different shareholder rights and national practices foreseen in different jurisdictions in the case of share issues, such as pre-emption rights, appropriate disclosures and standing authorities competent for the disapplication of the rights of the existing shareholders. Further increasing the dilution threshold by 10 per cent risks undermining shareholder rights and circumventing what is foreseen in local market guidelines and practices.

The need to decrease cost and time for a company issuing shares should not be to the detriment of the rights of existing shareholders, who are entitled to appropriate disclosure and information as to share issues of the company and whose shares provide them with concrete rights.

In that context, EFAMA considers that the increase of the threshold by 10 per cent is not the appropriate way to facilitate raising of capital, as it disproportionately undermines shareholder rights. It would therefore advice the deletion of this provision.

PRIIPs KID in the Prospectus Summary

EFAMA fully supports the proposal to model the summary of the prospectus on the PRIIPs KID⁷. Such alignment can reshape the prospectus summary towards a more user-friendly version.

We would suggest, however, for reasons of legal consistency and to the benefit of the investor, that for those securities falling under the scope of the PRIIPs Regulation, replacing the “securities summary” with the content of the PRIIPs KID should not be left to the discretion of the issuer, it should be mandatory.

Some additional points

⁷ Regulation (EU) No 1286/2014 of the European Parliament and the Council on key information documents for packaged retail and insurance-based investment products (OJ L 352, 9/12/2014, page 1)

The Legal Entity Identifier (LEI) of the issuer should be included in the prospectus. This will enhance transparency and simplify the investors' assessment by enabling them to make use of all the research databases that reference the issuer's LEI. Given that a big number of issuers are required to have a LEI under EMIR, MiFID and other recent EU regulation, this inclusion entails no major additional costs or burden for the issuer and allows wider research results for the investor.

It is important to ensure that the prospectus and the information it contains is available by electronic means, which currently seems to be the investors' main preference. Mandatory paper copies should be avoided as much as possible.

Finally, we would suggest any supplements to the prospectus to be provided in a clear and user-friendly way (for instance by way of mark-up).

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