



# ***EMPOWERING EU CAPITAL MARKETS FOR SMEs***

***Making listing cool again***

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*Final report of the Technical  
Expert Stakeholder Group  
(TESG) on SMEs*

## **Disclaimer**

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**Empowering EU capital markets for SMEs - Making listing cool again**  
**Final report of the Technical Expert Stakeholder Group (TESG) on SMEs**  
May 2021

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# 1. INTRODUCTION

## 1.1. The importance of SMEs in the EU

SMEs are the backbone to the EU economy. They are the key drivers of economic growth, employment, innovation and tax revenue in Europe. Funding is required in order to fuel and accelerate their growth. European capital markets play an important role in this, but they are not working optimally. This needs to be addressed urgently.

## 1.2. The importance of accessing public markets for SMEs and existing challenges

EU public capital markets are negatively affected by a market failure which limits considerably their ability to be a robust funding source for SMEs. EU public equity markets provide substantial social benefits, offering an effective way to share risk and allocate capital efficiently between public savings and issuers. Within this framework, **initial public offerings (IPOs) enable SMEs to raise funds as they grow**, and offer an exit route for early-stage investors. However, recent analyses have shown that EU public equity markets “*have fallen behind in global terms*”.<sup>1</sup> EU public equity markets are

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<sup>1</sup> Oxera Consulting LLP, *Primary and secondary equity markets in the EU. Final Report*, November 2020, <https://www.oxera.com/wp-content/uploads/2020/11/Oxera-study-Primary-and-Secondary-Markets-in-the-EU-Final-Report-EN-1.pdf>.

indeed much smaller than those in the USA, despite having a similar-sized economy, they are also smaller than Asia's markets when measured by market capitalisation relative to GDP and much smaller than the market in the UK as percentage of GDP. Feedbacks from market participants indicate that **the initial and ongoing costs<sup>2</sup> of becoming a public company have risen considerably in recent decades and widened the gap between public and private equity funding.** This is even more accurate with specific reference to SMEs, which have to deal with particularly burdensome regulatory costs associated with listing.

The **decline in listings in the EU** reflects a global trend in public equity markets. It calls for actions to reduce the barriers to list in Europe by firms, and particularly SMEs. Currently, European SMEs are overly dependent on bank finance to fund their growth and tend to lack access to alternative funding options, including on public equity markets. Limited access to suitable financing instruments makes it more difficult for these companies to grow without excessive reliance on collateral-heavy bank lending that weakens their future growth prospects. The growth opportunities of SMEs could be further curtailed in instances where bank funding is not available or is inadequate, as can be the case for innovative and small companies with irregular cash flows, increasingly so in the post-COVID-19 environment. Well-functioning public equity markets are crucial for the efficient allocation of capital between savers and borrowers, and for providing an effective way to share risks. **Newly listed SMEs could become a key driver of new investment and job creation:** recently listed companies often outstrip their privately-owned counterparts in terms of annual growth, workforce increase and innovation potential. Access to public equity funding and more visible profile from listing enables companies to accelerate business growth.<sup>3</sup> What is more important, fostering SME IPOs is key to also boosting earlier-stage financing, as providing more exit opportunities for investors through IPOs would increase the attractiveness of venture capital and private equity investments.

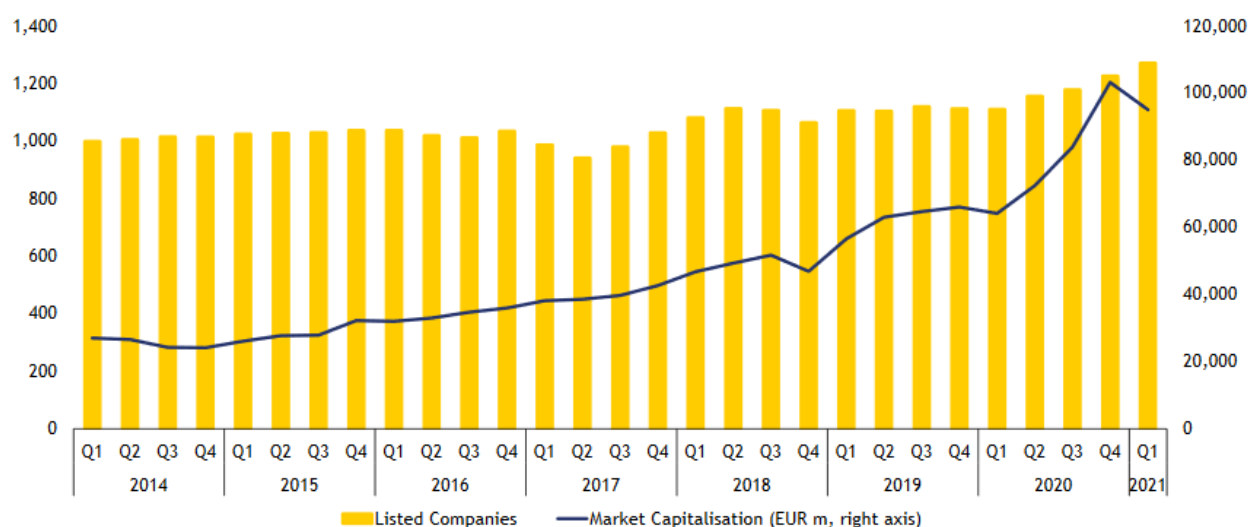
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<sup>2</sup> The costs of listing being both direct (fees) and indirect (agency costs, under-pricing, risk management, litigation, and regulation).

<sup>3</sup> Commission Staff Working Document, *Impact assessment accompanying the document 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*, 24 May 2018.



Figure 1: The Number of Listed companies on SME markets in Europe has remained flat



Source: FESE Capital Markets Fact Sheet 2021, p.9<sup>4</sup>

As shown by figure 1 above, the total number of listed companies on SME markets in Europe has barely increased since 2014, despite the fact that those listed enjoyed clear benefits (as evidenced by the increase in their market capitalisation). A number of studies<sup>5</sup> provide evidence of a sub-optimal situation with SME IPOs in Europe. The new Capital Markets Union (CMU) Action Plan published in September 2020 (henceforth “CMU Action Plan 2020”)<sup>6</sup> identified factors such as high administrative burden, high costs of listing and compliance with listing rules as discouraging for many companies, especially SMEs, from accessing public markets. This, in turn, limits the range of available funding options for companies willing to scale up and grow. This is all the more relevant in the post-COVID-19 recovery context, where smaller companies need to have unimpeded access to equity funding. **Targeted simplification of existing listing rules** will reduce compliance costs for SMEs and remove a significant obstacle that holds them back from tapping public markets.

Furthermore, Brexit and considerations of the EU competitiveness in that context make the need to have attractive and efficient EU public markets more urgent. Today, the EU-27 has a largely bank-

<sup>4</sup> <https://fese.eu/app/uploads/2021/04/FESE-Capital-Markets-Fact-Sheet-2021-Q1.pdf>

<sup>5</sup> AFME, Initial Impact of COVID-19 on European Capital Markets, April 2020, <https://www.afme.eu/Portals/0/DispatchFeaturedImages/AFME-%20Impact%20of%20COVID-19%20on%20European%20Capital%20Markets-1.pdf>, EY Global IPO trends, Q2 2020, [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_gl/topics/growth/ey-q2-2020-global-ipo-trends-report-v1.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/growth/ey-q2-2020-global-ipo-trends-report-v1.pdf)

<sup>6</sup> European Commission, 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, September 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2020:590:FIN>.

centred financing culture, underdeveloped public capital markets, significant obstacles to cross-border funding and a lack of retail savers' participation in capital markets.<sup>7</sup>

Capital markets are shaped by history, culture and tradition. In 2020, only 9% of the adult population of the euro area owned publicly traded shares – against 52% in the USA.<sup>8</sup> Whom to trust with financing businesses or taking care of savings has as much to do with habits, customs and local practices as with rational, rule-based decision-making. Confirmation bias amplifies the tendency to stick to prior beliefs, rather than change course, even if there are convincing, evidence-based reasons to do so.<sup>9</sup> With this in mind, "*forming a 'capital markets union' has been called a project of (...) transnational behavioural change*".<sup>10</sup>

At the same time, financial markets are legally constructed and regulation may have great potency to build, transform or strengthen a capital market.<sup>11</sup> As a minimum, where legal rules create roadblocks, a top-down **legislative intervention oriented to enhance capital markets'** benefits and reduce burdensome compliance costs may be of great help to achieving the long-awaited CMU.

Advancing the CMU is not just about capital markets and financial institutions. It will also benefit entrepreneurs, employees and savers. The COVID-19 pandemic has re-emphasised the importance of the CMU project and the need to make rapid progress.<sup>12</sup> Progressing with the **CMU reforms could speed up the EU recovery** and increase the growth potential of SMEs. Most importantly, it could facilitate the structural changes that have become unavoidable as a result of the pandemic and support the transition to a low-carbon and digitalised economy. The COVID-19 crisis is thus a wake-up call to strengthen the CMU and make the EU economy more robust and resilient.<sup>13</sup>

The proposals in the present report should be pursued jointly and over a short period of time in order to achieve the desirable level of ambition. Similarly to the recommendations put forward by the High

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<sup>7</sup> L. De Guindos, F. Panetta, I. Schnabel, *Europe needs a fully-fledged capital markets union- now more than ever*, 2 September 2020, <https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200902~c168038cbc.en.html>.

<sup>8</sup> *Ibidem*.

<sup>9</sup> Katja Langenbacher, *Building a Capital Market – the Final Report of the High Level Forum on the EU Capital Market Union*, in *European Company and Financial Law Review*, 2020, p. 601 ff.

<sup>10</sup> J.N. Gordon, K. Judge, *The Origins of Capital Markets Union in the United States*, in F. Allen, E. Faia, M. Haliassos and K. Langenbacher (eds.), *Capital Markets Union and Beyond*, MIT Press, 2019, pp. 89-90.

<sup>11</sup> Katja Langenbacher, *Building a Capital Market – the Final Report of the High Level Forum on the EU Capital Market Union*, in *European Company and Financial Law Review*, 2020, p. 603, where further references.

<sup>12</sup> L. De Guindos, F. Panetta, I. Schnabel, *Europe needs a fully-fledged capital markets union- now more than ever*, 2 September 2020, <https://www.ecb.europa.eu/press/blog/date/2020/html/ecb.blog200902~c168038cbc.en.html>.

<sup>13</sup> *Ibidem*.

Level Forum on CMU (henceforth “CMU HLF”),<sup>14</sup> **the recommendations formulated by the Technical Expert Stakeholder Group on SMEs (henceforth “TESG”) shall be considered as a whole, rather than individually, and as mutually reinforcing.**

### 1.3. Mandate of the TESG

In January 2018, the concept of SME growth markets (SGM) was introduced by the Markets in Financial Instruments Directive II (MiFID II)<sup>15</sup> as a new category of multilateral trading facilities (MTFs) to facilitate high-growth SMEs’ access to public markets and increase their funding opportunities. Subsequently, the SME listing package<sup>16</sup> aimed at fostering the development of SGMs, by alleviating the administrative burden for companies listing on such platforms through amendments to the Prospectus Regulation<sup>17</sup> and Market Abuse Regulation (MAR).<sup>18</sup> Delegated Regulation (EU) 2019/1011,<sup>19</sup> adopted in December 2018, further sought to facilitate the registration of MTFs as SGM, by: (i) introducing an SME definition based on yearly debt issuance, and (ii) giving more flexibility to SGM operators to exempt SME debt-only issuers from the obligation to produce semi-annual reports. It also required SGM operators to define a minimum free float<sup>20</sup> for admission to trading, in order to foster the liquidity of admitted issuers’ shares.

Although, according to MiFID II, only 50% of MTF issuers need to be SMEs in order for the MTF to register as an SGM, the regulatory alleviations for the SGM apply to all issuers listed on an SGM. This should enable these platforms to attract both SMEs and non-SMEs, thereby fostering their liquidity on

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<sup>14</sup> High Level Forum on the Capital Markets Union, *A new vision for Europe’s Capital Markets. Final Report*, 10 June 2020, [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/growth\\_and\\_investment/documents/200610-cmu-high-level-forum-final-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf) (“CMU HLF report”)

<sup>15</sup> 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>.

<sup>16</sup> Commission Delegated Regulation (EU) 2019/1011 of 13 December 2018 amending Commission Delegated Regulation (EU) 2017/565 as regards certain registration conditions to promote the use of SME growth markets, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1011&from=EN> and 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R2115&from=EN>.

<sup>17</sup> 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017R1129>.

<sup>18</sup> 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R0596>.

<sup>19</sup> Commission Delegated Regulation (EU) 2019/1011 of 13 December 2018 amending Commission Delegated Regulation (EU) 2017/565 as regards certain registration conditions to promote the use of SME growth markets for the purposes of Directive 2014/65/EU of the European Parliament and of the Council <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019R1011&from=EN>.

<sup>20</sup> Free float refers to 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 interests

and profitability of platforms. Applying the same set of rules to all SGM issuers also ensures that companies are not penalised for growing and exceeding the threshold(s) set in the SME definition.

**The SME listing package also amends Article 33 of MiFID II so as to mandate the Commission to set up an expert stakeholder group to “monitor the functioning and success of SME growth markets”. To fulfil this requirement, in October 2020 the European Commission set up a TESG on SMEs. The TESG was made up of stakeholders with technical expertise, who were tasked with monitoring and assessing the functioning of SGMs, as well as providing insight and proposals on further promoting access to public markets for SMEs. The TESG had to establish whether the requirements applicable to SGMs allow them to deliver the expected benefits to SMEs.**

In particular, the **TESG aimed to analyse the appropriateness of the current regulatory framework** for SMEs and SGM, identify further areas to improve the SGM framework as well as to foster SME access to public markets, including regulated markets (RMs). The analysis covered issues related to listing requirements, SME research, SME indices, types of shares and the attractiveness of public SME equity to institutional and retail investors. The TESG also assessed the ongoing requirements for listed entities, including transparency obligations and reporting requirements, and identified how SMEs could fulfil those requirements in the most proportionate and cost-efficient way. The members made concrete proposals in these areas, including on how to reduce the burden and costs for SMEs to list and stay listed, and proposed specific legal amendments. The TESG also undertook a technical evaluation of the SME and public listing-related recommendations from the CMU HLF, the Oxera study on Primary and secondary equity markets in Europe (henceforth “Oxera report”),<sup>21</sup> the European IPO Task Force<sup>22</sup> and the MiFID II Review Report on the functioning of the regime for SGMs published by ESMA (henceforth “ESMA report on SGMs”)<sup>23</sup>.

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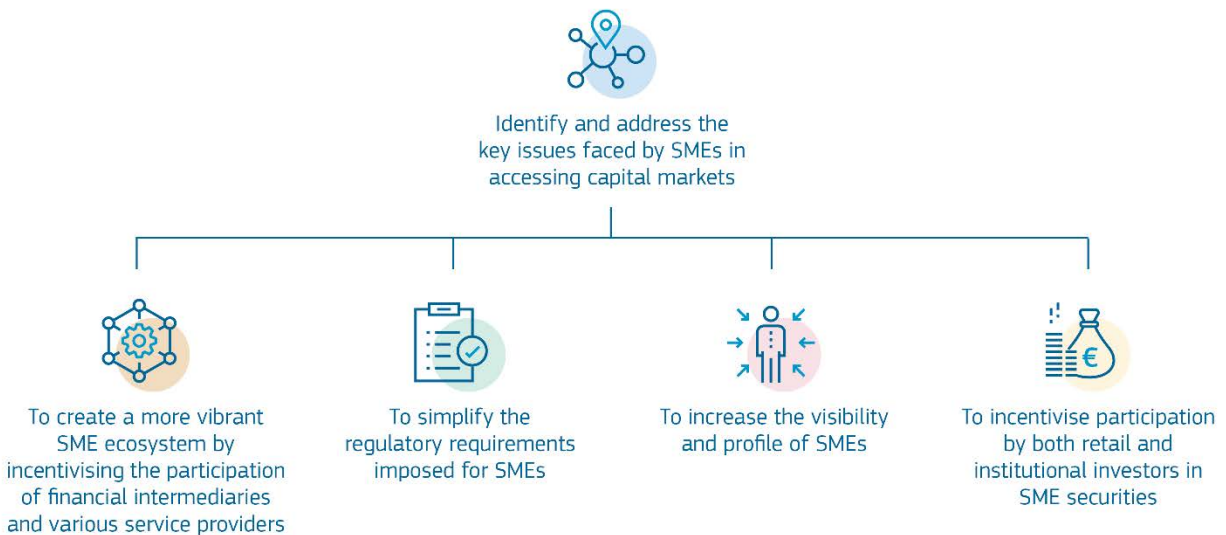
<sup>21</sup> Oxera Consulting LLP, *Primary and secondary equity markets in the EU. Final Report*, November 2020, <https://www.oxera.com/wp-content/uploads/2020/11/Oxera-study-Primary-and-Secondary-Markets-in-the-EU-Final-Report-EN-1.pdf>.

<sup>22</sup> European IPO Task Force, *European IPO Report 2020. Recommendations to improve conditions for European IPO markets*, 2020, <https://fese.eu/app/uploads/2020/03/European-IPO-Report-2020.pdf>.

<sup>23</sup> ESMA, *MiFID II review report on the functioning of the regime for SME Growth Markets*, 25 March 2021 | ESMA70-156-4103, [https://www.esma.europa.eu/sites/default/files/library/final\\_report\\_on\\_sme\\_gms\\_-\\_mifid\\_ii.pdf](https://www.esma.europa.eu/sites/default/files/library/final_report_on_sme_gms_-_mifid_ii.pdf)

## 1.4. Overview of the report

This report provides an overview of the recommendations made by the TESG. In order to ensure that capital markets deliver benefits to European SMEs, a holistic stakeholder approach is needed: all members of the ecosystem, regulatory, taxation and investment framework must act in unison to support listing by European SMEs. When preparing this report the TESG sought to identify and address the key issues faced by SMEs in accessing public equity markets. In doing so, it focused on four main objectives, as follows:



Chapter 2 provides a **description of the ecosystem** in which SMEs seek to access financing and explains the market failure that has been observed regarding SMEs access to public markets and their inability to list. It provides an assessment of why public markets, as currently functioning, are not suitable for SMEs. The chapter explains why one key, lingering issue is the inconsistency of the SME definition.

Chapter 3 presents the recommendations and associated legal amendments aimed at **simplifying the listing requirements**, such as the rules on prospectuses for listings and follow-on issuances of securities, as well as continuous regulatory requirements which the EU listed companies, including SMEs, are subject to. This is one of the key recommendation of the TESG as the members argue that the current EU legislation provides little differentiation and almost no proportionality when it comes to the treatment of SMEs relative to larger companies. Consequently, the regulatory framework is too

burdensome for smaller issuers. This tends to discourage SMEs from listing on EU financial markets and continues to weigh on already listed SMEs.

In order to **create a vibrant market for listed SMEs**, it would be fundamental to alleviate the listing requirements, simplify the applicable documentation, provide greater flexibility when it comes to choosing the listing country and venue, and revise the legal frameworks to allow quick and efficient access to capital. Markets should be made more attractive and convenient for both privately-owned and listed SMEs. With particular regard to the reform of the requirements for prospectuses, the HLF expressed a very clear position in its report, where it stated that “*the stakeholder expert group that the Commission will set up to monitor the success of SGMs should conduct a targeted assessment of the functioning of prospectus with a view to determining where further alleviations and flexibilities can be introduced*”.<sup>24</sup>

Simplification, proportionality and flexibility should be the key guiding principles driving not only future amendments of EU requirements on prospectuses, but also **amendments to the current legal framework established under the MAR**. The MAR framework leads to very high compliance costs for SMEs and exposes them to risks, which may create significant disincentives for listing or remaining listed. This is further reinforced by the fact that SMEs could be subject to disproportionately high sanctions in case of an inadvertent breach of MAR.

Since compliance with the regulatory framework weighs considerably on SMEs, certain temporary measures, such as **listing sandboxes**, should be put in place to allow SMEs to achieve gradual compliance with the complex obligations of a listed company. In addition, the EU should not underestimate the attractiveness of **multiple voting rights structures** – particularly in industries with a high degree of innovation – by allowing the founders and early backers to raise new (public) equity without losing control of the company. This approach has proven to be popular with SME issuers in certain European and other markets and ultimately may be one of the deciding factors for a company when choosing where to list.

Chapter 4 lists the recommendations that aim to **address the issue of asymmetric information** by increasing the visibility of listed SMEs and highlighting the achievements of the companies that are going the “extra mile” towards investors. It is well established that at the core of market failure with

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<sup>24</sup> CMU HLF, p. 68

SME listing stands the lack of liquidity in SME stock as well as limited information available to investors on listed SMEs compared to larger companies. It is widely recognised that EU SMEs have been long suffering from **very limited or no equity research coverage**. This trend has been further amplified by the introduction of MiFID II that undermined local brokerage houses, which are by nature the main equity research providers for this market segment. As a consequence, limited research coverage further reduced the ability of investors to properly assess investment opportunities in this market segment. **The TESG believes that this issue should be addressed by introducing incentives for sponsored and independent equity research with the aim to increasing research coverage and enhancing transparency.** This holds true also for credit research. If paired with easier access to reliable and timely financial and non-financial information on issuers, it would allow for a more straightforward assessment of creditworthiness of SMEs by fixed income investors and help to contain their cost of borrowing. In parallel, it is essential for the Commission and EU stock exchanges to create a label to promote those SMEs that distinguish themselves – the “**EU SME Champions**” – as a way to improve the allocation of resources to the worthiest SME issuers and provide a valuable signalling to peer SMEs. The emphasis should also be placed on clear and **addressable voluntary ESG standards** to take advantage of soaring demand for sustainable investments in Europe. Finally, a set of **minimum harmonised governance criteria** should be established at EU level for SMEs listed on SGMs to increase their transparency and safeguard the interest of minority investors.

Chapter 5 covers the recommendations aimed at incentivising the development of SMEs’ investor base. The TESG recommendations contain legal amendments that can be implemented both directly at the EU level and by individual Member States, with particular regard to **tax incentives aimed at fostering SME listings** and secondary issuances on EU capital markets. Although it is up to national governments to put in place tax incentives that could favour the development of capital markets, it is important that the Commission clearly backs and encourages such policies, as they are deemed essential for the growth of the companies that drive the EU economy. In order for such initiatives to be effective with regard to SMEs and small mid-caps, it is essential that state aid rules are modified accordingly. Tax schemes aimed at supporting listing by companies with a capitalisation below EUR 1 billion should not be considered in breach of such state aid rules, including initiatives favouring investors, companies, entrepreneurs and brokers. As far as retail investors are concerned, the approach should focus on empowering their participation in the financial markets, instead of over-protecting them. In particular, 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, such as fixed income securities. The investor categorisation should be amended in MiFID II. Firstly, a new category of “qualified retail investors” should be introduced. These qualified retail investors should be able to invest in primary and secondary equity and debt offerings currently open only to institutional investors. Secondly, the current requirements for “professional investors” under MiFID II should be broadened.





## 2. SME LISTING PROPOSITION AND WHY EU MARKETS NEED TO REFORM

Just like their larger counterparts, SMEs require access to long-term financing in order to grow, improve their competitiveness and better integrate into local or global supply chains. However **SMEs often struggle to raise the necessary debt or equity due to significant information asymmetry** and the associated costs related to due diligence and the structuring of a suitable financing instrument. **This creates a significant financing gap**, which becomes even more pronounced in times of economic distress, as evidenced most recently by the COVID-19 pandemic. In such situations, having reliable and quick access to additional financing becomes even more crucial to allow SMEs to weather the crises and emerge from them stronger and more resilient.

As set out by the CMU Action Plan 2020, **it is necessary to reform capital markets' legal setting in order to facilitate SMEs' access to equity**. The Commission estimates that a negative GDP shock of around 8% to 15.15% in comparison to a non-pandemic baseline would lead to a damage in corporate equity of around EUR 0.7 - 1.2 trillion in 2020 and 2021 in the absence of public support.<sup>25</sup> PwC estimates that the total losses might be closer to EUR 1 trillion and rising, depending on how long

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<sup>25</sup> European Commission, *European Economic Forecast Spring 2020*, May 2020, p. 69

the restrictive measures for containing the pandemic will stay in place.<sup>26</sup> The resulting equity shortfall might lie between EUR 450 and 600 billion when considering the EUR 400 - 550 billion already expected in the form of public and private sector equity influx. However, equity raised on public markets in 2020 amounted to only EUR 77.4 billion – just 7.7% of the expected losses.<sup>27</sup> These numbers provide a glance of the size of the issue, highlighting the importance of reforming public markets to support EU companies, and SMEs in particular, in closing the equity gap in a quicker and easier way.

It should be highlighted that **EU capital markets were lagging behind other developed economies long before the pandemic spread on a global scale**. In its report,<sup>28</sup> Oxera compared the funding mix in EU-28 countries with that of the USA in 2018: it emerges that the weight of listed equity in the US is still much more pronounced than in any EU Member State despite the efforts of the Commission under the CMU initiative.

Such **market failures can be addressed only by adopting a holistic approach** addressing the issues of relevance for all players in the EU capital markets landscape. The recommendations contain proposals for concrete legal amendments to EU legislation in order to achieve these objectives. With regard to the specific matters of national competence, e.g. proposals on tax incentives, or areas where EU rules are currently lacking, e.g. proposals on multiple voting rights structures, it will be essential to get the full backing from the Member States. There is also a role to play by all other members of the ecosystem including advisors, investors and stock exchanges to ensure that EU capital markets deliver for SMEs.

## 2.1. SMEs: what should a stock market listing deliver to them?

**Access to public markets offers several long-term benefits to SMEs** beyond capital raising. For instance, an equity listing gives a company a real valuation and shares that can be used as a currency for acquiring other businesses, in addition to attracting, retaining and rewarding staff in a meaningful way. It can also enable founders to remain in control of their business (e.g. instead of selling it to a large group) and to access long-term liquidity for their shareholding. It brings higher profile, credibility

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<sup>26</sup> AFME – PwC, *Recapitalising EU businesses post COVID-19: How equity and hybrid markets instruments can drive recovery*, January 2021, <https://www.afme.eu/Publications/Reports/Details/detail/Recapitalising-EU-businesses-post-COVID-19--How-equity-and-hybrid-markets-instruments-can-drive-recovery>.

<sup>27</sup> Id, p. 6.

<sup>28</sup> Oxera report, p. 23

and visibility. It enables companies to position themselves on a global platform with continued access to deep pools of capital for subsequent capital raising.

Despite these benefits, the Oxera report stated that **the number of listings in the EU-28 declined** by 12%, from 7,392 in 2010 to 6,538 in 2018, while GDP grew by 24% over the same period.<sup>29</sup> In order to reverse this trend and to enable public markets to support SMEs' growth, the benefits of listing must outweigh the costs. In this report, the TESSG sought to **address the issues linked to public listing** by enhancing both the tangible and intangible benefits of listing for SMEs, while also focusing on how to reduce monetary, efficiency and time-related costs. When listing is the right strategy for a company to fund its growth, the EU capital markets and underpinning legislation should support it. In their analysis, the TESSG remained focused on ensuring that the enhancement of benefits and reduction of costs will aid all stakeholders in SMEs markets.

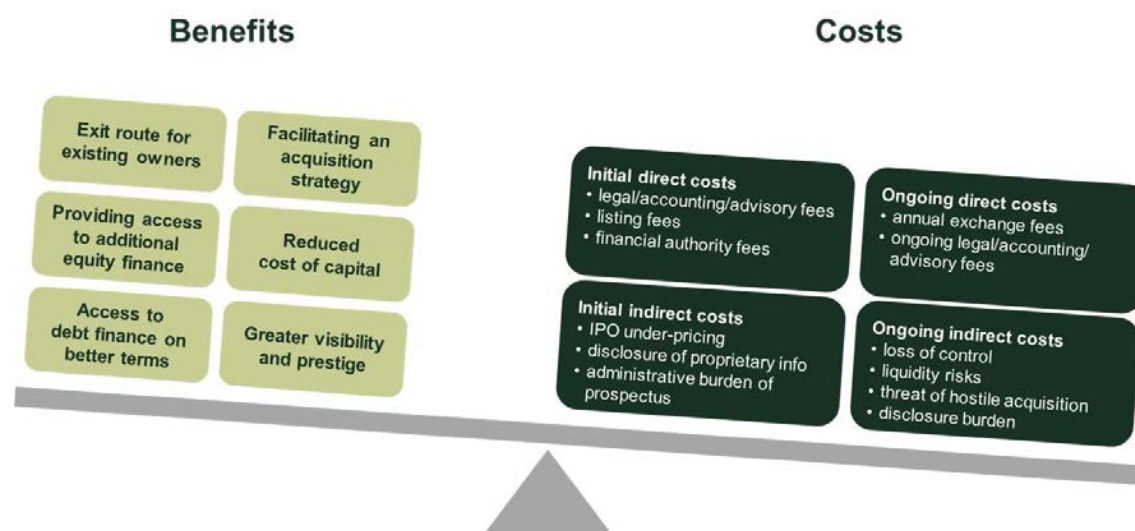
**Enhancing the benefits** – The TESSG examined some of the benefits of a stock market listing and how they can be enhanced for companies in terms of increasing their profile and branding of listed companies; creating EU SME champions; broadening investor categories that can invest in listed SMEs; incentivising investments with supportive taxation policy; building the ecosystem; addressing liquidity issues; and enabling issuers to raise equity and debt financing on better terms.

**Reducing the costs** – The TESSG concluded that the listing process and ongoing requirements for listed SMEs have become excessively burdensome over time. In this report, the TESSG revisited these requirements as already amended by the SME listing package in 2018, to ensure that they achieve their specific purpose, without unnecessarily undermining the ability of an SME to list and remain listed. In this regard, the TESSG assessed in particular requirements under the prospectus regulation and the market abuse regime, as well as wider listing and reporting requirements with a view to achieving a balanced, well-functioning market with proportionate obligations for SMEs.

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<sup>29</sup> *Ibidem*.

Figure 2: Costs and benefits of listing



Source: Oxera article “Private retreat: are we witnessing the decline of public equity markets?“, November 2020<sup>30</sup>

## 2.2. From SMEs to SMCs: the need for a consistent definition

Currently, SME definitions vary widely throughout financial services legislation. The TESG recommends introducing a new and broader SME definition building on the concept of **Small and Medium Capitalisation Companies (SMCs)** as already suggested by the HLF, applicable across all financial services legislation to issuers listed on RMs or SGMs and having a market capitalisation of below EUR 1 billion. It also supports the alignment of SME definitions in different pieces of EU financial services legislation (including, where appropriate State Aid rules).

Under Action 2 of the CMU Action Plan 2020, **the Commission committed to assessing, by the end of 2021, whether the listing rules for both SGMs and RMs could be simplified further.** The assessment will focus, *inter alia*, on the appropriateness and consistency of the definition of SMEs across the financial legislation. The TESG agrees with the focus on the SME definition in the CMU Action Plan 2020 and considers that any new initiative should capture a larger set of issuers, expanding the definition of SMEs both in the financial sector legislation and State Aid rules.

<sup>30</sup> <https://www.oxera.com/insights/agenda/articles/private-retreat-are-we-witnessing-the-decline-of-public-equity-markets/>

To this end, the TESG fully supports the CMU HLF's view that **the SME definition** currently established in EU law (more concretely in financial legislation, which applies an additional definition based on a market capitalisation criterion of less than EUR 200 million) **is no longer valid**. The TESG argues that the threshold for market capitalisation used by this definition is no longer commensurate with market realities and should thus be revisited.<sup>31</sup>

In light of the above, the TESG strongly supports the recommendation of the HLF, according to which **“all publicly listed companies on any type of market whose market capitalisation is lower than 1 billion euros should be defined as small and medium capitalisation companies (“SMCs”)”**.<sup>32</sup>

Introducing an SMC category into the EU legislation would allow to capture mid-cap issuers that face the same problems as small-caps. This proposal would also be in line with the US Jobs Act, stock exchanges classification, and market participants and industry associations' views.<sup>33</sup>

The **SMC definition would encompass a larger number of small companies able to benefit from tax incentives** (if also applied in State Aid rules). It would allow SGMs to capture a larger group of companies willing to access junior debt and equity markets. The broadened definition of SMCs would thus also address the issue where, due to a restricted definition of an SME and despite the primary focus on SME listing, MTFs may have difficulty qualifying as SGMs. Once the new definition is introduced in MiFID II (and State Aid rules), other relevant financial legislation should also be adjusted accordingly to reflect the eligibility of larger companies (e.g. ELTIF Regulation,<sup>34</sup> EuVECA Regulation,<sup>35</sup> Prospectus Regulation<sup>36</sup>).

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<sup>31</sup> The CMU HLF report correctly states on p.70 : *“while there is in principle a common SME definition based on the total staff headcount, annual turnover and annual balance sheet value that applies to all policies, programmes and measures that the European Commission develops and operates for SMEs, there are also some notable departures, such as in the case of financial legislation where a definition based on market capitalisation is applied or certain State Aid rules where the SME Definition can apply only in part or even does not apply altogether. The currently adopted definition based on market capitalisation may be considered too narrow to capture all companies sharing the SME features”*.

<sup>32</sup> CMU HLF p. 66

<sup>33</sup> Several respondents to the ESMA promoted consultation on SME Growth Markets requested increasing the threshold to 1 billion. See ESMA report on SGMs, p. 13

<sup>34</sup> Regulation (EU) 2015/760 of the European Parliament and of the Council of 29 April 2015 on European long-term investment funds. See also AMF, *Propositions de l'AMF sur la revue du règlement ELTIF sur les fonds européens d'investissement à long terme*, 29 March, 2021.

<sup>35</sup> Regulation (EU) 345/2013 of the European Parliament and of the Council of 17 April 2013 on European venture capital funds.

<sup>36</sup> Regulation 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.

**RECOMMENDATION 1.A: The TESG recommends to broaden the definition of SMEs across financial services legislation through the creation of a Small and Medium Capitalisation Companies (SMC) definition. This definition should apply to all publicly listed companies on any type of market whose market capitalisation is lower than EUR 1 billion.**

**RECOMMENDATION 1.B: The TESG recommends to align the definitions of SMEs by referring to SMCs across different pieces of financial services legislation (MiFID II, Prospectus Regulation, ELTIF Regulation, EuVECA Regulation, Market Abuse Regulation), as well as to align the SME definition in the EU Risk Finance Guidelines with the SMC definition in order to allow for a possibility to extend tax incentives to a wider number of smaller issuers, while remaining compatible with the internal market.**

As noted by ESMA,<sup>37</sup> an increase in the threshold to EUR 1 billion would include a larger proportion of issuers across the EU (e.g. with a threshold of EUR 500 million, 81% of the issuers at EU level would qualify as SMEs) which, in the TESG's opinion, is a desirable outcome.<sup>38</sup>

The **TESG proposal would allow EU public markets to catch up with larger and more developed third-country public markets** and, in turn, allow local SMCs to grow into global players and cope with the COVID-19 crisis. This would contribute to meeting the objectives of the CMU Action Plan 2020, the March 2020 SME strategy for a sustainable and digital Europe as well as the objectives of the European Green Deal and the Industrial and Digital Strategies.

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<sup>37</sup> ESMA report on SGMs, p. 15

<sup>38</sup> In this regard, however, the TESG disagrees with ESMA's view according to which an increase of the threshold could lead to the undesirable effect of incentivising more mature issuers, currently trading on RMs, to seek admission on SGMs to benefit from a lighter regulatory regime. In this regard, the TESG highlights that the entire regulation applicable to SGMs assures a high level of investors' protection, as stated in the EU Recovery Prospectus regime which recognises that listed companies on SGMs are already fully transparent vis-à-vis the investors.



## 3. SMCS: REFORMING THEIR REGULATORY ENVIRONMENT

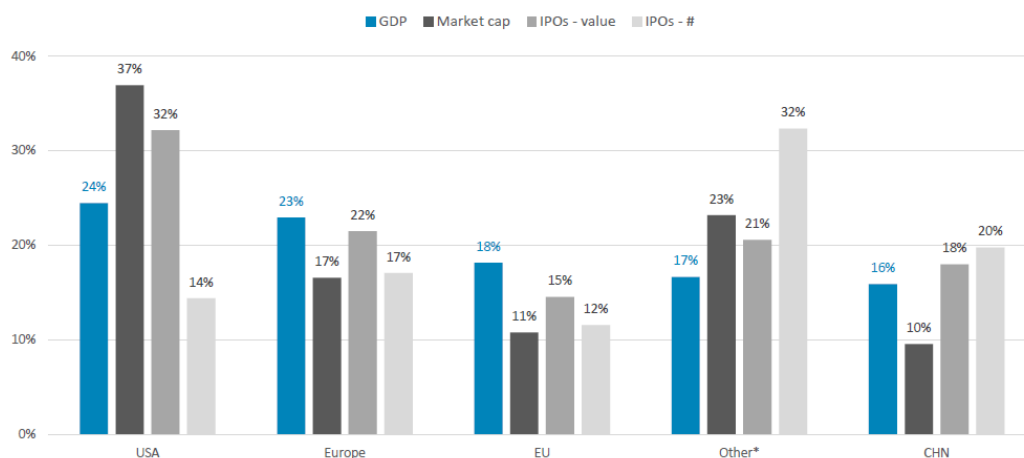
### 3.1. Alleviating listing requirements

European public markets lag behind those in the USA, China and other major economies in terms of total market capitalisation of listed companies, as well as number and value of IPOs (see figure 3). This is mostly due to the fragmented nature of the European stock exchange landscape and significant burden of listing requirements, particularly for SMEs. **One of the deterrents for companies to get listed is represented by the great number of requirements which increase the direct and indirect costs of listing for issuers, particularly for SMEs.**<sup>39</sup>

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<sup>39</sup> See the figures available at <https://www.oxera.com/insights/agenda/articles/private-retreat-are-we-witnessing-the-decline-of-public-equity-markets/>

Figure 3: Global market share of GDP, market capitalisation, and the value and number of domestic IPOs (2015 to 2020)



\* Other = Australia, Canada, Hong Kong, Japan, Singapore, South Korea, Switzerland & UK

Source: New Financial analysis of data from the IMF, Dealogic, WFE, FESE and individual exchanges

This has been clearly recognised in Action 2 of the CMU Action Plan 2020: *“Public listing is too cumbersome and costly, especially for SMEs. Targeted simplification of existing listing rules will reduce compliance costs for SMEs and remove a significant obstacle that holds them back from tapping public markets. High administrative burden, high costs of listing and compliance with listing rules dissuade many companies from accessing public markets. This limits the range of available funding options for companies willing to scale up and grow”*.<sup>40</sup>

In this respect, Action 2 of the CMU Action Plan 2020 commits to simplifying the listing rules for public markets. **The TESG notes that, while the Action Plan correctly identifies the issue at stake, new initiatives should be ambitious enough to substantially reduce issuers’ costs and risks related to listing as well as to facilitate follow-on issuances by listed SMEs.**

The HLF recommended that the TESG monitors the success of SGMs and conducts a targeted assessment of the functioning of the prospectus, with a view to determining where further alleviations and flexibilities can be introduced. On this basis, **the TESG identified eight specific areas where requirements could be amended both for newly listed and already listed SMCs** in order to incentivise new listings and alleviate the burden for already listed companies.

<sup>40</sup> CMU Action Plan 2020, p. 7



The principle adopted by the TESG to lay down its recommendations is fully in line with the work of the CMU HLF, which stated that *“Alleviations should be introduced for SMEs and, in some cases, also for companies other than SMEs (or SMCs) in the Market Abuse Regulation (MAR), Prospectus Regulation, Transparency Directive and IFRS Regulation. It should ensure 2 principles: “think small first” and proportionality”*.<sup>41</sup> The proposals for a simplification of the Prospectus Regulation are inspired by Action 2 of the CMU Action Plan 2020, the recommendation of the HLF on CMU, highlighting the need to alleviate listing rules, and the UK Listing Report 2021.<sup>42</sup> While some of the TESG proposals are put forward only for SMCs, others are also relevant and should be applied to all issuers, as specifically indicated in the following paragraphs.

As cited in the Oxera report, Assonime – the association of Italian joint stock companies – analysed the average length of the IPO prospectus for the 10 most recent IPOs in the main EU markets<sup>43</sup> as of March 2019. It established that the median length of an IPO prospectus was 400 pages in Europe, with significant divergence among countries, ranging from 250 pages in the Netherlands to over 800 pages in Italy. There is little proportionality with respect to the length of the IPO prospectus based on 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). The large size of the documentation is detrimental in many ways: it is costly and time consuming for SMCs to produce; it makes it more difficult for investors to find relevant information; it can even simply discourage them from reading and considering investing; and, finally, it requires a longer period of time for the National Competent Authority (“NCA”) to scrutinise and approve the prospectus. The CMU HLF also highlighted that *“the group should evaluate how to reduce the content of a prospectus only to key aspects with a view to significantly reducing its length but not to the detriment to investors and issuers”*.<sup>44</sup>

**RECOMMENDATION 2.A: The TESG recommends to limit the number of pages of an IPO prospectus for SMC issuers to 300, including the summary. SMCs should, however, have the option to request their relevant NCA the permission to extend the number of pages if justified by a complex financial history.**

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<sup>41</sup> CMU HLF, p. 66,

<sup>42</sup> The UK Listing Review, 3 March 2021, <https://www.gov.uk/government/publications/uk-listings-review>.

<sup>43</sup> Namely, France, Germany, Italy, Netherlands and Spain.

<sup>44</sup> CMU HLF, p. 68

Effective from March 2021, the Recovery Prospectus<sup>45</sup> has been temporarily established to ease the process of raising new equity on EU capital markets to deal with the economic consequences of the COVID-19 pandemic. The TESG believes that the Recovery Prospectus lays down principles of paramount importance by recognising that listed companies are already transparent and that any prospectus for follow-on issuance should focus only on truly new information related to that specific transaction.

**RECOMMENDATION 2.B: The TESG recommends that a new simplified prospectus (replacing the current simplified prospectus for secondary issuances), similar in its form to the Recovery Prospectus, be adopted on a permanent basis for secondary issuances and for transfers from an SGM to a RM, provided that specific conditions are satisfied.**

The proposal can be applied to SMCs, as well as to any other issuers which satisfy the criteria of applicability under the Recovery Prospectus. The TESG further believes that the new simplified prospectus should also apply to debt issuances, providing listed SMCs with an equally streamlined access to both equity and debt.

The **TESG proposals to shorten the prospectus and alleviate further disclosure requirements for secondary issuances are fully in line with the principle of proportionality**. They seek to reduce compliance costs for issuers, as the proposed prospectuses would be less expensive to produce, and should result in a faster approval process by supervisory authorities. Shorter prospectuses would also benefit investors by being more reader-friendly and focus exclusively on information relevant for them.

The Prospectus Regulation currently affords unequal rights to equity and debt issuers (with denomination above EUR 1,000 per unit) when it comes to the choice of a home Member State of issuance and, respectively, the choice of a home authority. Equity issuers are not able to choose their home Member State, while debt issuers are. The current framework also offers a more favourable treatment to third-country issuers (compared to the EU ones), as non-EU issuers can also choose flexibly their home Member States.

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<sup>45</sup> 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, [https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2021%3A068%3ATOC&uri=uriserv%3A0JL\\_2021.068.01.0001.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2021%3A068%3ATOC&uri=uriserv%3A0JL_2021.068.01.0001.01.ENG).

**RECOMMENDATION 2.C: The TESG recommends to extend the right to choose their home Member States of issuance to EU SMC issuers of equity securities and non-equity securities with denomination below EUR 1,000 per unit.**

The TESG agrees with the CMU HLF on the need to further alleviate national marketing requirements for prospectuses to improve the process of passporting. In particular, the TESG believes that an improvement should be made with respect to the use of languages. This is key in order to limit the duplication of documentation in several languages and reduce the burden on companies offering securities in several Member States.

**RECOMMENDATION 2.D: The TESG recommends that prospectuses of SMC issuers can be drawn up only in English as the customary language in the sphere of international finance, independently from the official language of the home Member State.**

This recommendation could be extended to all equity issuers listed on SGMs and RMs.

Effective from July 2019, the European Commission included the provision on a Universal Registration Document (URD) in the Prospectus Regulation, in line with the shelf registration principles already well-established in other financial markets, particularly in the USA. However, two years after its introduction, the adoption of the URD failed to take off among EU issuers,<sup>46</sup> as they must meet a number of requirements and conditions which undermine the attractiveness of the document and outweigh its benefits.

**RECOMMENDATION 2.E: The TESG recommends that the status of Frequent Issuer is granted from the first approval of the URD by the NCA. If an approved or filed URD is used as a constituent part of the prospectus, it should not be part of the scrutiny process. In line with recommendation 2.D on the use of languages, any EU issuer should be granted the possibility to draw up an URD in English.**

This recommendation could be extended to all equity issuers listed on SGM and RM.

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<sup>46</sup> There were only 15 Approved URDs as reported by the ESMA in its Report on Prospectus activity in 2019. According to the ESMA's website, at the end of April 2021, there were 17 approved URDs. <https://registers.esma.europa.eu/>

Under the existing regulation, the distribution of prospectuses is still subject to the obligation on issuers to provide a copy of the prospectus on either a durable medium or printed, upon request of any potential investor.

**RECOMMENDATION 2.F: The TESH recommends abolishing the requirement to print and incentivising the use of the electronic form of prospectus, to be published through the channels already listed in Article 21(2) of the Prospectus Regulation.**

This recommendation could be extended to all equity issuers listed on SGM and RM.

Under one reading of the existing legislation (MiFID II), it may be understood that a company may seek dual listing (i.e. admission to trading on a venue other than the original trading venue) only based on a third-party request. Furthermore, these issuers could be subject to additional requirements, for example, with respect to governance imposed by the new venue.

**RECOMMENDATION 2.G: The TESH recommends providing 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 SGM may on their own request demand to be admitted to trading on another SGM.**

In addition, the TESH believes that the listing rules that stock market operators put in place in addition to those required by EU legislation could translate into further burden for SMCs. As such, there might be some margin for simplification. Therefore, the TESH believes that the Commission should call on stock market operators to review their listing rules in order to ease the access of SMCs to capital markets and reduce the cost and complexity of listing, without compromising market integrity.

**RECOMMENDATION 2.H: The TESH recommends to the European Commission to issue guidance to stock market operators to simplify their listing rules, in order to ease the access of SMCs to the markets and reduce the cost and complexity of listing, without compromising market integrity.**

## 3.2. Simplifying market abuse regime

While the market abuse regime is crucial to safeguard market integrity and investor confidence, there is room for some amendments and alleviations in the requirements laid down by MAR, in order to ensure proportionality and reduce burden.

As highlighted by the CMU HLF, “there are a series of burdensome regulatory provisions and requirements that act as disincentives for companies to remain listed on RMs or MTFs. The cost of complying with the regulatory requirements is high, especially for SMEs. For many companies, it is not worth to stay listed on public market as the cost outweighs the benefits”.<sup>47</sup> The TESG has identified a number of specific problems that issuers have to face on a daily basis:

01 High costs of staying listed due to MAR requirements	02 Legal uncertainty when assessing what constitutes inside information and when inside information needs to be disclosed
03 Burdensome investigation costs	04 High compliance risk and disproportionate sanctions
05 Fragmented sanctions regime	06 Burdensome requirements for the disclosure obligation related to presentation of recommendations

1. **High cost of staying listed due to regulatory requirements:** MAR entails a series of burdensome regulatory provisions and on-going requirements once listed that act as disincentives for companies to access or remain listed on MTFs or RMs. Furthermore, the costs of complying with MAR requirements are very high and constantly raising.<sup>48</sup>
2. **Legal uncertainty:** there is a need to clarify what constitutes inside information and when inside information needs to be disclosed, in order to increase legal certainty for issuers and to reduce their cost of regulatory compliance.

<sup>47</sup> CMU HLF p. 71

<sup>48</sup> Cf. Oxera report, p. 69; European Commission, *Feedback statement of the public consultation on building a proportionate regulatory environment to support SME listing*, 2018, pp. 10-11, where most market participants mentioned insiders lists, delay in disclosure, market sounding, and closely associated persons identification among the most burdensome provisions of MAR.

3. **Issuers operating as gatekeepers:** issuers on RMs or MTFs should not be required to operate as gatekeepers or at least as adjunct gatekeeper to NCAs. Investigation costs should not be borne by issuers that might not be able to devote significant resources to manage MAR compliance requirements.
4. **High compliance risk:** sanctions must be proportionate to the nature and significance of the breach of law but also sufficiently dissuasive to prevent market abuse. The risk of an inadvertent breach of MAR and the associated administrative sanctions are seen as an important factor that dissuades companies from listing on EU markets. It is therefore necessary to reduce the risks of bureaucratic failures by issuers;
5. **EU punitive sanction regime and proportionality:** market abuse violation should be punished by proportionate administrative sanctions, which should be harmonised at the EU level, while the final decision to sanction shall be entrusted to an impartial body. The TESG does not contest in principle the appropriateness of applying criminal sanctions in certain cases. However MAD II criminalises notions which are at times not well defined, posing serious concerns of non-compliance with the *lex certa* principle derived from the legality principle. Furthermore, the existing research suggests that alternatives to imprisonment should be developed, starting with the possibilities of improving the functioning of private enforcement (e.g. through result-based remuneration systems for lawyers, collective enforcement and punitive damages) and of administrative enforcement (developing economically incapacitating sanctions).<sup>49</sup>
6. **Burdensome MAR requirements for the disclosure obligation related to presentation of recommendations:** the secondary MAR legislation includes disproportionate requirements related to the content of recommendations and related disclosures. Those requirements should be simplified for instruments listed on SGMs in order to foster their coverage by research with a view to attracting investors.

In order to revitalise EU public debt and equity markets in the current situation, the TESG recommends an intervention by the Commission in order to **amend MAR and create a business-friendly ecosystem for ambitious companies, in particular SMCs looking to grow through EU public**

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<sup>49</sup> *Ibidem*.

**markets.** The TESG recommendations, which take into account the CMU HLF recommendations to further assess MAR simplifications and alleviations,<sup>50</sup> are aimed at:

- i) Clarifying – for all issuers – what constitutes inside information and when it should be disclosed to the market so as to increase legal certainty for issuers and reduce their regulatory compliance costs and risk of being fined for wrongdoing;
- ii) Greatly simplifying – for SMCs – duties in insider lists, market soundings, and manager’s transactions including closely associated persons; and
- iii) Establishing – for all issuers – a more proportionate sanction regime.

The first proposal goes straight to the heart of the MAR regime and deals with the definition of inside information. In that respect, the TESG’s approach differs from the CMU HLF’s view – instead of proposing to include in EU legislation a definition of preliminary inside information, the TESG recommends amending, for issuers listed on RMs or MTFs, the definition of inside information by following the so called two-step approach.

This preferred option is supported by scholars and market participants (although not shared by ESMA).<sup>51</sup> In particular, 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*”.<sup>52</sup> **The delay in the disclosure of inside information would thus apply only in exceptional circumstances.** This would reduce issuers’ expenses associated with the disclosure procedure, as well as the risk of sanctions for non-compliance. Moreover, the conditions regarding the delay of the disclosure should be amended by removing the reference to the possibility that investors are misled. This notion creates significant uncertainty.

**RECOMMENDATION 3.A: The TESG recommends to clarify the notion of inside information, by applying a two-step approach, and to clarify when this information should be disclosed.**

<sup>50</sup> CMU HLF, pp. 67

<sup>51</sup> This solution has been suggested by several respondents to the recent public consultation on the revision of MAR launched by ESMA on 3 October 2019 (see ESMA, *MAR Review report*, 23 September 2020 | ESMA70-156-2391, p. 49, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf)). The opportunity to differentiate the notion of inside information was also already been stressed in the ESME Report in 2007 (see ESME Report, *Market Abuse EU legal framework and its implementation by Member States: a first evaluation*, Bruxelles, July 2007, p. 5).

<sup>52</sup> ESMA, *MAR Review report*, 23 September 2020 | ESMA70-156-2391, p. 65, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf)

The **usefulness of insider lists for market abuse investigations** has already been put into question on a number of occasions.<sup>53</sup> While removing the requirement to draw up insider lists would not prevent NCAs from conducting investigations and would significantly reduce administrative costs for issuers, there are concerns that such a change could potentially harm market integrity.<sup>54</sup> These concerns are testimonies to the prevailing view that issuers shall operate as additional gatekeepers to NCAs to protect market integrity. The TESG does not support this approach and considers that NCAs (not issuers) are responsible for monitoring and investigating market abuse. No implicit investigation costs should be borne by SMCs that do not have resources to adequately manage the MAR compliance.

Moreover, NCAs can in any event apply a wide array of sophisticated supervisory investigation instruments as provided for in Article 23 of MAR and Members States should rather invest in enforcement tools to fight insider trading, as is done in the USA.<sup>55</sup>

**RECOMMENDATION 3.B: The TESG recommends to remove the obligation for SMC issuers to keep an insider list. As a second-best scenario, the TESG recommends to further reduce and simplify the content of the insider list for all issuers.**

The TESG fully supports the CMU HLF's proposal to increase the threshold for managers' transactions (above which issuers should report transactions). The current threshold, which is too low, leads to unnecessary additional administrative burden for listed companies. Instead, the threshold above which managers have to notify transactions in shares or bonds to the issuer and the NCA should be established based on the market capitalisation of the issuer, with the lowest threshold being EUR 50,000 as also suggested by the CMU HLF. Furthermore, the requirement to notify should not be subject to a one-off trigger for all ensuing transactions, once the first threshold of EUR 50,000 is reached. Instead, as proposed by some respondents to the MAR Consultation,<sup>56</sup> a manager should be

<sup>53</sup> C. Di Noia, *Pending Issues in the review of the European market abuses rules*, ECMI Policy brief No. 19, February 2012, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2028918](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2028918); ESME Report, *Market Abuse EU legal framework and its implementation by Member States: a first evaluation*, Bruxelles, July 2007.

<sup>54</sup> Commission Staff Working Document, *Impact assessment accompanying the document 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*, Brussels, 24 May 2018, p. 38.

<sup>55</sup> Over the past 10 years, the SEC has significantly enhanced its insider trading surveillance, detection and investigative capabilities through the adoption of new investigative approaches and the development of new technology. This has enabled the SEC to gain the ability to connect "patterns of trading to sources of material non-public information" as never before. The implication of this is that not only can the SEC use trading data to establish potential relationships among and between traders, but it can also use relationship information to deduce whether they have sources of prohibited information who are common to them. According to the SEC, it uses "data analysis tools to detect suspicious patterns such as improbably successful trading across different securities over time". See D.M. Hawke, *SEC Data in Insider Trading Investigations*, 2019, p. 1, <https://www.arnoldporter.com/-/media/files/perspectives/publications/2019/08/sec-data-in-insider-trading-investigations.pdf>



required to notify transactions each time the EUR 50 000 threshold is reached. **Clear guidance should also be provided on what types of managers' transactions need to be disclosed, as well as the scope of the relevant provisions in the context of different types of transaction.** Finally, the TESG holds that the requirement to keep a list of closely associated persons should be repealed, as it entails costs that are disproportionate to the benefits offered.<sup>57</sup>

**RECOMMENDATION 3.C: The TESG recommends to amend the MAR rules on disclosures by persons discharging managerial responsibilities and to remove the obligation for issuers to keep a list of closely associated persons.**

The TESG agrees with the view of the CMU HLF that *“sanctions for market abuse must be proportionate regarding the nature of the breach of law but also sufficiently dissuasive to prevent market abuse. In some cases, they may be higher than the market capitalisation of companies (...). The risk of inadvertent breach of MAR and associated administrative sanctions are seen as an important factor that dissuades companies from listing”*.<sup>58</sup>

Against this background, the TESG proposes to alleviate the requirements for issuers and managers as set out in Article 17 (public disclosure and delay of inside information), Article 18 (insider list), and Article 19 (managers' transaction), without raising the risk to market integrity. Moreover, the TESG proposes to **remove the possibility of applying criminal sanctions in the case of non-compliance with the requirements set out in Articles 17, 18 and 19**, as administrative sanctions (including accessory sanctions and the confiscation of the profit made from the unlawful conduct) are sufficiently suitable for sanctioning MAR violations under those provisions. The TESG also recommends to entrust decision-making to an independent body that would also conduct genuine re-examination (*revisio*) of the case instead of a mere review (*reformatio*) of the logical consistency of the appealed decision.<sup>59</sup>

**RECOMMENDATION 3.D: The TESG recommends to amend MAR to establish a more proportionate punitive regime.**

<sup>57</sup> As proposed by one respondent in the consultation by ESMA on MAR and SME GM, see ESMA, *Final Report on the amendments to the Market Abuse Regulation for the promotion of the use of SME Growth Markets*, 27 October 2020, p. 31.

<sup>58</sup> CMU HLF, p. 68

<sup>59</sup> Oxera report, p. 27: *“The most relevant regulatory factors that may be deterring companies from listing in the EU appear to be (...) fines (or, more specifically, the proportionality in the levels applicable to different contexts) set out in the EU MAR. Feedback from the interviews regarding the lack of proportionality of fines was particularly prevalent among practitioners in Central and Eastern Europe, who indicated that the levels of the potential fines are a significant deterrent for small issuers in the region”*.

In addition, the TESG proposes clarifications to MAR and ESMA's proposed liquidity contract template for listed SMEs on SGMs by allowing liquidity providers and issuers to agree on their liquidity contracts without the requirement for market operators to "agree to the contracts' terms and conditions", which is not in line with current market practices in which trading venues are not involved in the agreement of the liquidity contract.

Whilst market operators have a responsibility to ensure fair and orderly markets (by continuously monitoring the quality and liquidity of their relevant markets), their role does not involve agreeing to commercial contracts between issuers and investment firms. This role is given to NCAs who should be informed of the existence of these issuer liquidity contracts.

**RECOMMENDATION 3.E: The TESG recommends to amend MAR and the ESMA draft regulatory technical standard on liquidity contracts so that market operators are not required to "agree to the contracts' terms and conditions", defined by issuers and investments firms, for liquidity contracts to be used in the framework of SGMs.**

The expected benefits of the TESG's proposals are to facilitate access to EU public capital markets, which is a key priority of the CMU Action Plan 2020, reducing high costs and risks linked to burdensome compliance requirements and reducing the complexity of EU capital markets regulation which are among the main reasons why EU companies, especially SMEs, are hesitant to seek resources on the capital markets.

### 3.3. Giving issuers back control (multiple voting rights/ dual class shares)

It has been well documented that the fear of losing control over one's company constitutes one of the main deterrents to getting listed and tapping public markets.<sup>60</sup> In order to mitigate this concern, **multiple voting rights structures have been used in a number of countries and have been highlighted as an efficient way for talented founders to go public while retaining control of their company.** Multiple voting rights share models i.e. dual class shares widely used in Sweden or loyalty shares available in Italy and France, are common amongst tech, science, and other high-growth

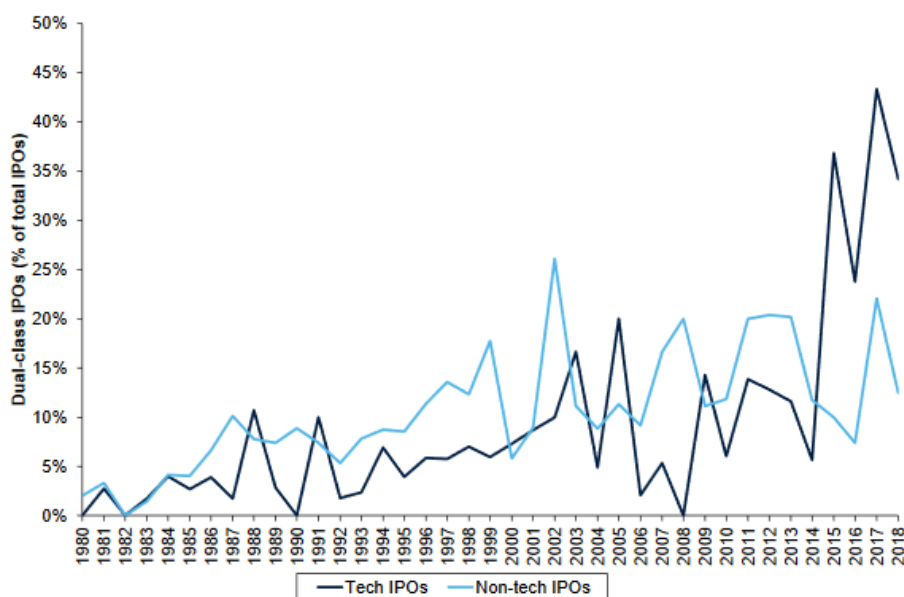
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<sup>60</sup> *Id.*, p. 118. See also J.C. Brau, S.E. Fawcett, *Evidence on What CFOs Think about the IPO Process: Practice, Theory and Managerial Implications*, in *Journal of Applied Corporate Finance*, 2006, 18 (Summer), pp. 107-117.

companies, where the founders have an interest in preserving their ability to influence the strategic direction of the company.<sup>61</sup>

Over the past years, there has been **an increasing use of multiple voting rights shares in countries where they are allowed** (e.g. the USA, the Nordics). In the USA, four out of the top 10 listed companies (35% of capitalization) have multiple voting rights shares with no cap on voting rights; 20% of all IPOs in the last years (16% in 2011-2015, 11% in 2006-2010) and 36% of high-tech IPOs (16% in 2010-2015, 6% in 2006-2010) had multiple voting rights. A large proportion of non-USA firms going to list on USA venues have also resorted to dual class shares. For instance, Alibaba's listing on the NYSE in 2014 and 50% of Chinese IPOs in the USA in 2010-2015 (15 by number), had multiple voting rights.<sup>62</sup>

Figure 4: Rise in the dual class structure of tech IPOs in the USA



Source: Oxera study on Primary and secondary equity markets in the EU, p. 46

Even at the EU's gates, **variable voting rights shares have been identified as a key ingredient to improving the attractiveness and competitiveness of the public market ecosystems.** The

<sup>61</sup> As highlighted in Tech Capital Markets, *Findings and Recommendations Accelerating alternative finance for innovative SMEs by improving connections with stock exchanges and growth marketplaces*, 2019, p. 18, nearly a quarter of the global market capitalisation of dual-class stocks is in the high-growth tech sector.

<sup>62</sup> Assonime, *Loyalty shares as a tool to encourage access to capital markets. Equity market in Europe: reversing the decline*, 15 January 2021, p. 6

UK Listing Review has also recently suggested overhauling the UK listing regime to allow dual-class structures in the Premium Listing Segment.<sup>63</sup>

### **Multiple voting rights facilitate the transition of companies from private to public markets.**

The literature supports the view that controlling shareholders of newly listed companies do not necessarily extract private benefits from their control; rather they pursue a strategy that the market would otherwise not let them achieve. The founders' role in companies such as Google, Facebook, and Snapchat reflects this vision of corporate control.<sup>64</sup>

The EU may miss out on economic growth, intellectual property and job creation if high-growth companies opt to list in third countries that allow variable voting rights shares. **There is evidence that companies prefer to list in countries and on venues with flexible rules on voting rights.**

Recent examples are the FCA Group and Campari which mentioned among other reasons the greater freedom in tailoring enhanced voting rights in the Netherlands as a deciding factor when choosing which trading venue they should list on. In a recent report published by the Italian government, it was highlighted that several countries, both within and outside the EU, allow companies to issue shares with multiple voting rights and that this difference in regulation carries the risk of competition between legal systems, to the detriment of the Italian stock market.<sup>65</sup> Moreover, the report states that there have also been cases in which the decision to move abroad by listed Italian companies - or to choose a foreign jurisdiction in mergers involving listed Italian companies - was partially motivated by the possibility to use a legal regime permitting more flexibility with respect to multiple voting shares.

As currently only some Member States allow for multiple voting rights, there is a strong need to harmonise the law across the EU. The Oxera report<sup>66</sup> noted **an extremely fragmented regime at local level, highlighting that dual class shares are allowed under company law in Denmark, Finland, France, Italy, Ireland and Sweden** (with, however, different ratios between common shares and multiple voting shares) **but are not allowed in Germany and Portugal** (among others) (see figure 5 for more information). The need to have a uniform framework to enhance long-term

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<sup>63</sup> The UK Listing Review, 3 March 2021, <https://www.gov.uk/government/publications/uk-listings-review>.

<sup>64</sup> C. Mosca, *Should Shareholders Be Rewarded for Loyalty? European Experiments on the Wedge between Tenured Voting and Takeover Law*, (11 December 2018) Bocconi Legal Studies Research Paper No. 3299513, pp. 15-16, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3299513](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3299513).

<sup>65</sup> *Bozza Decreto Rilancio*, 13 May 2020, sub art. 45; see also M. Corgatelli, *Multiple Voting Shares: competition among jurisdictions in the draft of the Italian "Decreto Rilancio"*, in *Fordham Journal of Corporate & Financial Law*, July 24 2020, <https://news.law.fordham.edu/jcfl/2020/07/24/multiple-voting-shares-competition-among-jurisdictions-in-the-draft-of-the-italian-decreto-rilancio/>.

<sup>66</sup> Oxera Report, pp. 43-44.

investment has been brought up at EU level already in 2011, when the Reflection Group on the Future of EU Company Law<sup>67</sup> recommended a clear framework for issuers wishing to provide for preferential treatment for long-term shareholders through multiple voting rights. However, the documents that followed, including the Shareholder Rights Directive (SHRD), never met such expectations.

Figure 5: Current national rules on share class structure in EU Member States (2019 data)

MEMBER STATE	MULTIPLE VOTING RIGHTS ALLOWED	LIMITED VOTING RIGHTS ALLOWED	NO VOTING RIGHTS ALLOWED
AUSTRIA	x	✓	✓
BELGIUM	x	✓	✓ (up to 1/3 of total shares)
DENMARK	✓	✓	✓
FINLAND	✓	✓	✓
FRANCE	✓ (2x voting on shares with holding >2 ys)	✓ (up to 1/2 of total shares)	✓ (up to 1/4 of total shares)
GERMANY	x	✓	✓ (up to 1/2 of total shares; must have preferential rights to dividends)
IRELAND	✓	✓	✓
ITALY	✓ (loyalty shares, 2x voting on shares with holding >2 ys)	x (preference shares allowed under certain conditions)	✓ (up to 1/2 of total shares)
NETHERLANDS	✓	✓	x
PORTUGAL	x	✓	✓ (up to 1/2 of total shares)
SPAIN	✓ (loyalty shares)	✓	✓ (up to 1/2 of total shares; must have preferential dividend rights)
SWEDEN	✓ (up to 1/10 of total shares)	✓	x

Source: Oxera study on Primary and Secondary equity markets in the EU, p. 43-44

<sup>67</sup> Reflection Group on the Future of EU Company Law, *Report on the Future of EU Company Law*, 5 April 2011, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1851654](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851654).

The TESG fully supports the CMU HLF where it notes that: “Companies should have a choice to opt for dual-class shares with variable voting rights when going public, with a sunset clause determined at the company’s discretion, to the extent it does not disincentivise investors from investing in companies. It allows the owners to maintain control of their company when it is at a vulnerable point. All companies, irrespective of their size, should be allowed to implement a dual class share system. This will help companies avoid being taken over by larger companies, gives owners a vested interest in maintaining company growth, and helps foster a long-term outlook for the company, while keeping listing an attractive funding option. This needs to be balanced against the fact that it prevents shareholders from exercising their stewardship and governance responsibilities including, for example, in areas such as sustainability”.<sup>68</sup>

The TESG also embraces Oxera report’s policy recommendation to “encourage flexibility in the use of dual-class shares where national rules or practices prevent this (...). Among the 14 EU member states analysed in-depth in the study, 5,000 family-run companies above €50m in size remain unlisted—this could be a significant source of new listings”.<sup>69</sup>

**RECOMMENDATION 4: The TESG recommends to introduce into EU law the option for issuers who wish to list or are already listed on a RM or MTF to adopt multiple voting rights structures, such as dual class shares and/or loyalty shares.**

Multiple voting rights structures may help tackle undue short-termism, as also highlighted in the EU Commission Action Plan on Sustainable Finance<sup>70</sup> (see in particular Action 10 on “Fostering sustainable corporate governance and attenuating short-termism in capital markets”). Similarly, in the advice given to the Commission on sustainable finance,<sup>71</sup> ESMA noted that additional incentives – such as multiple voting rights – should be introduced to promote shareholders’ long-term perspective.

In line with the CMU HLF, **the TESG holds that, as in many other markets outside of the EU, it should be the prerogative of the issuers to decide whether or not to include a sunset provision** (where the right duration for a sunset provision would be difficult to establish by law), as

<sup>68</sup> CMU HLF p. 66

<sup>69</sup> Oxera report p. 27

<sup>70</sup> European Commission, Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *Action Plan: Financing Sustainable Growth*, COM(2018) 97 final, 8 March 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0097&from=EN>.

<sup>71</sup> ESMA, *Report on undue short-term pressure on corporations*, ESMA30-22-762 | 18 December 2019, pp. 69-70, [https://www.esma.europa.eu/sites/default/files/library/esma30-22-762\\_report\\_on\\_undue\\_short-term\\_pressure\\_on\\_corporations\\_from\\_the\\_financial\\_sector.pdf](https://www.esma.europa.eu/sites/default/files/library/esma30-22-762_report_on_undue_short-term_pressure_on_corporations_from_the_financial_sector.pdf).

the optimal duration may differ for each company. Each issuer should be free to evaluate if and how it wishes to reduce the risk of providing founders with long-term control.<sup>72</sup>

While there is a large variety of views in terms of the ideal proportion of voting rights in dual class share structures, **the TESG recommends introducing the EU harmonised maximum 10:1 ratio, which has worked successfully for many years in Sweden and has been implemented by HKEX and SGX.**<sup>73</sup>

### 3.4. Introducing pre-listing supports (transitional period and listing sandboxes)

One-size-fits-all regulation influences SMEs' choice of private equity vs public equity financing. Private equity financing is often perceived by SMEs as cheaper, easier and less burdensome than listing, whereas rules applying to companies listed on public markets are often associated with new challenges and costs. At the same time, issuers on public markets are expected to respond to investors' demands and quickly adapt to the new regulatory environment.<sup>74</sup>

Listing on SGMs and RMs implies compliance with a broad set of requirements on corporate governance, reporting and disclosure of information. These **new regulatory requirements are particularly burdensome for smaller companies/SMCs**. As noted above, they represent a major disincentive for these companies to list. In view of the above, the TESG sees the need for:

1. A **pre-listing sandbox period** to facilitate SMC' listings on SGMs or RMs; and
2. A **transitional period** for SMCs listed on SGMs, willing to transfer to RMs or directly listing on RMs.

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<sup>72</sup> E. Lidman, R. Skog, *London allowing dual class Premium listings: A Swedish commentary*, 2021, p. 24, <https://ecqi.global/working-paper/london-allowing-dual-class-premium-listings-swedish-commentary>, observe that «a mandatory 5-year sunset clause is not only unmotivated, but would also heavily degrade the possible upsides of allowing DCS-structures» and that «if MV-shares cannot be transferred (without them converting to SV-shares that is), relocations of control through MV-shares literally becomes impossible. This, we believe, could be highly detrimental to companies with DCS-structures, since it would likely hamper the market mechanisms that would otherwise, on a system level, allocate control to where it should be most effective».

<sup>73</sup> See E. Lidman and R. Skog, *London allowing dual class Premium listings: A Swedish commentary*, 2021, p. 24, <https://ecqi.global/working-paper/london-allowing-dual-class-premium-listings-swedish-commentary>. In Switzerland, the maximum ratio is also set to 10:1 (see H. C. von der Crone, E. Plaksen, *The Value of Dual-Class Shares in Switzerland*, March 10 2010, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1542780](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1542780)), and the same goes for Singapore and Hong Kong (see Rule 210(10) (d) of the SGX Mainboard Rules and Rule 8A.10 'Restriction on Voting Power' of the HKEX Main Board Listing Rules). Denmark previously had a maximum difference of 1:10, and Finland a maximum difference of 20:1, but both countries have recently removed their maximum ratios. Neither Canadian nor US law prescribes a maximum voting ratio, but in both countries, the 1:10 ratio is the most common (see B. Amoako-Adu, F. Smith, *Dual class firms: Capitalization, ownership structure and recapitalization back into single class*, in *Journal of Banking & Finance*, 2001, vol. 25, no. 6, pp. 1083–1111 for Canada and P.A. Gompers, J. Ishii, A. Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, in *The review of financial studies*, 2010, vol. 23, no. 3, pp. 1051–1088 for the US)

<sup>74</sup> World Federation of Exchanges, *SME Financing and Equity Markets*, 22 February 2017, p.7, [https://www.world-exchanges.org/storage/app/media/research/Studies\\_Reports/WFE%20Report%20on%20Equity%20Market%20Financing%20of%20SMEs.pdf](https://www.world-exchanges.org/storage/app/media/research/Studies_Reports/WFE%20Report%20on%20Equity%20Market%20Financing%20of%20SMEs.pdf)

The development of a pre-listing sandbox for non-listed SMEs and the introduction of a **transitional period for SMCs listed on SGMs willing to transfer to RMs or SMCs directly listing on RMs** seek to provide SMCs with greater regulatory flexibility, without unduly watering down investor protection and, where appropriate, under due supervisory oversight.

**Pre-listing sandboxes may provide adequate support in the pre-listing phase to SMCs** in the form of individual guidance, including supervisory, on applicable legal requirements. Sandboxes are already well established within the Fintech regulatory framework.<sup>75</sup> Although sandboxes are currently created mostly for entities developing “disruptive technologies” in the financial sector, there is a potential for their adjustment and use also for new/future issuers entering public capital markets. Pre-listing sandboxes could be an effective tool to create a fast-track listing process for SMCs. They could, for example, be organised in the form of helpdesks and/or national programmes coordinated by NCAs or stock exchanges. **The sandbox would seek to prepare a to-be-listed SMC for its future compliance with listing requirements.** The SMC in a sandbox could be subject to an analysis/feasibility study to assess its prospects to be listed. Such analysis/feasibility study could help tackle the issue of poor visibility of SMC issuers for investors. The sandbox period could be used for monitoring SMC progress and testing investor appetite. Only SMCs with a high-growth potential, that are not yet able to meet the criteria for admission to trading, should be eligible for a listing sandbox.

However, not only first-time issuers face challenges. **Companies listed on SGMs wishing to transfer to RMs could also face serious challenges and should therefore benefit from a transitional period** that would facilitate their transition and compliance with the regulatory framework applicable to RMs. During this transitional period, SMCs willing to list on RMs or issuers, transferring from an SGM to an RM, would not be required for a limited number of years to prepare their annual financial reports in a European single electronic format (‘ESEF’). Compliance with the ESEF may lead to costs and in certain cases may require additional investment in IT solutions which in the case of SMCs can be burdensome.

**A reasonable transitional period would give SGM issuers transferring to RMs and SMCs listed directly on RMs the necessary flexibility to overcome the costs related to new compliance with the single electronic reporting format.**

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<sup>75</sup> Policy Department for Economic, Scientific and Quality of Life Policies, Directorate-General for Internal Policies, *Regulatory Sandboxes and Innovation Hubs for FinTech. Impact on innovation, financial stability and supervisory convergence*, PE 652.752 - September 2020, p. 19.



Nevertheless, in order to prepare SMCs for the transition, they could be encouraged and assisted by exchanges to start to prepare for RMs' additional disclosures, while still being listed on SGMs, such as disclosures on corporate governance, related party transaction reporting and ESG disclosure obligations. These types of disclosures are not only relevant from the regulatory point of view – they also become increasingly important for investors.

The prospect of getting dividends is no longer a sufficient incentive for investors who are increasingly attracted by additional considerations related to sustainability and corporate governance.

In this respect, the TESG supports the CMU HLF<sup>76</sup> according to which *“All newly listed companies on regulated markets, including those transitioning from SGMs, fitting the definition of an SMC, would benefit from a transition period of up to a maximum of 5 years for the application of certain elements of relevant legislation”*.

**RECOMMENDATION 5: The TESG recommends to create a pre-listing sandbox for SMCs listed on both RM and GMs (for up to 2 years) as well as an optional transitional period for a duration of 3 years for SMCs wishing to transition from SGMs to RMs as well as for SMCs wishing to list directly on RMs.**

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<sup>76</sup> CMU HLF p. 66



brand visibility

## 4. SMCS: INCREASING THEIR VISIBILITY AND PROFILE

### 4.1. Promoting EU's SMC champions

Becoming a listed entity is a significant milestone for every company. It marks the start of a journey which, in addition to access to capital and liquidity, brings a number of intangible benefits to companies in the form of a higher profile, reputation, branding and visibility. This, in turn, positively impacts on the SMCs ability to attract customers, attract and retain talent, negotiate preferable credit terms and reduce its overall cost of capital.

The Oxera report<sup>77</sup> highlighted **branding and visibility as an important part of the listing decision**. The following findings came out most prominently:

- The most important reason to seek an IPO is to boost the firm's reputation and profile;
- The ability of an IPO to support the firm's growth ambitions and reduce its cost of capital are also important factors; and
- Lack of availability of private equity funding is the least important factor cited by firms.

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<sup>77</sup> Oxera report, p. 57

The EU needs to shine a spotlight on SMCs to ensure that they receive the visibility they deserve. To do so, the TESG believes that there is a need for initiatives specifically aimed at profiling SMCs, promoting their success, and attracting investors, which will in turn increase SMCs' awareness of listing as a way to accelerate innovation and growth.

This could be achieved through the **creation of an EU Champion label** to highlight SMCs who are best in class. In order to qualify for the EU Champion label, SMCs must satisfy a number of eligibility criteria, including (i) a minimum free float of 35%;<sup>78</sup> (ii) market capitalisation of at least EUR €100 million; (iii) compliance with the ESG obligations as outlined in Chapter 4; (iv) compliance with the corporate governance criteria set out in Section 4.5; (v) a website with easy-to-find information relevant for investors; and (vi) coverage by at least one equity analyst. The EU Champion label can then be used as a branding and quality mark for companies to aspire to attracting investors, customers and talent.

**RECOMMENDATION 6.A: The TESG recommends to create an EU Champion label to boost the SMC's profile and visibility.**

These **EU Champions could be included in a dedicated index** that should be introduced to further promote and attract investment in such companies. Investment in this index should be supported incentives targeted at retail and institutional investors (see section 5.2.). The creation of the EU Champion index should support the liquidity in the underlying constituents, attract equity research and increase the profile of SMCs included in the index.

**A dedicated website should be created to include information about the EU Champion companies.** This would allow investors to have easy access to this information as well as promote the benefits of listing to other SMCs. It should include supporting educational materials, describing the listing process and concrete benefits of listing based on brochures, videos and testimonials. It should thus also allow to address the issue of financial illiteracy of some SMCs.

The creation of the label, index and dedicated website should bring visibility of the participating SMCs and raise their profile.

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<sup>78</sup> 35% as a free float criterion is already used in the market and has proved successful, e.g. by Borsa Italiana's STAR segment; see <https://www.borsaitaliana.it/azioni/mercati/star/requisiti/requisitistar.en.htm>

**RECOMMENDATION 6.B: The TESG recommends to create a dedicated investable index to support investment in best-in-class EU SMCs.**

## 4.2. Supporting equity research

Equity research is a necessary tool to increase SMC visibility and facilitate the flow of capital from institutional and individual investors. In the context of the Mid-term review of the CMU Action Plan, the Commission concluded that equity research was particularly important for SMCs, given their lower visibility for investors and lesser amount of available public information.<sup>79</sup> **Lack of research is often mentioned by institutional investors as one of the top reasons for not investing in SMCs.**<sup>80</sup> Therefore, SMC research also serves the important function of providing a second opinion, oversight and monitoring of SMCs, ensuring well-functioning capital markets. Research and surveys confirm that for listed companies, it is important to be covered by sell-side analysts,<sup>81</sup> and that a drop in equity research coverage can result in less efficient pricing and lower liquidity, more volatile trading around subsequent earnings announcements, and increased required returns (as evidenced by figure 6 below).<sup>82</sup>

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<sup>79</sup> European Commission, *Commission Staff Working Document Economic Analysis Accompanying The Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions on the Mid-Term Review of the Capital Markets Union Action Plan*, SWD(2017) 225 final.

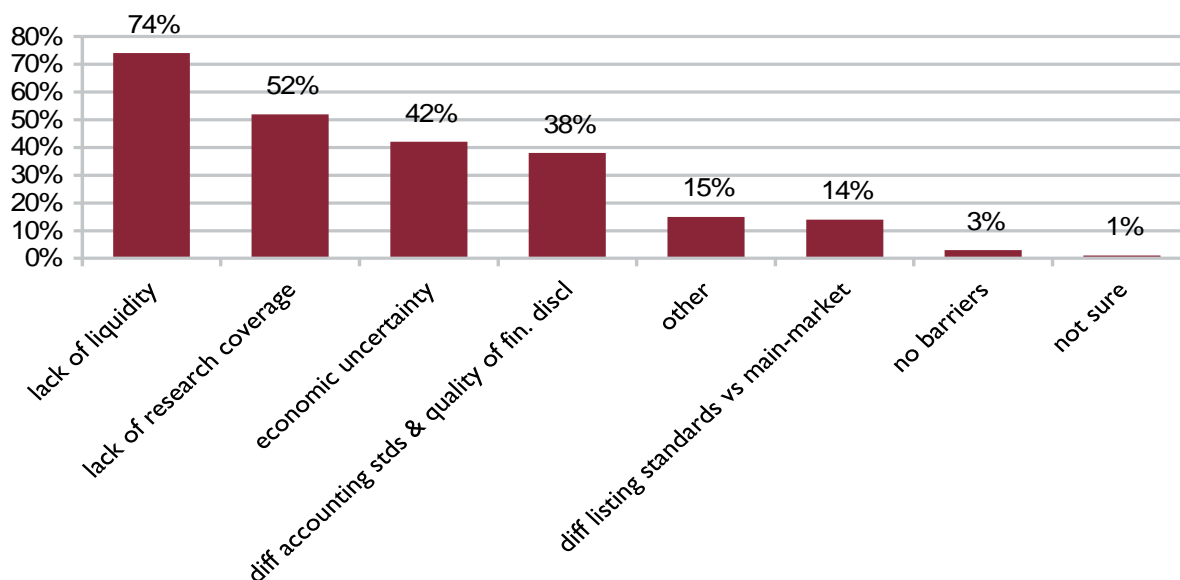
<sup>80</sup> European IPO Task Force, *European IPO Report 2020. Recommendations to improve conditions for European IPO markets*, 2020, section 1.4., <https://fese.eu/app/uploads/2020/03/European-IPO-Report-2020.pdf>.

<sup>81</sup> L. D. Brown, A. C. Call, M. B. Clement, N. Y. Sharp, *The Activities of Buy-Side Analysts and the Determinants of Their Stock Recommendations*, in *Journal of Accounting & Economics*, 2016, Vol. 62, no. 1, pp. 139-156.

<sup>82</sup> B. T. Kelly, A. Ljungqvist, *Testing Asymmetric-Information Asset Pricing Models*, in *The Review of Financial Studies*, 2012, vol. 25, no. 5, pp. 1366-1413.

Figure 6: Barriers to investors' interest in SMEs

### What barriers exist that impact investor interest in SMEs?



Source: Dealogic, Olivier Wyman

Source: Dealogic, Olivier Wyman analysis as found in the European IPO Report 2020, p. 19<sup>83</sup>

Given the lack of equity research and importance it plays for attracting liquidity in SMC stocks, **it is necessary for the Member States to incentive the provision of SMC equity research.** An efficient way to do so would be through tax incentives. As taxes on corporate income (and any incentives related to it) concern direct taxation, EU competence in this area is limited to bringing the different laws in Member States more in line with each other, and only to the extent necessary to improve the functioning of the EU's internal market or address common cross-border challenges. Tax incentives in this area would therefore fall under national competence and would require national action. Nonetheless, the TESS considers that the Commission should encourage the Member States to introduce such tax incentives at national level, for instance by promoting the exchange of best practices if possible as part of a Commission recommendation. The recommendation could build on identified best practices already in place in and outside the EU. Among others, clever tax incentive schemes such as making research costs tax deductible both for SMEs and regional brokerage houses, should be considered.

<sup>83</sup> European IPO Task Force, European IPO Report 2020. Recommendations to improve conditions for European IPO markets, 2020, <https://fese.eu/app/uploads/2020/03/European-IPO-Report-2020.pdf>

**RECOMMENDATION 7.A: The TESG advises the Commission to issue a recommendation to the Member States to strongly encourage them to put in place measures to promote equity research coverage of all listed SMCs. Among others, the Commission should encourage the exchange of best practices in the field of tax incentives.**

Today, equity research is produced by brokers on an un-sponsored (independent) as well as sponsored basis (company pays for the research), by independent research houses, and to a lesser extent also in-house by fund managers. SMC issuers are, however, often not covered at all by research analysts as there is not enough market interest to justify the additional cost for the broker.<sup>84</sup> **Providing good quality research on SMCs is in fact relatively harder given the lesser availability of data.** The Mid-term review of the CMU action plan<sup>85</sup> points this out as a market failure and notes that analysts tend to orient coverage to large caps as it is more profitable.

To attract investments, many SMCs have started to pay for equity research themselves on a sponsored basis. Investors have traditionally tended to turn down sponsored research due to potential conflicts of interest (as the company pays for its own research coverage). However, lately sponsored research has gained market acceptance as a tool for investors to get up to speed on smaller companies, and is ultimately preferred to no research at all. **The TESG argues that some coverage on a sponsored basis would be beneficial for investors, and for SMCs, especially smaller ones, which do not have trading volumes to incentivise brokers to cover the stock.** For SMCs, however, financing sponsored research may be a relatively high cost to incur.

ESMA in its MiFID II review report on the functioning of the regime for SGM<sup>86</sup> acknowledges the **issue of limited SMC research** and sees merits in assessing the possibility of developing programmes funding research. It proposes pan-EU programmes at the level of trading venues and suggests “evaluating if SGMs could benefit from establishing such programs, and eventually proceed to a Level 1 amendment”. The TESG considers that this recommendation should be extended to SMCs not only on SGMs, but also those listed on MTFs and RMs.

<sup>84</sup> Weild, D., & Kim, E. (2009). *A wake-up call for America* (Grant Thornton Capital Market Series). [http://www.academia.edu/download/40004488/A\\_wake-up\\_call\\_for\\_corporate\\_America20151114-19276-1ilkq07.pdf](http://www.academia.edu/download/40004488/A_wake-up_call_for_corporate_America20151114-19276-1ilkq07.pdf)  
[https://www.oxera.com/insights/agenda/articles/unbundling-whats-the-impact-on-equity-research/#\\_ftn12](https://www.oxera.com/insights/agenda/articles/unbundling-whats-the-impact-on-equity-research/#_ftn12):

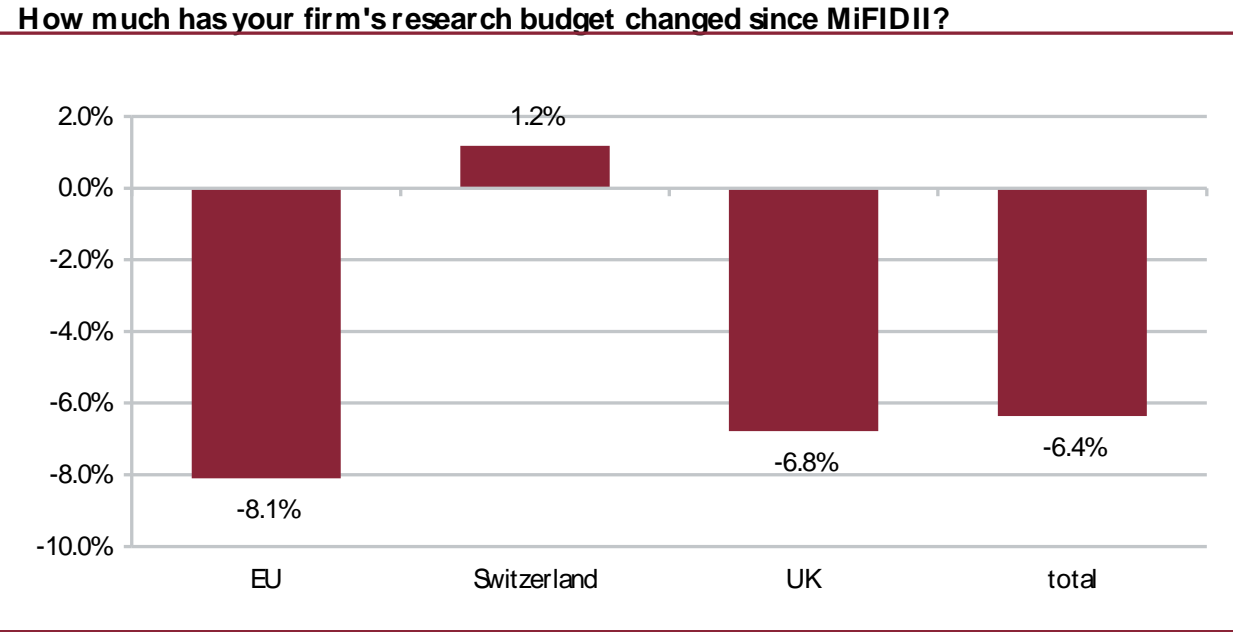
<sup>85</sup> European Commission, Staff Working Document, Economic Analysis accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-Term Review of the Capital Markets Union Action Plan, 2017, p. 46, 47 and 49

<sup>86</sup> ESMA report on SGMs pp. 23-24

As the EU has dedicated tools to support SMCs and foster an investment-friendly environment, in particular through the EU Regional Development and Cohesion Policy, the TESG therefore suggests to the **Member States to seek funding for SMC financial research from the European Regional Development Fund (ERDF)**.

With the implementation of MiFID II, the payment for equity research was unbundled from execution fees to increase transparency and ensure best execution. The unintended consequences, however, are that as research budgets have been cut, demand and, subsequently, prices for independent equity research have fallen and the number of research providers has dropped to the benefit of large, US-based firms with global scale to leverage research costs, threatening the financial viability of local brokers.<sup>87</sup>

Figure 7: Change in firm's research budget since entry into application of MiFID II



Source: CFA Institute, *MiFID II: One year on, Assessing the market for Investment Research*, p.8<sup>88</sup>

<sup>87</sup> *MiFID II: One year on, Assessing the market for Investment Research*, CFA Institute, 2019 ISBN: 978-1-942713-66-1 <https://www.cfainstitute.org/-/media/documents/survey/cfa-mifid-ii-survey-report.ashx>

<sup>88</sup> *MiFID II: One year on, Assessing the market for Investment Research*, CFA Institute, 2019 ISBN: 978-1-942713-66-1 <https://www.cfainstitute.org/-/media/documents/survey/cfa-mifid-ii-survey-report.ashx>

Although the Capital Markets Recovery Package (CMRP) has reintroduced the possibility of bundling for research covering companies with a market capitalisation below EUR 1 billion,<sup>89</sup> this on its own is unlikely to be sufficient to restore SMC research. Weak financial health of regional brokerage houses continues to threaten local ecosystems surrounding stock exchanges and limit the availability of independent SMC equity research. Support for funding of both sponsored and unsponsored equity research should thus enhance the long-term viability of regional brokerage houses, as the main providers of SMC equity research in the EU.

**RECOMMENDATION 7.B: The TESG recommends to support both independent and sponsored SMC research with funds from the ERDF, including with the aim of securing the long-term viability of regional brokerage houses.**

### 4.3. Appropriate credit research and rating for SMCs

As Thomas Wieser, CMU HLF Chairman, pointed out in his foreword to the CMU HLF final report “The European banking system, although better capitalised and more resilient, is not sufficient by itself to provide the amount of credit the EU economy will need to recover from the crisis. Without stronger market financing, economic growth will remain subdued”.<sup>90</sup>

Debt represents the biggest source of funding for EU SMCs: addressing SMCs access to various sources of financing would be incomplete without a proper analysis of debt financing.

With respect to SMCs, it is therefore critical for the EU economy to rely on a vibrant private debt market. **The EU private debt market will only reach its full potential if underpinned by EU-based market infrastructure and domestic and independent service providers.**<sup>91</sup> Nonetheless, the adverse impact of the COVID-19 crisis on the economy has led to soaring indebtedness of SMCs. Whilst the European Central Bank, through even more unconventional monetary measures, governments, through budget expenditures and state guarantees, and commercial banks, through continued lending, have prevented the EU economy from plunging in an ever deeper crisis, the recovery

<sup>89</sup> See, in particular, 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, [https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2021%3A068%3ATOC&uri=uriserv%3AOJ.L\\_.2021.068.01.0014.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?toc=OJ%3AL%3A2021%3A068%3ATOC&uri=uriserv%3AOJ.L_.2021.068.01.0014.01.ENG).

<sup>90</sup> CMU HLF, p. 5

<sup>91</sup> The US Private Placement (USPP) market is a striking example of success. In this case, the insurers’ Federal supervisor has developed and run an IT infrastructure and a credit rating service. This does not mean the EU should copy/paste this US model but this should inspire EU policy makers and market practitioners alike.



should also be underpinned by increased lending to SMCs to fully restore investment and growth in the EU.<sup>92</sup>

To reduce the information asymmetries and perceived risk with investing in SMC debt, **it is important to provide investors with relevant information that would enable them to properly assess the risk and suitability of a loan to an SMC.** Today, it is cumbersome and time consuming for certain investors to collect the necessary data and it may not be worth the effort given lower individual loan volumes. Therefore, such investors do not participate in the asset class, thereby reducing the potential pool of money available to support SME finance.

**RECOMMENDATION 8.A: The TESG recommends to facilitate the process of data collection by including relevant debt data in the European Single Access Point (ESAP), to be put forward by the European Commission later this year.**

ESAP could also be used to make other relevant key figures available to investors,<sup>93</sup> which could be crucial for the assessment of the creditworthiness of a company.

This proposal, along with the recommendation to include ESG data in the ESAP, would foster integration of ESG risk factors into credit analysis (research and ratings) and enable sustainable financing.

Credit rating and credit research services are paramount for all stakeholders (borrowers, lenders, States) to ensure that SMCs' leverage and risk of default are closely measured and monitored to avoid capital misallocation and strengthen financial stability. To preserve EU-based, fully independent credit research for SMCs, **the TESG recommends to build on Article 8d of the Credit Rating Agency Regulation which already establishes a useful regulatory precedent in the field of credit rating agencies**, as it encourages issuers to use smaller credit rating agencies (with no more than 10% of the total market share in the EU). The TESG considers that BCG/Linklaters November 2017 report<sup>94</sup> on private debt markets commissioned by the Commission contained a number of useful policy

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<sup>92</sup> For instance, the French MOF announced in March 2021 the launch of a private debt fund (subordinated participating loans and bonds) of EUR 20bn to help restart the economy. The fund will be granted a 30% State guarantee, provided its invested companies respect key criteria. As it happens, the recourse to STS securitisation has not been retained in this occurrence.

<sup>93</sup> E.g. equity ratio, leverage ratio, interest coverage ratio, etc.

<sup>94</sup> European Commission, *Identifying market and regulatory obstacles to the development of private placement of debt in the EU*, 16 February 2018, [https://ec.europa.eu/info/publications/180216-study-private-placements\\_en](https://ec.europa.eu/info/publications/180216-study-private-placements_en).

recommendations that require follow-up. In particular, the following four recommendations require further attention:

- **Launch information campaign in the EU**, so as to increase the awareness of private placements among potential issuers and investors to support further market participation.
- **Facilitate communication between institutions of different Member States** to ensure the exchange of experience and best practices.
- **Evaluate benefits of providing an independent, regulated rating** on the credit quality of private placements issuers.<sup>95</sup>
- **Clarify EU regulatory framework** and **encourage efforts at a national level** to facilitate the development of private placements.

**RECOMMENDATION 8.B: The TESG recommends to subsidise SMCs paying for a regulated credit rating to foster the development of a disintermediated debt market for SMCs.**

On the latter point, restoring EU self-sufficiency in terms of corporate credit analysis and decreasing EU dependence on US credit ratings<sup>96</sup> and research oligopolies appears as a strategic imperative in the CMU context.

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<sup>95</sup> Bonds of industrial companies with an issue volume of 500 million euros or more and an investment grade rating are classified as first-class on the basis of the LCR regulations. However, the interest rates of these bonds do not pay for the risk taken. ALMs of insurance companies and banks nevertheless acquire these bonds because they follow the guidelines in terms of procedure and liability. Although it is clear to the ALMs that the desired economic success (e.g. for the insured community or the company) cannot be achieved with the acquired financial instruments (e.g. H&M with a term of 8.5 years with a coupon of 0.250%). The risk SME bonds pay adequately or even over-proportionally well (on average, the coupon in Germany is around 6%). However, ALMs avoid buying these bonds because there are no procedural rules to hedge them. For liability and regulatory reasons, these financial investments are avoided, although they would be quite suitable. It is therefore particularly important that a set of rules is introduced to give semi-professional as well as institutional investors (foundations, family offices, banks and insurance companies) legal certainty and enable them to buy SME bonds.

<sup>96</sup> US credit ratings market share in the EU is further increasing in spite of initial legislative measures such as those embedded in CRAR. See ESMA, *Report on CRA Market Share Calculation*, 14 December 2020| ESMA33-9-382, [https://www.esma.europa.eu/sites/default/files/library/esma\\_33-9-383\\_cra\\_market\\_share\\_calculation\\_2020\\_0.pdf](https://www.esma.europa.eu/sites/default/files/library/esma_33-9-383_cra_market_share_calculation_2020_0.pdf).

#### 4.4. Simplifying ESG requirements

The CMU and the Sustainable Development Strategy (SDS) need to go hand in hand, in particular when considering the needs of SMCs. The CMU HLF states in its report that *"Only sustainability can ensure prosperity in the longer run. The Capital Markets Union is needed to deliver the EU New Green Deal"*.<sup>97</sup> With SMCs accounting for the vast majority of output in the EU, it is clear that the green transition will not take place unless Europe's SMCs are also on board. However, when it comes to sustainability reporting, ratings, as well as access to green financing, SMEs are often at a disadvantage to large companies given their limited resources.

To achieve the objectives of the EU Green Deal, **private capital needs to be redirected to sustainable finance**. It is vital that the information provided by companies conveys a reliable, comparable and relevant picture of the sustainability risks and opportunities of a company. At present, there are a multitude of competing reporting standards for ESG data, which increases reporting costs, compromises comparability between companies and makes green investment decisions difficult. To remedy this, several **important pieces of legislation are currently being developed** (the EU Taxonomy<sup>98</sup> and the Sustainable Financial Disclosure Regulation (SFDR)<sup>99</sup>), **or revised** (the Non-Financial Reporting Directive (NFRD)<sup>100</sup>, now called the Corporate Sustainability Reporting Directive (CSRD)<sup>101</sup>). The risk is that these legislative acts might not be fully synchronised when it comes to the requested KPIs. If this were the case, it could risk putting a disproportionately heavy reporting burden on SMCs. Even if SMCs at present are not required under the NFRD to disclose ESG data, they are under pressure to report from investors (which are required to report under the SFDR) and to the companies they are suppliers to (which need to report under the NFRD). In addition, the Commission proposal on the CSRD is suggesting to broaden the scope of application of the NFRD by requiring all listed and non-

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<sup>97</sup> CMU HLF, p. 6

<sup>98</sup> Regulation (EU) 2020/852 of the European Parliament and of the Council on the establishment of a framework to facilitate sustainable investment on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 (referred to as the "Taxonomy Regulation"), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32020R0852>.

<sup>99</sup> Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector, <https://eur-lex.europa.eu/eli/reg/2019/2088/oj>.

<sup>100</sup> Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (referred to as the 'Non-financial Reporting Directive' – NFRD), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095>.

<sup>101</sup> On 21 April 2021, the European Commission adopted a comprehensive package of measures to help improve the flow of money towards sustainable activities across the European Union. Together with the EU Taxonomy Climate Delegated Act and six amending Delegated Acts on fiduciary duties, investment and insurance advice, the package comprises a proposal for a Corporate Sustainability Reporting Directive (CSRD). The proposed directive aims to improve the flow of sustainability information in the corporate world and make sustainability reporting by companies more consistent, so that financial firms, investors and the broader public can use comparable and reliable sustainability information (more information are available at [https://ec.europa.eu/info/publications/210421-sustainable-finance-communication\\_en](https://ec.europa.eu/info/publications/210421-sustainable-finance-communication_en)).

listed companies that are not SMEs according to the Accounting Directive<sup>102</sup> to disclose non-financial information, which would also include issuers listed on SGMs.

The TESG proposes **several measures to simplify ESG reporting and increase transparency**. The proposals address proportionality of reporting, simplification and standardisation, data availability, ESG education and the introduction of a CMU-wide ESG index to promote SMC ESG champions.

The TESG proposes to follow **a tailored and voluntary framework for disclosure of ESG information for SMCs in the ongoing NFRD review**. In addition to the existing disclosure requirements under the NFRD for companies (both listed and non-listed) with more than 500 employees, the TESG supports the Commission's approach of a tailored framework of the ESG information that SMCs should disclose on a voluntary basis. More specifically, the TESG is in favour of defining proportional and clearly set KPIs to limit the administrative burden and costs associated with ESG reporting.

If it is agreed during the negotiations among co-legislators to expand the scope of the NFRD (now CSRD) – beyond large companies and SMCs listed on RMs – to companies with fewer than 500 employees, **the TESG proposes that that Article 8 of the Taxonomy Regulation temporarily exempts these companies from reporting in line with the Taxonomy Regulation until the Taxonomy is fully completed, covering all sectors and environmental objectives**. Larger companies with more resources should be the ones to first tackle potential obstacles and pave the way for SMCs. In addition, **the TESG strongly disagrees with the proposal of making disclosure requirements mandatory for SMEs listed on RMs, as it risks discouraging SMEs from listing on RMs. The TESG insists on introducing proportionality in ESG reporting**. In general, SMCs have fewer resources dedicated to sustainability reporting, while large companies tend to have dedicated teams working on this. SMCs would thus find it more difficult to navigate through the complex set of ESG rules and regulations.

Therefore, to ensure that SMCs do not miss out on commercial opportunities as suppliers, benefit from new sustainable investment opportunities and access ESG-linked financing smoothly, the TESG

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<sup>102</sup> According to Article 2 of the annex to Recommendation 2003/361/EC, "The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million".

recommends that **an SMC reporting standard be developed with a view to ensuring lighter disclosure requirements and avoiding an unnecessary administrative burden on SMCs.**

This is in line with EFRAG's<sup>103</sup> proposal that *“The ESS (European standard-setting) should consider adopting a proportionate standard-setting approach tailored for EU SMEs. This would take the form of SME-specific standards aiming at balancing (i) the specific governance, organisational and resource availability aspects of SMEs and (ii) the need for sustainability information produced by SMEs to be relevant for their stakeholders, i.e. coherent with their own reporting requirements.”*

The TESG proposes to introduce a **voluntary, limited, standardised set of ESG KPIs split in three categories (E, S and G)**. There should be a unique set of KPIs that should apply across all reporting legislation, including the SFDR and the NFRD, to avoid duplication of work. This is relevant particular in the case of the **SFDR, as Article 7(2) in the draft Regulatory Technical Standard (RTS) of the SFDR does not necessarily protect SMCs from an additional reporting burden** – small-cap fund managers will need to collect the data also from their SMC holdings. The newly established EU Sustainability platform could be assigned the task to ensure uniformity in the reporting requirements.

Standardized templates and forms need to be developed by ESMA in order to have unified information and definitions of KPIs across the EU, which can be used by all stakeholders (SFDR, CSRD and the Taxonomy). In addition, a voluntary, expanded set could be developed. This should provide a robust reporting basis for all EU SMEs and their investors. The KPIs below have been selected using a "risk-based" approach to strike a balance between the company's positive ESG impacts and the ESG risks in the business model.

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<sup>103</sup> European Reporting Lab, EFRAG, *Final report, Proposals for a relevant and dynamic EU sustainability reporting standard-setting*, February 2021, [https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FsiteAssets%2FEFRAG%2520PTF-NFRS\\_MAIN\\_REPORT.pdf](https://www.efrag.org/Assets/Download?assetUrl=%2Fsites%2Fwebpublishing%2FsiteAssets%2FEFRAG%2520PTF-NFRS_MAIN_REPORT.pdf).

Figure 8: Voluntary, limited, standardised set of ESG KPIs



\* To be used also as mandatory KPI in the context of the SFDR RTS

**RECOMMENDATION 9.A: The TESG recommends to introduce a tailored and voluntary framework for SMCs in the NFRD review with a proportionate and clearly set of KPIs. The TESG recommends to co-legislators to depart from the Commission’s proposal on CSRD, by making disclosure requirements non-mandatory for SMCs listed on RMs.**

**The TESG considers that tax incentives, to the extent possible aligned across Member States, should be used to compensate SMCs for higher ESG reporting costs.** A number of Member States already allow for the deduction of research and development costs for taxable income. Similarly, costs related to training and support services for the development of ESG reporting and disclosure by SMCs may also be considered for tax incentives.

ESG data should be included in the ESAP.<sup>104</sup> At the moment, SMCs are given smaller coverage than larger companies by sustainability service providers. There are two reasons for this: data availability and demand, both of which tend to be higher for larger, publicly listed companies. As a result, investors tend to process and score raw sustainability data for SMCs, using their own methodologies. Therefore, making ESG raw data readily available and comparable for all stakeholders is key. **The TESG therefore supports the objective to include ESG data in the ESAP.** Having easy access to data would also facilitate sustainability research, allowing research analysts as well as fund managers to screen companies against the non-financial metrics. It would also allow the Commission and the Member States to follow progress on transition towards the Green Deal objectives across all sectors in the EU. The ESAP needs to be promoted to all stakeholders to make it a success. The TESG notes that earlier initiatives, such as the ESMA’s European Rating Platform, are not used as widely as it could be hoped for.

Given the SMCs lack of knowledge and understanding of sustainability matters and requirements, in addition to written guidelines, **the TESG also recommends to put in place an advisory service - or teach-ins - on the Taxonomy and required sustainability data reporting under the NFRD/CSRD.** This service should provide instructions on how to prepare and present the sustainability information required under the EU legislation. The Platform on sustainable finance could develop such teach-ins. The education/teach-ins should also be accessible for institutional and retail investors, as

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<sup>104</sup> European Commission, *Targeted Consultation Document, Establishment Of A European Single Access Point (ESAP) For Financial and Non-Financial Information publicly disclosed by Companies*, 20 January 2021, [https://ec.europa.eu/info/consultations/finance-2021-european-single-access-point\\_en](https://ec.europa.eu/info/consultations/finance-2021-european-single-access-point_en).

well as other interested parties, to increase their awareness. Teach-ins will improve the EU citizens' financial literacy on sustainability matters, thus also fostering retail investor participation in green investment and green transition.

Sustainability ratings may influence a company's valuation and its access to green financing. Research, however, shows that ratings diverge substantially between agencies due to differences in metrics and weights.<sup>105</sup> This makes the whole rating process opaque, especially for SMCs that have limited access to rating agencies. At present, sustainability ratings are not regulated. **The TESG believes that rating agencies providing sustainable ratings should be subject to regulation and supervisory oversight to increase the transparency of the rating process.** This applies to the whole market but is even more relevant for SMCs, as they are at a disadvantage, compared to large companies, in the rating process. The TESG concurs with the ESMA's view that providers need to be supervised in a proportionate way.<sup>106</sup>

**RECOMMENDATION 9.B: The TESG recommends to introduce tax incentives for costs related to sustainability reporting and supports the Commission's objective to include sustainability-related information in the ESAP. Furthermore, the TESG recommends to develop advisory services or teach-ins to support companies, and in particular SMCs, in their reporting process. Finally, the TESG recommends to make sustainability rating agencies and processes subject to regulation and proportionate supervisory oversight.**

To foster sustainable innovation, growth, as well as international competitiveness, ESG needs to be promoted in a firm's corporate culture since inception. **The introduction of an EU-wide ESG index - promoting SMC ESG champions - could spur and foster this approach, improve visibility and liquidity of included SMCs, and promote ESG reporting and adherence to best practices with the aim to entering the index.**

The proposal builds on the Commission-led feasibility study for the creation of an equity market index family which is investable, replicable and tradeable – calling for adequate criteria such as free float

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<sup>105</sup> F. Berg, J. F. Kölbl, R. Rigbon, *Aggregate Confusion: The Divergence of ESG Ratings*, 20 Aug 2019, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3438533](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3438533).

<sup>106</sup> ESMA calls for legislative action on ESG ratings and assessment tools (29 January 2021), <https://www.esma.europa.eu/press-news/esma-news/esma-calls-legislative-action-esg-ratings-and-assessment-tools>.



and liquidity measures. The need for such an index has also been articulated by Eurofi (2020), as SMCs play a key role in the European economy and account for 80% of the listed companies in the region.<sup>107</sup>

Indices could be constructed such that each jurisdiction / sector and each firm has a capped index allocation. For the ESG Index to work, certain EU markets would not be covered from the very beginning given the lack of eligible instruments. Nevertheless, those markets would still be part of the underlying screened universe. The ESG index should be based on the voluntary disclosure of the proposed standard EU SMCs ESG KPIs (See figure 8 above).

**RECOMMENDATION 9.C: The TESG recommends to facilitate the development of the SMC ESG Index based on standard EU SMC ESG KPIs.**

## 4.5. Corporate Governance

Good corporate governance and transparency are essential for the success of any company and in particular to those seeking access to capital markets<sup>108</sup> and represent an investment in the companies' long-term growth and future prosperity. These goals may be achieved at minimum expenses for SMCs issuers with tailor-made measures aimed to reinforce good governance standards. When issuers are governed according to principles of good corporate governance, they will find it easier to tap capital markets and attract investors.

In fact, good corporate governance is not just about improving the management of business activities, but it also represents the structure through which the companies' objectives are set. Through a good corporate governance structure, SGM issuers can attain their objectives and monitor their performance. A number of studies have shown that issuers that rank well below average on good governance characteristics are particularly prone to mismanagement and risk their ability to capitalize business opportunities over time.<sup>109</sup>

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<sup>107</sup> Eurofi Initiative – ESG Report on Small and Mid-Caps [https://www.eurofi.net/wp-content/uploads/2020/04/esg-report-on-small-mid-caps\\_zagreb\\_april2020.pdf](https://www.eurofi.net/wp-content/uploads/2020/04/esg-report-on-small-mid-caps_zagreb_april2020.pdf)

<sup>108</sup> Oxera report p. 15, the following is suggested as policy “*strengthening corporate governance to build public trust in equity markets and raise standards in jurisdictions where local requirements are in practice weaker*”.

<sup>109</sup> L.A. Bebchuk, A. Cohen, C.C.Y. Wang, *Learning and the Disappearing Association Between Governance and Returns*, in *Journal of Financial Economics*, 2013, Vol. 108, No. 2, pp. 323-348, <https://ssrn.com/abstract=1589731>.

**The TESG recommends to introduce a harmonised set of good corporate governance principles related to:**

- i) Reporting of related party transactions;**
- ii) Disclosure of acquisition/disposal of voting rights;**
- iii) The appointment of at least one independent director for issuers having a market capitalisation above a certain threshold;**
- iv) The identification of a reference person to manage the relations with the investors;**
- v) Minimum requirements for delisting to protect minority shareholders.**

The TESG agreed that the proposed corporate governance principles would be beneficial to SMCs, since they are already voluntarily promoting their corporate social responsibility strategies as a response to a variety of social, environmental and economic factors. However, the TESG could not agree on the best way to deliver on this objective. **The TESG therefore proposes to the Commission to consider three policy options for a possible initiative on corporate governance requirements for companies.**

The first option would entail **introducing good corporate governance principles in EU legislation for issuers of shares admitted to trading on SGMs (i.e. only listed companies)**. It could include two layers of rules. The first set of rules, defined at EU level, would lay down general principles for SGM operators to build on when defining detailed provisions tailored to local conditions. Market operators would then be required to admit to trading only those issuers that comply with those detailed rules. The second set of rules would then be developed by SGM operators and be applicable by issuers on a voluntary basis. Should these (voluntary) provisions not be complied with, SGM issuers would be required to issue a public document disclosing this arrangement.

The second option would entail **broader harmonisation of corporate governance principles in EU legislation for both listed and non-listed companies**. This option is expected to enhance the transition towards a unified corporate governance regime in the EU.

Under the third option, **only SMCs willing to obtain the EU Champion label and integrate the EU Champion index, would be under a requirement to make additional efforts on corporate governance**. Under this option, the corporate governance disclosures would be part of the criteria for

SMC EU Champion label. In case this option is chosen, the TEGS proposes that the Commission publishes guidelines to facilitate the compliance of SMCs with these criteria in order to support the uptake of the label.

**RECOMMENDATION 10: The TEGS agrees on a set of corporate governance disclosures that could be beneficial to SMCs, namely: (i) reporting of related party transactions; (ii) disclosure of the acquisition/disposal of voting rights; (iii) appointment of at least one independent director for issuers having a market capitalisation above a certain threshold; (iv) identification of a reference person to manage the relations with investors; and (v) minimum requirements for delisting to protect minority shareholders. The TEGS recommends that the Commission considers three options for a possible initiative on corporate governance.**



## 5. SMCS: ATTRACTING INVESTMENTS

### 5.1. Creating tax incentives

As it has already been mentioned earlier, the market failure in the field of SMC listing can be explained by a number of reasons (see chapter 1.2 for more information), including the small size of issuers and their limited visibility to investors, affecting liquidity in the stock on both SGMs and RMs. This market failure can only be adequately addressed by public intervention, such as by using carefully-designed and targeted tax schemes aimed at SMCs, but also at SMC brokers, research providers, investors, etc. In this respect, the TESG believes that it would be inappropriate to apply different tax treatment depending on the type of a listing venue, as the issue is present across all public equity markets. **The TESG considers that targeted and well-designed tax incentives can have a significant positive impact both on companies seeking access to public equity financing and on financial intermediaries, assisting these companies** (with research, liquidity providers, etc.). Targeted tax incentives can also assist the growth of financial instruments, channelling financing into SMCs.

In this regard, **the TESG fully supports the CMU HLF recommendation to the Member States to consider tax incentives to promote long-term investment into SMCs through ELTIFs.** While the

TESG notes that the CMU HLF correctly addresses the issue at stake, any new initiative should be even more ambitious to relaunch the EU public capital markets.

While it is recognised that tax incentives are a scarce resource, **SMEs play a key role in contributing to the EU economic growth**. This is in line with what has already been suggested by the Oxera report.<sup>110</sup> The Commission should thus encourage the Member States to provide tax incentives for SMCs and for investments in SMCs.

**Tax incentives have been identified as one of the key contributing factors that allowed some Member States (such as Italy and Sweden) to increase listings on their MTFs**, specifically on AIM Italia, Nasdaq First North market and Nordic Growth Market's Nordic MTF. The Member States should be encouraged to deploy:

- Tax incentive schemes as tax credit to alleviate listing costs (similarly to those introduced in Italy);
- A lower corporate income tax rate for SMCs;
- Tax relief on sponsored research;
- Tax credit/higher tax deduction on the interest paid on bonds to encourage balance sheet diversification instead of relying on bank debt;
- Reduced capital gain tax for entrepreneurs/founders selling part of their holdings in the context of an IPO or at a later stage;
- Reduced income tax on SMC equity investments held by retail investors;
- Tax credit on a percentage of investment in SMC funds (similar to Venture Capital Trusts in the UK); or
- Tax relief on non-sponsored research on SMCs published by regulated financial intermediaries.

**The TESG believes that there is an urgent need to review the Risk Finance Guidelines (RFG) to broaden the definition of eligible undertakings which may benefit from tax incentives** and it recommends to broaden the SME definition to all companies with a market capitalisation of less than EUR 1 billion (an SMC). This will help address serious obstacles that prevent SMCs from tapping public equity markets. **The current SME definition under the RFG is outdated** and is no longer compatible with industry practice. It is thus unable to capture the relevant target group in relation to

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<sup>110</sup> Oxera report, p. 87

EU public capital markets, potentially rendering policy making around SMEs less effective (see more on this in Chapter 2).

**A harmonised broadened definition of SMCs would allow a bigger population of smaller companies to benefit from tax incentives** which would be found compatible with the internal market under the RFG. The TESS believes that it should be further explored whether SMCs listed also on RMs should be supported by tax incentives compatible with the RFG. The TESS suggests to include in the scope of possible State aid beneficiaries under the RFG private and corporate investors in SMCs, SMC founders and SMCs research service providers.

Furthermore, the existing State aid rules largely focus on private equity and start-up financing, while mostly neglecting the existence of a market failure in the public equity markets. Thus, the General Block Exemption Regulation (GBER) on State aid provides for an exemption of state aid aimed at supporting SMC research related to risk finance and private equity investments (so called “scouting costs”), while SMC research related to public markets does not benefit from the same exemption. **SMC research is an important part of the SMC valuation** whether it concerns private or public equity and therefore any difference in treatment of the two is inappropriate.

**RECOMMENDATION 11: The TESS recommends to the Commission to review in the RFG the definition of an SME listed on alternative venues (MTFs or SGMs) to allow a higher number of smaller companies to benefit from tax incentives which would be deemed compatible with State aid rules. Furthermore, the TESS recommends to broaden the current exemption for “scouting costs” to costs of research which was conducted for SMEs listed on alternative venues (such as MTFs or SGMs).**

## 5.2. Engaging retail investors

Stock markets should democratise wealth and open up investment opportunities to all people. Equity investment is based on investors’ trust and capability to invest. However, investors must be given the tools to access the financial system in an effective way: they must be able to understand and properly choose amongst the different investment options. The development of these skills requires a more comprehensive financial culture and education. **Retail investors with a deeper financial knowledge will better understand their risk profile.**

The TESG looked at Action 8.B of the CMU Action Plan (“*The Commission will put forward a legislative proposal to amend MiFID II by Q4 2021/Q1 2022 to reduce the administrative burden and information requirements for a subset of retail investors. This will involve reviewing the existing investor categorisation of retail vs. professional investors or the introduction of a new category of qualified investors.*”).

**The TESG fully supports the recommendations that address the need to foster the participation of retail investors to capital markets.** These include the recommendations in (i) the final Report of the CMU HLF,<sup>111</sup> (ii) the “Savings and Sustainable Investment Union” report by the Next CMU High-Level Group<sup>112</sup> and (iii) the “European IPO Report 2020” by the European IPO Task Force.<sup>113</sup> The most relevant out of those recommendations are:

- **Tax incentives proved very effective in enhancing retail investors’ involvement.** As stated before in this Report,<sup>114</sup> the Member States should be encouraged to introduce tax incentives for retail investors to invest in simple and transparent long-term financial instruments like ETFs or shares.
- **Various measures to channel savings into retirement investment products should be considered, including the introduction of auto-enrolment systems.** The EU should further encourage collective “workplace savings” and “employee shareholder plans”. The Pan-European Personal Pension Product (PEPP) is a potential tool which could help unlock funding for companies, while providing additional retirement earnings for individuals.
- **The financial culture of companies and retail investors as users of capital markets should be promoted.** Less than half of European households invest in financial products. The focus must be put on improving the financial education in primary and secondary schools. As the Oxera report<sup>115</sup> argues, it is better to empower investors with financial knowledge than to protect them.

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<sup>111</sup> CMU HLF, pp. 85 ff.

<sup>112</sup> The Next CMU High-Level Group, *Savings and Sustainable Investment Union. Report to Ministers and presented to the Finnish Presidency*, October 2019

<sup>113</sup> European IPO Task Force, *European IPO Report 2020. Recommendations to improve conditions for European IPO markets*, 2020, pp. 25 ff., <https://fese.eu/app/uploads/2020/03/European-IPO-Report-2020.pdf>.

<sup>114</sup> See *supra* par. 5.1. on tax incentives.

<sup>115</sup> Oxera report, p. 86

In addition, the TESG believes that **making investments in fixed income securities accessible to retail investors should be a priority** and should be explicitly encouraged by the Commission. Currently, investment opportunities for retail investors and fixed income products are mostly limited to government bonds, fixed income (actively managed) funds, ETFs and a very limited number of corporate bond issues. The debt markets should be progressively opened up for retail investors. Issuers should be encouraged to issue bonds that can be sold to retail investors. It can be achieved by targeted amendments to the current regulation, fiscal incentives (on the demand and supply side) and amendments to the classification of certain categories of investors. This is particularly important when it comes to ESG bond issuances that can contribute to greener transition.

Specifically, **the TESG puts forward two concrete proposals to amend the investor categorisation in MiFID II**, building on Action 8.B of the CMU Action Plan.

**The TESG proposes to add a specific category of “qualified retail investor” and to revise the current definition of a professional client in MiFID II.**

**The new category of a “qualified retail investor” or “knowledgeable retail investor” should be included in MIFID II under the definition of clients considered professional upon request, subject to the fulfilment of certain requirements.** These requirements should include (i) a financial portfolio of more than €200,000 invested cumulatively during a period of 3 years in equities, bonds, ETFs, etc., or (ii) a demonstrated professional expertise in the financial or other relevant sector or a certification recognised by the national authority. Qualified retail investors would be able to invest in primary or secondary market transactions both in equity and fixed income, offered by companies listed or to be listed on RMs or on SGMs, without triggering the obligation for those companies to draw up a prospectus.

The second recommendation is to revise the current definition of professional client and reassess the existing criteria. Under the revised criteria, the investor/client should be able to demonstrate their knowledge and experience, based on the level of professional skills and expertise of the fund manager or portfolio advisor assisting the investor/client, so as to extend the category of professional client to a wider pool of investors/clients.



Several reports<sup>116</sup> underline the unintended but cumulatively disincentivising effect of investor protection provisions in several pieces of legislation (e.g. UCITS, MiFID, PRIIPs) on retail investors' access to markets. Improved education on financial planning and investments would allow individuals to better understand risks and would serve as a better means of protecting them, as opposed to introducing overreaching investment protection measures. However, measures aimed at enhancing financial education are unlikely to bear fruit in the short-term.

A more immediate way to broaden the investor base is reviewing the current categories of investors and notably of those investors that do not trigger a requirement to issue a prospectus. **Currently, there are very few investors registered as professional clients, which has led to a very low participation of individual investors in capital markets.**

Under the Prospectus Regulation, companies must draw up a prospectus to issue equity or debt unless one of the exemptions can be applied. Companies are, for example, exempted if securities are offered only to qualified investors, also referred to as professional investors in MiFID II. However, the definition of a professional investor in MiFID II is rather strict and does not allow a broad group of experienced investors with the understanding of instruments/ securities and risks associated with them to participate in issuances of shares and bonds limited to professional investors. As stated above, this definition and the associated criteria should thus be reviewed. In particular, the criterion on trading frequency (transactions at “an average frequency of 10 per quarter over the previous four quarters”) does not necessary show the client’s experience in sophisticated financial instruments, while being difficult to meet. Another criterion on relevant knowledge does not take into account professional skills/professional expertise in the sectorial area, limiting it exclusively to expertise in the financial services (certain sectorial expertise may provide better insights into future performance of an instrument than expertise in financial services).

**RECOMMENDATION 12: The TESG recommends to add a specific category of “qualified retail investor” or “knowledgeable retail investor”, subject to certain criteria (detailed in the annex). The TESG also recommends to revise the current definition of a professional client.**

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<sup>116</sup> CMU HLF, p. 67; Oxera report p. 86; European IPO Task Force, *European IPO Report 2020. Recommendations to improve conditions for European IPO markets*, 2020, p. 26, <https://fese.eu/app/uploads/2020/03/European-IPO-Report-2020.pdf>.

## 6. CONCLUSION

Access to suitable sources of finance enable companies to scale up faster, invest in innovation and improve their competitiveness. In turn, this is key to achieving future economic growth. However, there are several areas where EU capital markets are lagging behind, in particular relative to those in the US and the UK. This puts EU companies at a disadvantage, which has ramifications for their ability to compete in the global markets and survive financial crises and other shocks. This, in turn, impacts economic growth and employment. Therefore, it is essential to ensure that there is a stable long-term funding landscape for all EU enterprises, in particular the smaller ones.

The TESG believes that a dynamic, efficient, and fit for purpose EU capital market will provide the required capital for SMCs to enable them to continue to grow and innovate. This will accelerate the creation of strong indigenous enterprises, rooted in Europe, developing intellectual property in Europe, paying taxes in Europe and passing leadership skills to the next generation.

The reforms that the TESG has suggested in this report will ensure that EU capital markets, and in particular public equity markets, are available for the deployment of risk capital into SMCs as well as the innovation-driven sectors of the EU economy. The proposals focus on increasing the benefits of being a listed company, reducing the initial and ongoing costs for listing and the administrative complexity, increasing the ability to use multiple voting rights shares, using pre-listing sandboxes, providing additional research coverage as well as empowering retail investors. Together, the TESG proposals will deliver proportionate listing requirements for SMCs, supportive tax policies, increased investor access, and higher profile for the many EU SMCs, which are key generators of economic growth.

In order to ensure that the EU capital markets deliver benefits to SMCs, all stakeholders need to play their role. No single stakeholder acting alone can deliver a solution. Therefore, the TESG encourages all key participants - including the Commission, Parliament, Member States, NCAs, European Supervisory Authorities, stock exchanges, investors, advisors and SMCs - to commit to developing the EU capital market ecosystem to turn it into an enabler of accelerated growth and innovation. Working together, we can achieve this and create a dynamic, well-funded EU SMC sector to be proud of.

**Let's empower EU capital markets for SMCs and make listing cool again!**

# TESG PROPOSALS TO EMPOWER EU MARKETS FOR SMES

The issues identified and proposals to address, as captured throughout this report, are summarised below. The TESG believes that the combination of all of these will empower EU markets to support SMC listings

The issue	TESG proposals
<b>1. Need for a single SME definition for capital markets purposes</b>	<p>Define all publicly listed companies on any type of market whose market capitalisation is lower than EUR 1 billion as small and medium capitalisation companies (SMCs).</p> <p>Align the definitions of SMEs by referring to SMCs across different pieces of financial services legislation.</p> <p>Align the SME definition in the EU Risk Finance Guidelines with the SMC definition.</p>
<b>2. Listing requirements have become too onerous – prospectus simplification is required:</b>	<p>Issue guidance to stock market operators to simplify their listing rules, in order to ease the access of SMCs to the markets and reduce the cost and complexity of listing.</p> <p>Adopt on a permanent basis a simplified prospectus, similar in its form to the Recovery Prospectus, for secondary issuances and for transfers from SGMs to RMs.</p> <p>Limit the number of pages of an IPO prospectus for SMC issuers to 300, including the summary.</p> <p>Extend the eligibility of home Member State to EU SMC issuers of equity securities and non-equity securities with denomination below EUR 1,000 per unit. Allow SMC issuers to draw up the prospectus in English, as the customary language in the sphere of international finance, independently from the official language accepted by the NCA.</p> <p>Grant the status of Frequent Issuer from the first approval of the URD by the NCA.</p> <p>Abolish the requirement to print a prospectus and incentivise the use of the electronic forms.</p>
<b>3. MAR regime is too onerous and needs to be reformed:</b>	<p>Amend MAR to (i) clarify what constitutes inside information and when it should be disclosed; (ii) simplify obligations in relation to insider lists, market soundings and PDMR transactions; (iii) establish a more proportionate punitive regime and (iv) clarify the EU liquidity contract regime to reflect existing practices.</p>
<b>4. Lack of flexibility re share structures needs to be addressed:</b>	<p>Introduce the option for issuers who wish to list or are already listed on a RM or MTF to adopt multiple voting rights structures, such as dual class shares and / or loyalty shares.</p>

<p><b>5. Lack of pre IPO support:</b></p>	<p>Create a pre-listing sandbox for SMCs listed on both RM and GMs (for up to 2 years) as well as an optional transitional period for a duration of 3 years for SMCs wishing to transition from SGMs to RMs as well as for SMCs wishing to list on RMs.</p>
<p><b>6. Lack of visibility and profile of SMCs – need to shine a spotlight on them:</b></p>	<p>Create an EU Champion label to shine spotlight on best in class EU SMCs, including a supporting index.</p>
<p><b>7. Insufficient equity research to give visibility to SMCs:</b></p>	<p>Encourage Member States to put in place measures to promote equity research coverage of all listed SMCs. Support both independent and sponsored SMC research with funds from the ERDF, including with the aim of securing the long-term viability of regional brokerage houses.</p>
<p><b>8. Credit research and rating is not adequate for SMCs and needs reform:</b></p>	<p>Facilitate the process of data collection by including relevant debt data in the ESAP. Subsidise SMCs paying for a regulated credit rating to foster the development of a disintermediated debt market for SMCs.</p>
<p><b>9. SMCs do not have clear and proportional ESG KPIs nor support for sustainability reporting:</b></p>	<p>Introduce a tailored and voluntary framework for SMCs in the NFRD review with a proportionate and clearly set of KPIs as well as tax incentives for costs related to sustainability reporting; include sustainability-related information in the ESAP. Develop advisory services or teach-ins to support companies, and in particular SMCs, in their reporting process. Make sustainability rating agencies and processes subject to regulation and proportionate supervisory oversight. Facilitate the development of the SMC ESG Index based on standard EU SMC ESG KPIs.</p>
<p><b>10. Lack of harmonised minimum good corporate governance principles:</b></p>	<p>Design a set of corporate governance disclosures that could be beneficial to SMCs, namely: (i) reporting of related party transactions; (ii) disclosure acquisition/disposal of voting rights; (iii) appointment of a least one independent director for issuers having a market capitalisation above a certain threshold; (iv) appointment of one reference person to manage the relations with the investors; and (v) minimum requirements for delisting to protect minority shareholders. The TESG recommends to the Commission to consider three options for a possible initiative on corporate governance.</p>
<p><b>11. Taxation policy not supportive of SMCs:</b></p>	<p>Review in the RFG the definition of an SME listed on alternative venues (MTFs or SGMs) to allow a higher number of smaller companies to benefit from tax incentives which would be deemed compatible with State aid rules. Broaden the current exemption for “scouting costs” to costs of research which was conducted for SMEs listed on alternative venues (such as MTFs or SGMs).</p>
<p><b>12. Need to broaden retail investor base that invest in SMEs:</b></p>	<p>Incentivise and encourage retail participation by (i) adding a specific category of “qualified retail investor” or “knowledgeable retail investor”, subject to certain criteria; and (ii) revising the definition of professional client to include a wider pool of investors.</p>

# ANNEX I – TECHNICAL RECOMMENDATIONS

## 1. SMEs: the need for a consistent definition

Recommendation
<p><b>1. SMEs to SMCs:</b> The TESG recommends to broaden the definition of SMEs across financial services legislation through the creation of a Small and Medium Capitalisation Companies (SMC) definition. This definition should apply to all publicly listed companies on any type of market whose market capitalisation is lower than 1 billion euros.<sup>1</sup></p> <p><b>2. Harmonisation and alignment of SME definition:</b> The TESG recommends to align the definitions of SMEs by referring to SMCs across different pieces of financial services legislation (MiFID II, Prospectus Regulation, ELTIF Regulation, EuVECA Regulation, Market Abuse Regulation), as well as to enlarge the SME definition in the EU Risk Finance Guidelines in order to allow for a possibility to extend tax incentives to a wider number of smaller issuers, while remaining compatible with the internal market.</p> <p>The need to have a uniform definition of SMCs was already raised in a study carried out on behalf of DG Enterprise and Industry<sup>2</sup> but the recommendations suggested were not followed up by the Commission. The study noted that the EU definition of SMEs lacks an indicator for market capitalisation, which is the main characteristic used by financial market participants to determine whether or not they perceive a stock to be small, mid-cap or large cap. To this end, it was suggested to introduce into EU legislation a market capitalisation criterion so as to capture within the SME definition mid-cap issuers that face the same problems as small-caps. It was recommended that in the medium-term the Commission should <i>«harmonise the definition of SMEs in the financial markets as in all case studies the project team observed different definitions for listed SMEs. A uniform definition of ‘growth company’ or ‘growth market’ would allow better comparability between listed SMEs in neighbouring markets within the EU. Market capitalisation is the most recognised characteristic used to define a company by financial market participants»</i>.<sup>3</sup></p> <p>Finally, Art. 77(2) of CDR 2017/565 qualifies non-equity issuers as SMEs if the nominal value of their debt issuances, over the previous calendar year, does not exceed EUR 50 million on all trading venues across the EU. This requirement seems not to be aligned with the evidence obtained from some national markets, where the average of the debt issuances is higher than this threshold. Thus, there is a risk for the SGMs of having to exclude those requests for listing of debt issuances if exceeding the threshold.</p> <p>The TESG is also aware of the various proposals that have been made in a recent consultation published by the Commission<sup>4</sup> regarding the SME definition, where some respondents proposed a broader and aligned definition with reference to listed issuers.<sup>5</sup></p>

<sup>1</sup> High Level Forum on the Capital Markets Union, *A new vision for Europe’s Capital Markets. Final Report*, 10 June 2020, p. 66, [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/growth\\_and\\_investment/documents/200610-cmu-high-level-forum-final-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf).

<sup>2</sup> ECSIP Consortium, *Improving the market performance of business information services regarding listed SMEs*, September 2013, p. 9, where listed SMEs are defined as enterprises with small and mid-level market capitalization (small- and mid-caps), where small-caps include issuers with a market capitalisation from EUR 336 million to EUR 1.3 billion and mid-caps include issuers with a market capitalisation from EUR 1.3 billion to EUR 6.7 billion.

<sup>3</sup> *Ibidem*. For further market evidence in terms of size of small cap, please see the MSCI Small Cap Index where the largest company in the index has a market cap of \$12.1bn, the smallest is \$145m, the average is \$1.65bn and the median is \$1.21bn. The average and the median clearly support the SMC definition argument.

<sup>4</sup> European Commission, *Public consultation on the review of the SME definition*, 6 February 2018, [https://ec.europa.eu/info/consultations/public-consultation-review-sme-definition\\_en](https://ec.europa.eu/info/consultations/public-consultation-review-sme-definition_en)

<sup>5</sup> Europeanissuers, *Response to Commission’s Consultation on the Review of the SME definition*, April 2018, p. 1, <http://www.europeanissuers.eu/positions/files/view/5aec85df0981c-en>.

## Legal amendments

- In **MAR**: see recommendation 3 on market abuse regime.
- In **RFG**: see recommendation 11 on State aid and tax incentives.
- In the **Prospectus Regulation**:
  - prospectus simplifications for SMCs: see recommendation 2 on alleviating listing requirements;
  - EU growth prospectus threshold increase to EUR 1 billion (Art 15(1)(a) and (b));
  - SME definition in prospectus regulation to be modified so to adopt SMC definition (Art 2(1)(f));
- In **MiFID II**:
  - SME definition in MiFID II to be increased from EUR 200 million to EUR 1 billion (Art 4(1)(13));
  - issuers whose shares have been admitted to trading for less than three years shall be deemed an SME for the purpose of Art 33(3)(a) where their market capitalisation is below EUR 1 billion (Art 77, CDR (EU) 2017/565)<sup>6</sup>;
- In the **ELTIF Regulation**: a qualifying portfolio undertaking for ELTIF shall include issuers admitted to trading on an RM or on an MTF having a market capitalisation below EUR 1 billion; (Art. 11(1)(b)(ii)).
- In the **EuVECA Regulation**: a qualifying portfolio undertaking for EuVECA shall include issuers admitted to trading on an RM or on an MTF having a market capitalisation below EUR 1 billion; (Art. 3(d)(i)).
- Amend Art 77(2) of CDR 2017/565 to increase the threshold for debt issuances to at least EUR 100 million.

## Feasibility: Implementation process and possible risks

The TESG does not see any material risk for market integrity.

The SME definition, under the 2003 Recommendation<sup>7</sup> is being regularly assessed by the Commission as evidenced above. However, the scope of the Recommendation is much broader than the financial sector legislation. The TESG concluded that there is a need to align the definition across the financial sector legislation specifically.

Several proposals could be assessed as part of the upcoming reviews of MiFID, MAR, and RFG. However, for the recommendations where no upcoming review is envisaged, it may take longer as there is a political risk in re-opening legislation that has only been recently closed, such as the Prospectus Regulation.

<sup>6</sup> This view has been expressed by some respondents in the consultation published by ESMA on the functioning of the regime for SME Growth Markets under the Markets in Financial Instruments Directive and on the amendments to the Market Abuse Regulation for the promotion of the use of SME Growth Markets, see AMAFI, Börse München, and Kapitalmarkt KMU.

<sup>7</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, <http://data.europa.eu/eli/reco/2003/361/oj>.

## 2. Alleviating listing requirements

### Recommendation

#### 1. Maximum length of the IPO prospectus

The TESG recommends to limit the number of pages of an IPO prospectus for SMC issuers to 300, including the summary. SMCs should, however, have the option to request their relevant NCA the permission to extend the number of pages if justified by a complex financial history.

#### 2. Simplified prospectus for secondary issuances and for transferring from an SGM to a RM

The TESG recommends that a new simplified prospectus (replacing the current simplified prospectus for secondary issuances), similar in its form to the Recovery Prospectus, be adopted on a permanent basis for secondary issuances and for transfers from an SGM to a RM, provided that specific conditions are satisfied.

The essential information to be included in the prospectus for secondary issuances, relating to both the simplified disclosure regime for secondary issuances (Art 14.1(a) of the Prospectus Regulation) and the prospectus for transferring from an SGM to an RM (Art. 14.1(b) of the Prospectus Regulation), needs simplification in order to ease and boost SMCs' access to equity financing. For both types of prospectus, the proposed simplification stems from the same concern to reduce the costs and time required to approve the document.

This would imply that the simplified prospectus provided for in Prospectus Regulation would be replaced by a new simplified prospectus.

An easy way to simplify both types of prospectus would be to rely permanently on the Recovery Prospectus introduced in the Capital Market Recovery Package.<sup>8</sup> In other words, it would be appropriate to take advantage of the review of the Regulation introducing the Recovery Prospectus to make this regime permanent – subject to certain amendments (e.g. removals of references to COVID) – as a replacement of the regime for simplified prospectus in case of secondary issuances currently foreseen in the Prospectus regulation. This would allow to develop a prospectus that is (i) easy to produce for issuers that want to raise equity (or debt) on capital markets; (ii) easy to understand for investors who wants to finance them; and (iii) easy to scrutinize and approve by national competent authorities.

Just like the Recovery Prospectus, the proposed prospectuses should include a short summary as a useful source of information for investors, in particular retail investors. That summary should be a self-contained part of the prospectus and should focus on key information that would enable investors to decide whether to study the prospectus as a whole in order to make their investment decision.

Provided that the underlying rationale for the proposal is to make it easier for already listed SMCs to raise additional financial resources from capital markets, the TESG sees merits in expanding the current proposal on a simplified prospectus for secondary issuances also to debt issuances, as it would allow for greater flexibility in choosing the most suitable form of financing without renouncing to a more simplified documentation. Indeed, this is especially sensible when considering that the information required by fixed income investors is more limited compared to what is required by equity investors to make an informed investment decision.

With particular reference to the prospectus for transferring from an SGM to an RM, the summary should provide a description of the impacts on governance and shareholders' rights deriving from the listing on an RM (e.g. transparency, corporate governance, applicable rules on takeover bids). This would ensure an efficient investor protection by providing a slim and clear document particularly for retail investors.

Furthermore, the prospectuses, as hereby suggested, should also enable a more efficient scrutiny by NCAs. To that effect, the proposed prospectus approval regime shall be in line with that of the Recovery Prospectus.

<sup>8</sup> <https://www.consilium.europa.eu/en/press/press-releases/2021/02/15/capital-markets-recovery-package-council-adopts-first-set-of-measures-to-help-companies-access-funding/>

### 3. Determination of “Home Member State”

**The TESG recommends to extend the right to choose their home Member States of issuance to EU SMC issuers of equity securities and non-equity securities with denomination below EUR 1,000 per unit.**

EU SMCs who wish to be listed on public markets, whether MTF or RM, should be given the possibility to determine the “Home Member State” for their equity issuances not only on the basis of its registered office, but also taking into account the Member State where the securities are admitted to trading, with the purpose of aligning the treatment of equity and debt issues, and of EU and third-country companies. Such an amendment would be particularly relevant with respect to the passporting regime with the aim to achieve an equal access to the market in the various European countries for both equity and non-equity European SMCs.

It should be noted that the definition of “Home Member State” in the Transparency Directive should remain unchanged as the SMC shall be supervised by the competent authority of the Member State where it has the registered office, independently from the Member State where the securities have been admitted to trading, under the principles of collaboration and cooperation between the NCAs and recognition of the scrutiny activity of NCAs, on which the passporting mechanism lays its foundations.

### 4. Language of the prospectus

**The TESG recommends that prospectuses of SMC issuers can be drawn up only in English as the customary language in the sphere of international finance, independently from the official language of the home Member State.** This would facilitate access to public markets in various European Member States and create a level playing field amongst the market participants. Only the summary of the prospectus should be translated in the official language of the home Member State, or at least one of its official languages, or in another language accepted by the NCA.

### 5. Shelf registration

The Commission is invited to review the provisions relating to the status of **Frequent Issuers** and the **Universal Registration Document (“URD”)** as outlined in the Prospectus Regulation, with a view to simplifying the procedure for granting the status of Frequent Issuer and promote the adoption of the Universal Registration Document by listed SMEs. More specifically, the TESG recommends that:

- The status of Frequent Issuer should be granted after the first approval of the URD;
- If the URD is used as a constituent part of a prospectus for the admission to trading and/or offering of securities, it should be made clear that the URD shall not be part of the approval process of the prospectus by the NCA;
- In order to enhance the use of the URD, any issuer should be granted the possibility to draw up the URD in English for passporting purposes, notwithstanding the specific language requirements of the relevant Home Member State.

### 6. Printed prospectus

Article 21 (2) of the Prospectus Regulation contains a list of channels of publication of prospectuses in electronic form. Electronic form of publication has been for a long time widely accepted by investors. However, Article 21 (11) also sets the obligation for issuers to provide a copy of the prospectus on either a durable medium or printed upon request of any potential investor. This requirement could be abolished without bearing any negative impact on retail investors. This results in costs without any positive impact on investors, since both retail and institutional investors are already used to accessing prospectus online and they do not ask for prospectuses either in printed form or on a durable medium. Therefore, **the TESG recommends abolishing the requirement to print and incentivising the use of the electronic form of prospectus, to be published through the channels already listed in Article 21(2) of the Prospectus Regulation.**



## 7. Dual listing

The TESG recommends providing 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 SGM may on their own request demand to be admitted to trading on another SGM.

More specifically, it should be made clear that (i) issuers admitted to trading on an SGM may also be admitted to trading on another SGM based on a request from the issuer to the relevant venue; (ii) in that case, issuers shall not be subject to any additional obligations relating to corporate governance or initial, ongoing or ad hoc disclosure with regard to the new SGM, except for reasonable additional requirements related to financial and non-financial reporting or disclosures, provided that relevant documents are made available in the language of the jurisdiction of the second trading venue or in English; and provided that the existing free float on the original SGM is considered sufficient for admission to the second trading venue (so called “just listing”). This, however, should not have an impact on the right of a SGM operator to assess and subsequently refuse the request for admission.

## 8. Listing rules of stock market operators

The TESG recommends to the European Commission to issue guidance to stock market operators to simplify their listing rules, in order to ease the access of SMCs to the markets and reduce the cost and complexity of listing, without compromising market integrity.

### Legal amendments (where available)

#### 1. Maximum length of IPO prospectus:

- **Amend** Article 4, paragraph 1(13) of MiFID II to define SMCs with a market capitalisation threshold of €1bn: “*small and medium-sized enterprises*’ for the purposes of this Directive, means companies that had an average market capitalisation of less than EUR 1 000 000 000 on the basis of end-year quotes for the previous three calendar years”;
- **Amend** Article 6 of the Prospectus Regulation to add the following paragraph “*4b. The prospectus for SMCs as defined in Directive (EU) 2014/65, article 4, paragraph 1(13) shall have a maximum length of three hundred sides of A4-sized paper when printed. SMCs may be authorised by their competent authority to include additional pages in case of complex financial history. The summary, the information incorporated by reference in accordance with Article 19 and experts’ reports shall not be taken into account as regards the maximum length referred above*”.

#### 2. Simplified prospectus for secondary issuances and for transferring from an SGM to an RM

Amend Article 14 and Article 14a of the Prospectus Regulation so that the content of the recovery prospectus replaces that of the simplified prospectus for secondary issuance and for transferring from an SGM to an RM permanently:

- **Repeal** Article 14 of the Prospectus Regulation
- **Amend** Article 14a of the Prospectus Regulation to replace the word “recovery prospectus” by “simplified prospectus”
- **Replace** the first subparagraph of Article 14a (1) of the Prospectus Regulation regarding the scope of the recovery prospectus with the first subparagraph of Article 14(1) (scope of the simplified prospectus)
- **Repeal** art. 47(a) of the Prospectus Regulation
- **Amend** Article 20 of the Prospectus Regulation by adding the following paragraph: “*6b. By way of derogation from paragraphs 2 and 4, the time limits set out in the first subparagraph of paragraph 2 and paragraph 4 shall be reduced to seven working days for a simplified prospectus. The issuer shall inform the competent authority at least five working days before the date envisaged for the submission of an*

*application for approval”.*

### 3. Determination of “Home Member State”

- **Amend** the definition of “Home Member State” provided by Article 2 letter m) (ii) of the Prospectus Regulation, so that Home Member State for EU SMC issuers of both equity and non-equity securities, without limitation on the issuance size, shall be determined at the choice of the SMC among the Member States where the issuer has its registered office, or where the securities were or are to be admitted to trading on a RM or where the securities are offered to the public

### 4. Language of the prospectus

- **Amend** Article 27(1) of the Prospectus Regulation in order to provide that the prospectus may be drawn up, at the choice of the issuer, in a language customary in the sphere of international finance (i.e. English language) as an alternative to the current provision, regardless of whether an offer of securities to the public is made or admission to trading is sought only in the home Member State or in more than one Member State
- **Insert** in Article 27(1) of the Prospectus Regulation the following provision: *“The competent authority of each Member State shall require that the summary referred to in Article 7 be available in its official language, or at least one of its official languages, or in another language accepted by the competent authority of the home Member State, but it shall not require the translation of any other part of the prospectus”*
- **Repeal** Article 27(3) of the Prospectus Regulation
- **Modify** Article 27(5) of the Prospectus Regulation as follows: *“Where a prospectus relates to the admission to trading on a RM of non-equity securities and admission to trading on a RM is sought in one or more Member States, the prospectus shall be drawn up either in a language accepted by the competent authorities of the home and host Member States or in a language customary in the sphere of international finance, at the choice of the issuer, the offer or the person asking for admission to trading on an RM*

### 5. Shelf registration

- **Amend** Article 9(2) of the Prospectus Regulation to repeal the reference to “two consecutive years”, specifying that it is sufficient for the issuer to receive the universal registration document (URD) approval by the NCA only once to be granted the status of Frequent Issuer
- **Amend** Article 20(6) of the Prospectus Regulation to exempt the URD from scrutiny by the NCA during the approval process of a prospectus when used as a constituent part of a prospectus, if the URD was already filed and approved by the NCA, by adding the following subparagraph: *“The competent authority for the prospectus approval shall not undertake any scrutiny nor approval relating to the universal registration document and any amendments thereto, and shall approve only the securities note and the summary”*.

### 6. Printed prospectus

- **Repeal** the requirement to deliver a prospectus on a durable medium upon investors’ request as per Article 21 (11) of the Prospectus Regulation.

### 7. Dual listing

- **Amend** Article 33(7) of MiFID II to make it explicit that: (i) issuers admitted to trading on an SGM may on their own request demand to be admitted to trading on another SGM; (ii) in that case, issuers shall not be subject to any additional obligations relating to corporate governance or initial, ongoing or ad hoc disclosure with regard to the new SGM, except for reasonable additional requirements related to the financial and non-financial reporting or disclosures, provided that relevant documents are made available

in the language of the jurisdiction of the second trading venue or in English; and provided that the existing free float on the original SGM is considered sufficient for admission.

#### **Feasibility: Implementation process and possible risks**

Each recommendation on simplifying the prospectus will require a number of amendments to the Prospectus Regulation (level 1). Such amendments can be considered in the context of the Prospectus Regulation review planned for 2022.

While the co-legislators might have some concerns around reducing the amount of information provided to investors through the prospectus, the recommendations were designed to ensure that sufficient transparency would still be provided so as to inform potential investors in their investment decisions.

Implementing a maximum length of the prospectus should not reduce transparency as it aims to align prospectus practices across the EU, given that some Member States already have an average size of IPO prospectuses consistent with the proposed limit without it translating into less transparency. Flexibility is also foreseen in case of complex financial history of the issuer.

The proposed changes to the secondary issuance and transfer prospectus build on the proposal put forward in the CMRP on the Recovery Prospectus, which has already been agreed upon by the co-legislators. The TESG's recommendation only foresees to extend this regime to secondary issuances and transfers from an SGM to a RM on a permanent basis, without changing the prospectus for initial offers. As such, investors would be able to rely also on the information already provided by the issuer in its initial IPO prospectus.

The proposed changes to the language, shelf registration and requirement to print a prospectus focus on simplifying and modernising processes without affecting the amount of information provided to potential investors.

The proposed changes to the designation of a home Member States may be perceived as entailing potential risks of regulatory arbitrage. However it should be kept in mind that the proposed changes only aim to align the treatment in terms of type of issuance (equity vs non-equity) and issuer (EU vs extra-EU). As such, the proposal would actually discourage issuers from following the practice – already adopted by several issuers to date – of moving the country of incorporation for regulatory purposes.

### 3. Simplifying market abuse regime

#### Recommendation

##### 1. Notion of inside information

**The TESG recommends to clarify the notion of inside information, by applying a two-step approach, and to clarify when this information should be disclosed.**

Relevant industry stakeholders have highlighted a number of times the need to amend the notion of inside information,<sup>9</sup> as defined in Regulation (EU) 596/2014 (Market Abuse Regulation, hereinafter “MAR”).<sup>10</sup> Even though the objective of the existing definition of inside information has been adopted to ensure market participants are not put at a disadvantage to company insiders, this notion appears to be too broad.

Any inside information does not only trigger an insider trading prohibition, but at the same time and at the same level of maturity, it triggers an immediate disclosure obligation.<sup>11</sup> This proves to be extremely costly where events are at a preliminary stage.<sup>12</sup> Therefore, in a number of cases, issuers are forced to seek legal advice incurring high costs, yet without the certainty of the soundness of the valuation provided. In other terms, listed companies deal with a high level of legal uncertainty as regards the notion of inside information, market abuse prohibition (*i.e.* insider dealing) and the duty of disclosure.

The current definition of inside information raises several problems, notably, on one hand, the difficult **identification of the moment when the information becomes “inside information”** and, on the other hand, the **risk of publishing information which is not yet mature enough**. A single definition of price sensitive information creates high uncertainty on when an information becomes “inside information”, while increasing the risk that issuers will be in breach of disclosure obligation.<sup>13</sup> The risk of a premature disclosure is, therefore, too high. This is harmful both for investors, as torrents of potentially unreliable information could be disclosed to them, and for issuers, as it could hinder their ability to conduct business and protect sensitive information, increasing the costs of disclosure and enhancing litigation risks.<sup>14</sup>

The uncertainty of what constitutes inside information has consequences also on the management of the insider list, according to Art. 18 MAR, as it is not clear when the latter must be activated.

**In light of the above, the notion of inside information needs to be clarified in order to achieve more proportionality for all listed companies.** Diversely to the proposal of the High-Level Forum on CMU, the TESG believes that the best solution is represented by the so called **two-steps approach**. In particular, a distinction

<sup>9</sup> CMU HLF, p. 67

<sup>10</sup> According to Art. 7(1) of MAR inside information shall comprise, *inter alia*: information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments.

<sup>11</sup> The adoption of a one-step model in the MAR was not obvious since a two-step model was first suggested in the draft of MAR. However, the Commission has not supported the proposal of a new definition of inside information that should trigger the insider trading prohibition but not the duty to disclose, see ESME Report, *Market Abuse EU legal framework and its implementation by Member States: a first evaluation*, July 2007, p. 5, C. Di Noia and M. Gargantini, *The market abuse directive disclosure regime in practice: some margins for future actions*, in *Rivista delle Società*, 2009, pp. 782 ff., where the authors point out: “*The first proposal for a possible amendment to the MAD framework is, according to the ESME report, more straightforward and therefore represents a first-best scenario. The solution would be to distinguish the inside information as a determinant for disclosure from the inside information as a reference for the obligation to refrain from abusive trading (or encouraging abusive trading) in relevant financial instruments: in effect, to return to a state of the art similar to that existing prior to MAD. Such a distinction between the two notions of inside information could be reached through an amendment to the MAD reflecting the previous 2001/34/EC directive*”.

<sup>12</sup> Reference should be made, for instance, to a CEO planning to resign, board members discussing potential ideas of a merger, preliminary risks of litigation, negotiation in an M&A transaction, etc.

<sup>13</sup> Scholars defined this set of practices a two step- approach because “unlike the approach in which the two measures of insider dealing and mandatory disclosure begin simultaneously, the measures take effect in two steps. First, the ban on insider dealing; then, the mandatory disclosure. While both steps may occur simultaneously, e.g. when information immediately qualifies as inside information, the approach deals with each measure on its own merits” J. Lau Hansen, *Say when: When must an issuer disclose inside information?*, in *Nordic & European Company Law LSN Research Paper Series* no 16-03, p. 10.

<sup>14</sup> J. Payne, *Disclosure of inside information*, Law Working Paper n. 422/2018, October 2018, ECGI, fn. 2.

between the notion of inside information for the purpose of insider dealing prohibition and one for the disclosure obligations would significantly clarify and simplify issuers' duties under MAR.<sup>15</sup> The introduction of a two-fold notion of price sensitive information would also narrow the cases of application of the delay in the disclosure of information only in exceptional circumstances. This would in turn strongly reduce issuers' expenses associated with the management of the delay procedure and reduce the risk of sanctions for non-compliance.

MAR should also be amended in order to clarify that inside information relating to a multi-stage process needs only be made public once the end stage is reached, unless a leakage has occurred.

This would allow a better enforcement of the insider dealing prohibitions, and at the same time, would significantly reduce listed companies' administrative burden and compliance costs.

In this context, it would also be appropriate to refine the notion of “*significant price effect*” of Art. 7(4) MAR. On the matter, the TESG supports the CMU HLF suggestion<sup>16</sup> according to which, for the purpose of the qualification of inside information, significant price effect shall mean “*information a rational investor would be likely to consider relevant for the long-term fundamental value of the issuer and use as part of the basis of his or her investment decisions*”. The introduction of the “long-term fundamental value of the issuer” would allow short-term investments, which often follow different investment logics than those underlying the notion of inside information, to be disregarded. Moreover, this would help foster harmonisation taking into account that some Member States focus on fundamental value and others include incentives for short-term volatility when assessing the impact on stock prices.

As per debt-only issuers, the TESG fully supports the view expressed by a strong majority of the respondents to an EC Consultation,<sup>17</sup> who were convinced that such issuers should disclose only information that is likely to impair their ability to repay their debt. Disclosure of inside information by non-equity issuers is very burdensome and deterring not only for European, but also for non-European issuers seeking to list debt securities on European markets.

## 2. Delay disclosure of inside information

**The conditions for delaying the disclosure should be amended by repealing any reference to the possibility that investors are misled.** This is indeed a highly controversial condition that often creates an uncertainty in *ex post* checks by NCAs (or criminal prosecutors). The condition that a listed company does not mislead the public when delaying disclosure of inside information easily slides into a circular requirement that is by definition impossible to comply with and should be repealed. This amendment would, for instance, allow issuers to interpret the legal basis correctly when they decide to disclose negotiations and only when they can be confident, with a sufficient degree of certainty, that a positive outcome is reached.

## 3. Insider lists

**The TESG recommends to remove the obligation for SMC issuers to keep an insider list. As a second-best scenario, the TESG recommends to further reduce and simplify the content of the insider list for all issuers.**

The management of insider lists is perceived as very burdensome for issuers and in particular for SMEs. **The TESG's preferred approach is to repeal the duty for SMC issuers to keep an insider list**, given that (i) the need to place investigation costs on issuers seems not to be supported by a strong data set evidencing its

<sup>15</sup> Before MAR came into force, some Member States (namely Italy and Denmark) used to apply the two-steps approach (see art. 2(2) Commission Directive 2003/124) to distinguish the inside information relevant for insider dealing (under Art. 8 of MAR) from that relevant for the disclosure obligations (under Art. 17 of MAR). According to this approach, on one hand, inside information was deemed to arise at an early point regardless of whether the information was uncertain, which triggered the ban on insider dealing, in order to protect the market until the inside information was disclosed. Disclosure, on the other hand, would be made when the inside information was certain. Under this approach, a duty to publish inside information is, therefore, not deemed to arise for each of the stage of a complex procedure (e.g. in case of entering into a letter of intent or the following negotiations preceding the closing of a contract), but is referred only to the final outcome of the process. In other terms, disclosure of insider information is required when the information itself is certain or near certain.

<sup>16</sup> CMU HLF p. 72

<sup>17</sup> European Commission, *Feedback statement of the public consultation on building a proportionate regulatory environment to support SME listing*, 2018, p. 14.

effectiveness in the investigations performed by the NCAs (or criminal prosecutors); (ii) NCAs (not issuers) are responsible for monitoring and investigating market abuse; (iii) the NCAs' investigations into insider lists may be carried out by a wide array of sophisticated supervisory investigation instruments as provided in Art. 23 MAR;<sup>18</sup> and (iv) Member States may, if necessary, invest in modern enforcement tools as is done in the USA.

Removing the requirement to draw up insider lists should not prevent NCAs from conducting investigations: their access to modern investigative technologies and the actual record keeping duties of issuers should be sufficient to identify the persons who have abused of price sensitive information in a specific case. **This should take place provided that the NCA, following disclosure of inside information to the market, intends to request clarification from the issuer. In this case, the latter should give access to needed information by the NCA to have a clear picture of the insiders involved.**

This approach is in line with the view of the CMU HLF, according to which *“there are a series of burdensome regulatory provisions and requirements that act as disincentives for companies to remain listed on RMs or MTFs. The cost of complying with the regulatory requirements is high, especially for SMEs. For many companies, it is not worth to stay listed on public market as the cost outweighs the benefits”*.<sup>19</sup>

As second-best scenario, and if the insider list obligation would remain unchanged, the TESG supports the opinion of CMU HLF<sup>20</sup> which observes that *“the management of the insider list is very burdensome due to all the information the issuer must gather to fill in the list. Art. 18 paragraph 9 should be amended to ensure that only the most essential information for the identification purposes is included. Issuers should be given flexibility to determine which elements of personal data in the insider list are sufficient for that purpose”*. **The TESG suggests in this case to further ease the content of the insider list providing that only the name, surname and National Identification Number shall be included in the list and that persons acting on behalf or account of SMCs (e.g. advisors and consultants) shall not be subject to the obligation to draw up and update their own insider list under Art. 18(1) of MAR.** Considering that NCAs are public authorities, the National Identification Number is sufficient to identify the person under investigation and to obtain any other data regarding such person. To create a uniform regime, Member States shall not be allowed to decide that SMCs should include in the insider list the same data as any other issuer.

#### 4. Insider lists and event-based section

With regard to the drawing up of the insider list, at the time of its entry into force, MAR exempted issuers admitted to trading on the SGM from the burden of keeping the insider list, thus guaranteeing them cost savings, subject to compliance with certain conditions. The SGM regulation adopted in 2019<sup>21</sup> has provided, for issuers admitted to trading on an SGM, the option to keep the insider list in a simplified form, which shall include all persons having regular access to inside information relating to the issuer. In this context, it is worth noting that the above-mentioned Regulation has entrusted ESMA with the task of drawing up the draft Implementing Technical Standards specifying the format of the new insider list and the information to be included in it. **Such technical standard should clarify that SGM issuers are obliged to maintain only one list of persons having regular access to insider information and are not required to create event-based sections of the insider list each time, in which the details of persons with access to a single piece of inside information are recorded so to alleviate MAR regime and reduce compliance costs associated with it.**

#### 5. MAR scope

<sup>18</sup> The NCAs must be given all supervisory and investigatory powers that are necessary for the exercise of their functions, including at least the right to: (a) have access to any document and data in any form, and to receive a copy of it; (b) require or demand information from any person, and if necessary, to summon and question any such person with a view to obtain information; (c) carry out on-site inspections; (d) enter the premises in order to seize documents and data; (e) to refer matters for criminal investigations; (f) require existing recordings of telephone conversations, electronic communications or data traffic records; (g) to require existing data traffic records held by a telecommunications operator.

<sup>19</sup> CMU HLF, p. 71

<sup>20</sup> *Id.* p. 67.

<sup>21</sup> Regulation (EU) 2019/2115 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, <http://data.europa.eu/eli/reg/2019/2115/oj>.

As regards issuers admitted to MTFs, it would be **appropriate to revise the application of MAR from the first day of trading, instead of from the day on which the application for admission to trading is submitted.** Alternatively, Art. 2 should be amended so as to keep the first day when organised trading activity takes place as general triggering event for MAR applicability, but allowing the option for Member States to extend the MAR regime to the moment when application for admission is made.

## 6. Market soundings

ESMA recognised that one of the main goals that led to the introduction of the market sounding regime is to ensure the possibility for NCAs to obtain a full audit trail on a process which is by nature at risk of unlawful disclosure of inside information. However, NCAs' broad investigations powers (Art. 23 of MAR) and market integrity duties for stock exchanges and market participants (Art. 33 of MiFID II) should be sufficient to detect and punish possible violations of market abuse (see above par. 3).

**As best scenario, Art. 11 of MAR should be 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 scenario, the TESG supports the proposal in ESMA's Consultation on MAR (a) to clarify that the market soundings may be applied only in presence of inside information being disclosed, and (b) to simplify the burdensome procedure for both disclosing market participants and persons receiving market soundings. **However, the TESG does not agree with ESMA's opinion on Art. 11 according to which the market sounding regime should be compulsory. Instead, the TESG would strongly recommend to make it a mere option to benefit from the protection of the allegation of unlawful disclosure of inside information.** Moreover, the TESG also rejects ESMA's opinion to introduce administrative sanctions for not complying with the market sounding procedure.

Finally, as **private placements of bonds addressed to qualified investors are excluded from the scope of the market sounding regime provided that an adequate non-disclosure agreement is in place, the TESG proposes to extend the exemption to equity placements and to include in both types of placement also external funding providers who may not qualify as qualified investors.**

## 7. Managers' transactions

**The threshold above which managers have to notify transactions in shares or bonds to the issuer and the NCA should be calculated (on an aggregate basis) according to the market capitalisation of the issuer, with a lowest threshold of EUR 50,000 as suggested by the CMU HLF.<sup>22</sup> In particular, different capitalisation categories could be envisaged on the basis of which the relevant threshold for manager transactions could be calculated at the beginning of the year.**

As to the criteria for the notification, the TESG supports tranches schemes, as proposed by some respondents to the MAR Consultation,<sup>23</sup> with notifications performed each time a hard threshold is reached (in other words, the current criterion of the threshold for the first notification in a given year would be applied also to the subsequent notifications). Indeed, the relevant information to be provided to the market is the fact that the relevant thresholds have been reached, rather than the occurrence of the single transaction.

The TESG also supports the view of the CMU HLF according to which *"Clear guidance should be provided on what types of managers' transactions need to be disclosed, as well as the scope of the relevant provisions in the context of different types of transaction. Transactions that do not send market signals (e.g. inheritances, gifts) should be out of scope. Finally, transactions should be aggregated to make the disclosure as simple as possible"*.<sup>24</sup>

<sup>22</sup> CMU HLF, p. 72

<sup>23</sup> ESMA, *MAR Review report*, 23 September 2020 | ESMA70-156-2391, p. 105, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf)

<sup>24</sup> CMU HLF, p. 68

The requirement of keeping a list of closely associated persons<sup>25</sup> as per Art. 19(5) should be repealed, as it entails a cost that is disproportionate to the benefit offered.<sup>26</sup> The TESG fully supports the respondents to MAR Consultation observing that “*the inclusion of Closely Associated Persons in the notification obligations is too burdensome for the benefits it provides to investors, and also the obligation for issuers to keep lists of closely associated persons proves burdensome as regards the updates to the list and data protection issues*”<sup>27</sup> and proposes the exclusion for all issuers to include in the scope of Art. 19 the Closely Associated Persons. Moreover, in view of the inclusion of Closely Associated Persons facilitating NCAs’ investigation,<sup>28</sup> the TESG recalls their observations above on the need to avoid that such costs are sustained by SMC issuers (see above par. 3.2).

Regarding closed period obligation and M&A transactions, it is worth noting that often closed periods could have a negative impact on the M&A transactions since the transaction may be delayed or accelerated to not fall in a closed period. Family-owned issuers are therefore penalized considering that board members often are also the controlling shareholders. The TESG would therefore recommend to include an exemption for transactions relating to major shareholding or that entail a public takeover bid or a merger.

## 8. Administrative measures and sanctions

### The TESG recommends to amend MAR to establish a more proportionate punitive regime.

MAR features a two-tier enforcement regime, relying on a mix of criminal penalties and administrative sanctions, both of which are subject to the principles of due process and double jeopardy (*ne bis in idem*).<sup>29</sup> Moreover, the legal framework is complemented by the provisions set out in the Charter of Fundamental Rights of the European Union (“CFREU”).

MAR provides administrative sanctions to be enforced by NCAs and Directive 2014/57/EU (“MAD II”) and requires Member States to implement a minimum level of criminal penalties at least in serious cases and when market abuses are “committed intentionally”.<sup>30</sup> This, however, favours decentralisation and fragmentation at the national level. The entire legal framework, consisting of the fundamental choice of MAD II to introduce a minimum level of criminal penalties for market abuse, the concurrent requirement to respect the *ne bis in idem* principle,<sup>31</sup> and the multiple options offered for identifying the “serious cases” to be punished with a criminal sanction “*lay the foundations for a very scattered enforcement regime across the EU*”.<sup>32</sup> To solve such issues of paramount relevance, **MAR should be enforced through administrative sanctions only for most of the infringements, applied by NCAs with a view to strongly reducing the fragmentation of administrative sanctions** (including accessory sanctions and the confiscation of the profit made from the unlawful conduct) as

<sup>25</sup> In order to give a sense of the amount of data that needs to be collected, according to the data gathered by Polish NCA there are approx. 25,200 closely related persons in Poland alone. In the EU, there are around 13,000 publicly listed companies (both on RM and MTFs). It is just a rough estimate, but each listed company might have on average 10 PDMRs and each of them might have on average 3 family members. That means that there are approx. 520,000 natural persons falling into the scope. This number further increases with approx. 100,000 legal persons that PDMRs may be associated with. Gathering data from all these persons is disproportionate having in mind that only very few of those persons (probably less than 1%) enter into transactions related to the issuer’s securities. Also, any infringement of the procedure is subject to a fine of up to EUR 0.5 million for any person in the chain (e.g. manager and his/her family members). Considering the size of companies and remuneration of managers (especially in some Member States), such sanctions are highly punitive; see European Issuers, *Response ESMA Consultation MAR*, 3 April 2019, p. 6.

<sup>26</sup> As proposed by one respondent in the consultation by ESMA on MAR and SME GM, see ESMA, *Final Report on the amendments to the Market Abuse Regulation for the promotion of the use of SME Growth Markets*, 27 October 2020, p. 31.

<sup>27</sup> ESMA, *MAR Review report*, 23 September 2020 | ESMA70-156-2391, p. 106, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf).

<sup>28</sup> *Id.*, p. 112.

<sup>29</sup> A. Perrone, *Market Abuse Regulation: The Puzzle of Enforcement*, in *European Business Organization Law Review*, 2020, Vol. 21, p. 379. See also ESMA, *Report on administrative and criminal sanctions and other administrative measures imposed under the Market Abuse Regulation in 2019*, 16 December 2020 | ESMA70-156-3537, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-3537\\_annual\\_report\\_on\\_mar\\_administrative\\_and\\_criminal\\_sanctions\\_2020.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-3537_annual_report_on_mar_administrative_and_criminal_sanctions_2020.pdf).

<sup>30</sup> See respectively, Articles 3(1) and 4(1) of Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (MAD II), <http://data.europa.eu/eli/dir/2014/57/oj>.

<sup>31</sup> The legal uncertainty regarding the double jeopardy principle is clearly demonstrated by the high numbers of judgments issued by Member States courts including Constitutional courts and by CJEU on the matter. See, for example, in 2018 CJEU C-524/15 Luca Menci; C-537/16 Garlsson real estate S.A. e a./Consob; C-596/16 Enzo Di Puma/ Consob e C-597/16 Consob/Antonio Zecca.

<sup>32</sup> A. Perrone, *Market Abuse Regulation: The Puzzle of Enforcement*, in *European Business Organization Law Review*, 2020, Vol. 21, p. 379.



they are largely suitable for sanctioning the violations.

Enforcing MAR through administrative sanctions presents its own challenges considering that they are efficient but are often adjudicated in ways that do not fully comply with procedural fairness. In particular, problems of fairness are more pronounced when the institutional design of the supervisory authority is based on an integrated model (*i.e.* where investigation, prosecution and decision-making are centralised in a single entity).<sup>33</sup> This, in turn, may lead to what is called a “*prosecutorial bias*” which needs to be addressed with higher efficiency and fairness of administrative proceedings. This could be achieved by entrusting the final decision to a truly impartial body, as already promoted in the dissenting opinion in *Grande Stevens* on the right to a fair trial (see Art. 47 CFREU)<sup>34</sup> with a subsequent “genuine re-examination (*revisio*) of the case”, instead of “a mere review (*reformatio*) of the logical consistency of the appealed decision”.<sup>35</sup> As noted, complying with the principle of fair trial could help the proper functioning of the administrative proceedings, rather than being a burden.<sup>36</sup>

As observed by the CMU HLF<sup>37</sup> “*sanctions for market abuse must be proportionate regarding the nature of the breach of law but also sufficiently dissuasive to prevent market abuse. In some cases, they may be higher than the market capitalisation of companies (e.g. Poland and Bulgaria). The risk of inadvertent breach of MAR and associated administrative sanctions are seen as an important factor that dissuades companies from listing. Member States shall amend their respective national sanctions regimes to ensure that the amount of administrative sanctions reflects the specifics of the supervised market and is proportionate to the nature of abuse*”.

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 Art. 17 (public disclosure and delay of inside information), 18 (insider list), 19 (managers’ transaction) should be strongly mitigated, and the sanctions provided for the infringements for Article 14 (unlawful disclosure of inside information) should not be punished by criminal sanctions.**

## 9. Liquidity Contract

**The TESG recommends to amend MAR and the ESMA draft RTS on liquidity contracts so that market operators are not required to “agree to the contracts’ terms and conditions”, defined by issuers and investments firms, for liquidity contracts to be used in the framework of SGMs.**

A well-known-problem affecting access to the capital market for SMEs in the EU is insufficient market liquidity. MAR introduced a new regime for issuer liquidity contracts, for which the Expert Group is supportive this would create additional liquidity for illiquid security markets, notably that of SGMs.

The new MAR provisions, aimed at promoting the use of SGMs, stipulate that an issuer admitted to trading on an SGM may enter into a liquidity contract for its financial instruments if a certain set conditions are met. However, one of these conditions is that the market operator (operating the SGM) acknowledges in writing to the issuer that it has received a copy of the liquidity contract and agrees to that contract’s terms and conditions, whilst existing practices indicate that:

- The liquidity contracts referenced in MAR are signed between an issuer and an investment firm (issuer liquidity contracts) with the investment firm agreeing to provide liquidity for that specific issuer. The trading venue is not involved in the agreement of the issuer liquidity contract and NCAs, not trading

<sup>33</sup> *Ibidem*.

<sup>34</sup> *Grande Stevens*, Dissenting opinion of Judges Karaka and Pinto de Albuquerque, at para. 11. An analogous point is raised in the dissenting opinion of Judge Pinto de Albuquerque in *Menarini Diagnostics S.r.l. v. Italy*, ECHR 27 September 2011, at para. 8.

<sup>35</sup> The “genuine re-examination” referred to in the *Grande Stevens* dissenting opinion should be interpreted, as already suggested, as a mechanism imposing a judicial check on the accuracy of administrative findings of both facts and law, not as providing for a *de novo* decision-making process. This would result in both better protection of human rights and in more effective minimization of the effects of cognitive biases.

<sup>36</sup> M. Gargantini, *Public Enforcement of Market Abuse Bans. The EctHR Grande Stevens Decision*, in *Journal of Financial Regulation*, 2015, Volume 1, Issue 1, p. 156, who also notes that “*Guarantees such as full equality of arms as well as impartiality and independence of the persons in charge of taking the final decision on the sanction, while having little consequence on the length of the procedure, improve the information conveyed to the supervisors and foster unbiased decisions*”.

<sup>37</sup> ESMA, *MAR Review report*, 23 September 2020, ESMA70-156-2391, p. 68, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf).

venues, have to be informed of the existence of these issuer liquidity contracts;

- In contrast, market making agreements or liquidity provision contracts signed between trading venues and investment firms set out obligations for trading members to provide liquidity in the markets and a continued presence during the trading day. These agreements are focused on ensuring the continued liquidity in the market operated by the trading venue.

The TESG questions the legal basis for this requirement given the fact that the market operator is not a party to the issuer liquidity contract. Such a contract is a private contract between an issuer and a liquidity provider only. For that reason it is unclear how regulatory compliance with the condition for market operators to “agree to the contracts’ terms and conditions” (as stipulated in article 13, paragraph 12, point d) is possible. This is not a market making agreement as concluded between a trading venue and an investment firm, this is but between an issuer and an investment firm as part of their commercial relationship.

While trading venues have a responsibility to ensure fair and orderly markets and in this respect, they continuously monitor the quality and liquidity of its market; this does not involve agreeing to any commercial contracts between issuers and investment firms.

An additional complexity is the possible involvement of more than one market operator in cases where issuers are admitted to trading on more than one market. This could result in diverging views by market operators without any regulatory process to come to a joint view.

The TESG believes clarity is required on this provision by changing the MAR legislation and would welcome consideration of our view that:

- The scope of the MAR provision only applies to issuer liquidity contracts, and not to the contracts between the trading venue and its trading members, and
- The obligation on the trading venue only relates to the trading venue ensuring that the issuer liquidity contract would not impede the orderly functioning of the market.

Alternatively, if there is a need for the market operator to undertake any type of review of the provisions, market operators could only envisage ensuring the contracts meet the specific template defined by ESMA in the related RTS. The market operator cannot be expected to give any consent to any (commercial) provisions added by the issuer and the broker that are not within scope of the legislation.

The TESG believes that it would also be helpful to provide further clarity on how the new regime interacts with the current Accepted Market Practices regime already in place and that will continue to exist under MAR. In particular, the TESG would welcome a clarification that:

- An issuer traded on an SGM and that, in such cases, the issuer should not be covered by the obligation of the new legislation;
- Given many issuers traded on SGM have already signed a liquidity contract with investment firms and these contracts are known by the relevant NCA, it should be clarified that these can continue to be accepted under this new regime. These issuers should not be required to replace the existing contract by a “new contract” as this would lead to increased costs and burdens for issuers on SGM.

Such clarifications would promote the use of liquidity contracts in SGM.

Keeping in mind that SGM regulation requires setting general conditions to help preventing the risk of market manipulation, the TESG holds that these general conditions should not make any specific stipulations with regard to specific parameters (i.e. limits on resources, limits on volumes, trading during periodic auctions and restrictions on large orders). As underlined by some respondents in recent ESMA consultation<sup>38</sup>, such details should be left to

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<sup>38</sup> ESMA report on SGMs pp. 10-11.

the bilateral agreement between issuer and liquidity provider, as this would allow to have cost-effective agreements.

## 10. Equity research under MAR

Investment recommendations or other information recommending or suggesting an investment strategy **should be exempted from the requirements laid down in Regulation (EU) No. 2016/958 when they relate exclusively to instruments admitted to trading on SGM, or at the least alleviated for such instruments.**

SMC are dependent on research and analyst coverage that tends to be undertaken by local brokers in case of SMCs. Equity research on SMCs increases investors' appetite and ability to invest into SMCs; in turn, their investments increase SMCs' liquidity. Therefore, it is essential to ensure that SMCs are sufficiently covered by equity research. Providers of investment research tend to focus their resources on more profitable larger issuers so that they can easily cover costs incurred by the said regulatory requirements. Therefore, SMCs are left without research or covered by research of lower quality as providers are deterred from SMCs research coverage. Reduced equity research generally results in less efficient pricing and lower liquidity, more volatile trading around earnings announcements.

## Legal amendments

Alleviations should be introduced for all listed companies and, in some cases, for SMCs only.

### 1. Inside information (for all issuers)

#### Best scenario:

- **Include** in Art. 7(5) a provision for a two-fold notion of price sensitive information: *“For the purposes of Article 17 paragraph 1, information shall be deemed to be of a precise nature if it indicates a set of circumstances which exists or the occurrence of an event, albeit not yet formalised, 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.”*;
- **Modify** Art. 7(4) in order to provide that [for the purpose of the qualification of inside information, this shall mean] *“information a rational investor would be likely to consider relevant for the long-term fundamental value of the issuer and use as part of the basis of his or her investment decisions”*;
- **Clarify** 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;
- **Modify MAR so as to include** that debt-only issuers should only disclose information that is likely to impair their ability to repay their debt.

#### Second best scenario:

- **Provide** at Level 3 explanatory clarification/guidance on the notion of inside information.

### 2. Delay disclosure of inside information (for all issuers)

- **Delete** the condition provided in Art. 17(4) (b): *“delay of disclosure is not likely to mislead the public”*.

### 3. Insider lists (for SMCs only):

#### Preferred option

- **Repeal** the duty to keep the insider list for SMCs provided that where the NCA, following disclosure of inside information to the market, intends to request clarification from the issuer, the latter should give

**access to needed information by the NCA to have a clear picture of the insiders involved.**

- **Provide** that persons acting on behalf or on account of SMCs (*e.g.* advisors and consultants) shall not be subject to the obligation to draw up or update their own insider list under Art. 18(1). In order to ensure a uniform regime, Member States shall not be allowed to decide that SMCs should include in their insider list the same individuals as any other issuer;

**Second-best scenario:**

- **Simplify** the content of the insider list in the ITS on insider lists providing that only data selected by issuers shall be included or that only the name and surname and National Identification Number shall be included in the list.

**4. Insider lists (for SGM issuers only)**

- **Clarify in the relevant ITS that** issuers admitted to trading on an SGM are not subject to the obligation to keep the event-based section of insider list.

**5. MAR scope (for all issuers)**

- **Provide** that, as regards issuers admitted to MTFs (including SGMs), MAR applies from the first day of trading;

**Alternatively,**

- **Amend** Art. 2 in order to clarify that MAR is applicable only as of the first day when organised trading activity takes place, while allowing Member States to broaden the application of MAR regime to the moment when application for admission to trading is made.

**6. Market soundings (for SMCs only)**

**Preferred option:**

- **Amend** Art. 11 clarifying that inside information for market sounding purposes may be disclosed, provided that adequate non-disclosure agreements are in place;

**Second-best scenario:**

- **Amend** Art. 11 to make the whole market sounding regime a mere option for disclosing market participants to benefit from the protection from the allegation of unlawful disclosure of inside information;
- **Clarify** that the market sounding regime may be applied only in presence of inside information being disclosed, and simplify the burdensome procedure for both disclosing market participants and persons receiving market soundings;
- **Amend** Art. 11(1)(a) in order to extend the exemption to equity placements provided for therein and to include in both bond and equity placements also external funding providers who may not qualify as qualified investors.

**7. Managers' transaction (for all issuers):**

- **Amend** Article 19(8)(9) by introducing a threshold of EUR 50 000 or higher based on market capitalisation and a tranche scheme for the notification of managers' transactions whereby manager is required to notify the transaction each time the EUR 50 000 threshold has been reached.
- **Provide** clear guidance on what types of managers' transactions, as well as the scope of the relevant provisions in the context of different types of transaction. Transactions that do not send market signals (*e.g.*, inheritances, gifts) should be considered out of scope and exemptions should be provided for transactions

relating to major shareholding or to transactions that will entail a public takeover bid or a merger;

- **Repeal** the requirement of keeping a list of closely associated persons, as per Art. 19(5).

#### 8. Administrative measures and sanctions (for all issuers):

- **Rethink** criminal sanctions in the market abuse regime, which are considered too punitive, so that social incapacitation should be applied only when a serious market disturbance concerning economic order matters has occurred;
- **Remove** criminal sanctions for infringements of Art. 14, Art. 17, Art. 18 and Art. 30(i)(b);
- **Provide** for an administrative proceeding entrusted to an independent body and entailing for a genuine re-examination (*revisio*) of the case.
- **Provide for:**
  - Maximum penalty per manager for negligent behaviour not exceeding half of their annual salary as per Art. 17, 1, 5 and 8 (*Public disclosure*) and one quarter for Art. 17, 2 (*Delay*), and 18 (*Insider list*) and 19 (*Managers' transactions*). Member States shall not be allowed to criminalise negligent commission;
  - Maximum penalty for legal person for negligent behaviour not exceeding EUR 500,000 or 1% of the turnover as per Art. 17 (*Public disclosure*) and EUR 25,000 for articles 17, 8 (*Delay*), and 18 (*Insider List*) and 19 (*Managers' transactions*). Member States shall not be allowed to criminalise negligent commission.

#### 9. Liquidity contracts (for all issuers)

- **Amend** MAR article 13, paragraph 12, point d, so that market operators or investment firms operating SGMs do not have to agree to the issuers and liquidity provider terms and conditions of their contracts:

*"The market operator or the investment firm operating the SME growth market acknowledges in writing to the issuer that it has received a copy of the liquidity contract and agrees to that contract's terms and conditions."*

- In addition, ESMA should **modify** its proposed draft RTS on Liquidity Contracts reflecting the MAR article 13 requirement by deleting paragraph 2 of Article 2 and setting limits and boundaries on certain aspects of the liquidity contracts (*i.e.* limits on resources and volumes, trading during periodic auctions and restrictions on large orders) which only limit the overall freedom to design agreements that would best suit the parties in a specific case.

#### 10. Disclosure obligation related to presentation of recommendations under MAR (for SMCs only):

- **Exempt** investment recommendation or other information recommending or suggesting an investment strategy related exclusively to instruments admitted to trading on SGM from the requirements laid down by the Regulation (EU) No. 2016/958 ;

Alternatively,

- **Provide** for a proportionate and lighter regime for such recommendations to be created in Regulation (EU) No. 2016/958 (especially exemptions from obligations set in the Article 3 and 4 of Regulation (EU) No. 2016/958) while taking into consideration higher flexibility of SGMs in comparison with RMs and limited scope and resources of SMCs.

#### Feasibility: Implementation process and possible risks

A potential review of MAR is planned by the European Commission for Q1 2022. Most of the TESG recommendations would require changes to either MAR or relevant delegated and implementing acts (level 2). It is

worth noting that several recommendations touch upon topics which were central to the Technical Advice that ESMA provided to the European Commission on the upcoming MAR review,<sup>39</sup> and that ESMA's position is not always in line with the recommendations proposed by the TESG

The TESG is aware that the **protection of market integrity** is a sensitive and important topic for the Commission, as well as for Member States and the European Parliament. As such, they may be reluctant to reduce the requirements imposed by MAR unless it is demonstrated that market integrity will not be impaired. The TESG does not believe the changes proposed would harm market integrity.

The recommendations on the amendments to the **notion of inside information** and to the conditions to delay disclosure of inside information (not only for SMEs but for all issuers) might be jointly dealt with as providing a clear system for delay of disclosure of inside information would alleviate the same level of burden as amending the notion of inside information.

Co-legislators and national competent authorities consider **insider lists** an essential tool to conduct investigation and ensure market integrity. Regarding the insider lists for companies listed on SGMs, the co-legislators may be opposed to further amending it especially with a view to further alleviating the regime. As regards the insider lists for SGM issuers, level 2 negotiations are already on-going, including on whether event-based lists will be required.

The **scope of MAR** is something that could be looked further as part of the MAR review. The same applies to **managers' transactions**.

On the recommendation relating to **administrative measures and sanctions** for all issuers, the TESG understands that amending the criminal sanctions part falls under the mandate of DG JUST and the administrative one falls under DG FISMA. Consequently, the amendment to the criminal sanctions would entail the involvement of the national justice ministries in addition to the finance ministries.

It is also worth noting that the existing data relies on MAD as there were no sanction provisions in MAR until 2019. ESMA is currently gathering data under MAR and will publish its report shortly. As regards criminal sanctions, the harmonisation of the level of sanctions with a view to providing legal certainty could be further explored. However, the elimination of criminal sanctions altogether for specific infringements may come across opposition from the co-legislators.

The Commission, together with ESMA, is already working on the **level 2 of liquidity contracts** and should bear in mind the recommendation of TESG in the process, notably with a view to include our proposed **MAR level 1 change** in the scope of the MAR review.

Lastly, **disclosure obligation related to presentation of recommendations** should not be a contentious point as the change proposed is of a minor character and it is limited to a level 2 measure.

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<sup>39</sup> ESMA, *MAR Review report*, 23 September 2020 | ESMA70-156-2391, [https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391\\_final\\_report\\_-\\_mar\\_review.pdf](https://www.esma.europa.eu/sites/default/files/library/esma70-156-2391_final_report_-_mar_review.pdf).

#### 4. Giving issuers back control (multiple voting rights/ dual class shares)

##### Recommendation

**The TESG recommends to introduce into EU law the option for issuers who wish to list or are already listed on a RM or MTF to adopt multiple voting rights structures, such as dual class share and/or loyalty shares.**

**Dual voting structures should be specifically permitted under EU legislation for any new company listing, irrespective of whether it is a large cap or SME.** It could be specifically promoted to the SGMs and relevant entrepreneurs to increase the awareness of the option to be listed and encourage companies to join EU capital markets at an earlier stage enabling them to access scale-up capital.

In this respect, the TESG fully supports the Oxera Consulting policy recommendation on “*encouraging flexibility in the use of dual-class shares where national rules or practices prevent this (...). Among the 14 EU member states analysed in-depth in the study, 5,000 family-run companies above €50m in size remain unlisted—this could be a significant source of new listings*”.<sup>40</sup> Moreover, and in line with the HLF recommendation, the TESG does not recommend including a sunset provision in order to be in line with many other markets outside of the EU. It should be the issuer’s prerogative to decide whether or not to include a sunset provision (where the right duration for a sunset provision would be difficult to establish by law), as the optimal duration may differ for each company.

The TESG has seen some quite extreme cases in terms of the proportion of voting rights, but the TESG supports a maximum 10:1 ratio, which has worked successfully for many years in Sweden and has been implemented by both HKEX and SGX.

Our proposal to encourage flexibility is to introduce the option for issuers which are to be listed, or which are already listed on a RM or on a MTF, to adopt dual class shares as for example in the Swedish model, or through loyalty shares as in Italy and France.

Under the Swedish model multiple voting rights are attached to the shares and are transferable to other shareholders.<sup>41</sup> The multiple voting shares are separate instruments, listed and traded separately from the common shares. Oxera Consulting<sup>42</sup> noted that a key factor of the success of Swedish capital markets in recent years is also attributable to dual-class shares, which are relatively common compared to other European financial centres.<sup>43</sup> Swedish companies are allowed to issue a second class of shares often called A-shares with superior voting rights; this is usually done to ensure that the firm’s founders and other top executives can retain a high ratio of control even after an IPO. These superior-voting shares are traded on the market<sup>44</sup> along with the regular shares (often called B-shares). The most common vote ratio is the maximum allowed, where an A share carries 10 (1) votes, while ordinary class-B shares carry 1 (0.1) vote.<sup>45</sup>

The France/Italy model provides loyalty shares where multiple voting rights are entrusted only to the shareholders who are recorded in a loyalty shareholders’ list and who hold the shares for a minimum of two years.<sup>46</sup> In this case, multiple voting rights are not attached to the shares themselves but rather to the shareholder, and do not circulate with the shares. Any share that is sold loses its multiple voting rights (exceptions for inheritance or merger). The

<sup>40</sup> Oxera report, p. 13

<sup>41</sup> E. Lidman, R. Skog, *London allowing dual class Premium listings: A Swedish commentary*, 2021, ECGI Working Papers, <https://ecgi.global/working-paper/london-allowing-dual-class-premium-listings-swedish-commentary>

<sup>42</sup> Oxera report

<sup>43</sup> The Swedish model may be more difficult to be used after the IPO as in some MS where it is provided for an exit for minority shareholders (withdrawal/appraisal rights) who have not approved the issuance of dual class shares having multiple voting rights (e.g. in Italy).

<sup>44</sup> Typically, class-A shares are issued before the IPO as the different share classes have to be included in the company’s articles of association. To change this post IPO would be difficult as The Swedish Companies Act (ABL 7:43) states that it is required that 2/3 of at least 90% of the total available votes in the company are in favour to issue class-A shares (this “super majority” is not required if the company wants to abolish differences in voting rights). The lower relative vote of the B-shares will in this case be priced by the market at a slightly higher discount. However, if a company makes a new share issue as listed, it could issue shares with a lower vote (max 1:10) and hereby allowing the old shareholders to retain control of the company and still allowing the company to raise capital via the equity market.

<sup>45</sup> T. Lakkonen, E. Åkesson, *Dual-Class share structure and IPO Long-Run Performance, An Empirical Study of the Swedish IPO market*, Stockholm School of Economics, 2007, p. 5.

<sup>46</sup> The holding period for listed corporations, generally, is not longer than four years. In Italy the founders holding period before the IPO may be counted so that on first day of trading founders having the shares for more than two years will be entitled to exercise multiple votes.

advantage for loyalty shares is that they are not a class and if issued, this will not trigger any exit right for minority shareholders<sup>47</sup> or requiring supermajority at shareholders' meeting.

The proposals above are consistent with the rationale of multiple voting rights to incentivise listing of EU companies on RM/MTF - whose main shareholders often fear that entering the stock market will dilute their shareholding and lead to the loss of the control - and to reward the maintenance of long-term equity investments, in order to favour management stability and sustainability.

#### Legal amendments (where available)

The EU should ensure its competitiveness globally, especially vis-à-vis the US, UK and other international markets and a common level playing field to avoid arbitrage between MSs to the detriment of the EU stock markets.

Our proposal, to attract issuers and IPO on EU capital markets and to avoid legislative arbitrage, is to include the following provision in a suitable legal instrument, in accordance with the Union's acquis:

*“Member States shall ensure that companies listed on regulated markets or admitted to trading on multilateral trading facilities are allowed to adopt multiple voting structures in the form of dual-class shares or loyalty shares with a maximum weighted voting ratio of 10:1.”*

The European Commission is invited to assess the appropriate legal instrument where this provision could be inserted.

#### Feasibility: Implementation process and possible risks

The European Commission will need to undertake a comprehensive assessment concerning the feasibility of this recommendation as regards RMs.

**Investors' perspective:** some investors may have mandates that prevent investment in companies with multiple voting rights structures. This may cause further concern where their performance is benchmarked against an index which includes such a company and such company outperforms the index. It should be easy for investors to track how the ownership of an issuer changes. Certain rules, such as flagging and mandatory bid rules, have to be kept in mind, as a decrease in the voting rights (the share of ownership would not be affected) of a main shareholder may lead to a number of investors reaching or even exceeding voting thresholds set out in their internal rules or applicable laws.

**Discounted valuation:** In general terms, the effect of a multiple voting rights structure may be to reduce the value of the company overall as the structure is perceived as riskier to invest in from a governance point of view, and many large institutional investors demand a one share, one vote share class structure. However, it is not clear that the discount is a constant feature and may diminish over time as trust increases in the performance of the board and controlling shareholder as they operate within their disclosed governance structure. It all depends on the performance of the company and the market.

**Voting rights at time of disposal:** Whilst the controlling shareholder holds ultimate voting control, she/he may hold the same economic rights *pari passu* as other shareholders (as in Sweden under the Takeover Rules).

**Disclosure and takeover:** It should be assessed by the EU Commission: (a) if the existing disclosure duties provided by SHRD are sufficient to assure full transparency on multiple voting rights structures; (b) if the EU takeover regime needs to be reviewed to assure that minority protections are not circumvented through multiple voting rights structures.

<sup>47</sup> M. Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat*. 2015, Bocconi Legal Studies Research Paper, No. 302015, ECGI – Law Working Paper No. 288/2015, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2574236](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2574236).



## 5. Introducing pre-listing supports (transitional period and listing sandboxes)

### Recommendation

**The TESG recommends to create a pre-listing sandbox for SMCs listed on both RM and SGMs (for up to 2 years) as well as an optional transitional period for a duration of 3 years for SMCs wishing to transition from SGMs to RMs as well as SMCs wishing to list on RMs.**

#### 1. Listing sandboxes

Create a fast-track pre-listing process for SMEs (e.g. by creating listing helpdesks and listing sandboxes) as an initiative for companies who wish to access capital market but that do not satisfy standard listing conditions and need adequate support in the pre-listing process. Sandbox acts as a layer between SMEs, stock exchanges and NCAs and facilitates smooth fulfilment of listing requirements. A two year period could cover all activities related to the pre-IPO phase with emphasis on the recommendations of the TESG group regarding:

- Educational programmes for SME coordinated by NCA and/or stock exchange: period in which potential issuers will become familiar with regulatory and listing requirements
- Advisory ecosystem for pre-listing phase in a form of helpdesks providing guidance and open dialogue between stock exchanges, NCAs and SMEs
- Tracking SME progress and providing an SME analysis/feasibility study following the sandbox period
- SMEs enhanced visibility based on promotional activities during programme
- Customised approach for SMEs with high growth potential which do not meet traditional criteria such as profitability or operating history

#### 2. Transitional period for issuers entering the public capital markets

Considering the CMU HLF recommendation on improving the public market ecosystem<sup>48</sup> and TESG research on the time period required for adjustment, transitional period of up to three years was considered as a maximum deadline for the application of certain elements of relevant legislation. Exercising period would be beneficial for SME, but market demands and investor expectations about the company's maturity must be take into account.

SGM registration implies that MiFID II legal or administrative requirements are fulfilled,<sup>49</sup> but MTFs can define new requirements to raise standards. The transitional period would be adjusted to do so, depending on the market requirements (from a listing sandbox to SGM, SGM to RM or directly listing on RMs).

For companies listing on SGM, it is highly recommended to benefit from a maximum of two years transitional period within the listing sandbox. For SGM issuers wishing to list on RM as well as SMCs wishing to list directly on RM, transitional period should be allowed.

Therefor a transitional period of:

- 2 years should be applied for companies (in the framework of the pre-listings sandboxes) to comply with SGM requirements;
- 3 years should be applied for issuers in SGM to comply with the RM requirements as well as SMCs willing to list on RMs.

<sup>48</sup> CMU HLF, p. 66

<sup>49</sup> See Article 33 of Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>.

This allows MTF market operators to “raise the bar” in the pre-listing sandbox and implement new requirements on the SGM, on voluntary basis, on:

- ESG, Corporate Governance, Reporting of related party transactions, Investor relations and appointment of Independent director
- In this respect, a transitional period of
  - 24/36 month would be needed for new issuer, considering that the beginning of the period starts from admission to trade
  - 12/24 month would be needed for issuers whose shares were already admitted for trading on a SGM.<sup>50</sup>

Issuers on RM are expected to fulfil investors’ demand on company maturity and capacity to answer post-listing obligations and ongoing recommendations related to regulatory and investor requirements, and therefore it is highly recommended that companies benefit from a “lighter regime” for certain subjects which do not affect RMs. Therefore transitional period of a maximum three years could be implemented for issuers on SGMs to comply with RM requirements as well as SMCs willing to list directly on RMs, related to the implementation of new IT solutions and new reporting that cause higher costs. **Transitional period for RM listing could apply to:**

- Compliance with XBRL Taxonomy<sup>51</sup> allowing issuers to be listed on RMs to progressively comply with the most invasive and expensive duties such as the new XBRL reporting format.
- Compliance with ESG reporting<sup>52</sup> for issuers that are not subject to NFRD Directive<sup>53</sup> allowing issuers to be listed on RMs to educate and set up internal reporting mechanisms
- In this respect, issuers to be listed on RM could benefit from
  - 36 month period (maximum time) on new reporting requirements for new issuers on RM
  - For SME’s transferring from SGM to RM, period spent on SGM should be recognised as already used “transitional period” as it is assumed issuers on SGM had sufficient time to prepare for RM.

## Legal amendments

### 1. Transparency directive (Directive 2004/109/EC)

- Issuers in the transitional period would be exempt from a duty to publish their annual report in the European Single Electronic Format, but they could comply with this requirement voluntarily.

## Feasibility: Implementation process and possible risks

- TESS does not see any material risk for market integrity, as the proposed transitional period would not affect issuers’ current disclosure framework in both SGM and RM.
- The above proposal should not introduce a parallel disclosure regime within SGM and RM. Issuers on these markets should not be granted lower disclosure requirements, however they should be incentivised to meet higher disclosure standards in respect to these markets.
- The pre-listing sandbox proposal should be compatible with the principles of investor protection, market integrity and transparency. In respect to the transitional period regime proposal, the Commission should undertake an impact assessment and a public consultation prior to proposing such an initiative to ensure its

<sup>50</sup> See the fiche on ESG.

<sup>51</sup> <https://www.esma.europa.eu/policy-activities/corporate-disclosure/european-single-electronic-format>

<sup>52</sup> Regulation (EU) 2019/2088 of 27 November 2019 on sustainability-related disclosures in the financial services sector, <https://eur-lex.europa.eu/eli/reg/2019/2088/oj>

<sup>53</sup> Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095>

compatibility of the aforementioned principles and not introduce adverse risks.

- Additional possible risk is directly linked to higher costs for issuers in case listing sandboxes are not co-financed by national operational programmes and/or national funding.
- TESG believes there is a risk that some proposals may require further changes at national level.
- Proposal requires stock exchanges to implement transitional periods in their rules related to markets.
- Cooperation of NCAs and stock exchanges is necessary to implement sandboxes: proposal requires NCAs and/or stock exchanges to support measures and establish listing sandboxes at national level.
- Elaboration of eligibility is required for sandboxes allowing NCA's and stock exchanges to establish sandbox programme and evaluation process on a national level.
- The eligibility criteria for SME GMs and RMs have to be maintained.
- The transitional period must not affect investor confidence: flexibility in the proposed measures have to be provided in stock exchanges' rules and coordinated on a national level.

## 6. Promoting EU's SMC champions

<b>Recommendation</b>
<p><b>1. The TESG recommends to create an EU Champion label</b></p> <p><b>2. The TESG recommends to create a dedicated investable index to support investment in best-in-class EU SMCs.</b></p> <p>The EU needs to shine a spotlight on listed SMCs. This could be achieved by the creation of a quality stamp / certification mark “EU Champion” that is earned by companies as a badge of honour when they meet certain pre-defined criteria. An investable index could be constructed to further promote and attract investment in such companies.</p> <p>This would include:</p> <ul style="list-style-type: none"><li>• Creation of an EU Champion website and other materials to showcase these companies</li><li>• Preparation of supporting educational material on listing process and benefits of listing – brochures, videos, testimonials – using this cohort of companies to encourage other SMEs to see what a stock market listing could deliver for them</li><li>• Creation of an EU Champion Index</li></ul> <p>The EU needs to celebrate, profile and showcase our listed SMEs (i.e. those with a market cap &lt;EUR 1 billion).</p>
<b>Legal amendments (where available)</b>
<p>While there are no legal amendments required, there are a number of initiatives that the Commission could take to support these recommendations including:</p> <ul style="list-style-type: none"><li>• establishing a Working Group to assess the creation of an EU Champion Index, with a view to discussing with the relevant stakeholders involved in its set up and ongoing operations;</li><li>• investigating how the operational costs of the maintenance of the EU Champion Index could be subsidised;</li><li>• developing an EU Champion investment label to incentivise and encourage all institutional investors to invest and commit a certain portion of their investments in SMCs as part of their ESG initiatives; and</li><li>• Support the publication of marketing campaigns to shine a spotlight on and profile successful EU listed SMCs and promoting listing as a long term strategic solution for the scaling of companies.</li></ul>
<b>Feasibility: Implementation process and possible risks</b>
<p><b>1. EU Champion Certification label</b></p> <p>The design of an overall certification label, with sectoral sub marks, can be used as a branding and quality mark for companies to aspire to when seeking to list and then by attracting investors, customers and talent to them post listing.</p> <p>In order to qualify for the “Champion” status listed companies must satisfy a number of eligibility criteria including:</p> <ul style="list-style-type: none"><li>• a minimum 35% free float;</li><li>• a market capitalisation of at least EUR 100 million;</li><li>• coverage by at least one equity analyst;</li><li>• compliance with the ESG obligations as outlined in Chapter 4 of the report;</li><li>• compliance with the corporate governance criteria set out in Section 4.5;</li><li>• appointment of a person responsible for investor relations; and</li><li>• a website with easy to find information relevant for investors.</li></ul> <p>All of the above will also contribute to the criteria required for the provision of a meaningful index to attract</p>

investment and liquidity.

Furthermore this quality label can be extended to create a brand around listing through the creation of a website which can:

- profile companies by industry sector and geography;
- enable investors to search for companies to invest in by sector;
- show case studies for each company – requirement for companies with their advisors to prepare a case study of their listing and post listing experience;
- link to the companies investor sections of their websites (one of the criteria above); and
- provide educational materials describing the listing process and concrete benefits of listing – brochures, videos, testimonials for SMEs wanted to consider if a stock market listing will deliver to them.

**The Certification label of EU Champion, would be granted on a similar basis as the “EU Growth Market” label, i.e. by the NCAs upon a common set of rules.** The label should be periodically reviewed.

## **2. EU Champion Index**

The creation of the EU Champion index will support this certification and the attractiveness of it to listed SMCs. Indeed indices will create liquidity in the underlying constituents, attract equity research and increase profile.

However, the creation of SMC indices is often difficult due to the costs of creating and maintaining them. In addition, it will require initiatives and incentives to attract the underlying funds/asset under management that are directed to investing in it. The European Commission could assist in this regard with:

- subsidising costs of the creation and maintenance of the index;
- ensure there is no trademark in place to allow for the commercial construction of such index;
- launch a working group: EC, ESMA, index providers/IIA and asset managers, among other stakeholders. There are certain inputs that can be treated as public goods in terms of data availability whereas the policy makers’ role is key especially on ESG aspects;
- promoting policy of investing in the index to Member States for national pension funds to support our SMEs;
- encourage large institutional investors to commit some funds to the index / investing in SMEs as part of their social mandate;
- incentivising retail investors to invest in passive funds replicating the index and encouraging the Member States to adopt appropriate tax policies.

## 7. Supporting equity research

### Recommendation

#### 1. European Commission recommendation to the Member States to support SMC equity research

Equity research coverage provides SMCs with information to investors and oversight, which in turn improves liquidity and access to capital. The European Commission should issue a recommendation to the Member States to strongly encourage them to put in place measures to promote equity research coverage of all listed SMCs.

Among others, the Commission should encourage the exchange of best practices in the field of tax incentives, both for independent and sponsored research. The Commission recommendation could build on identified best practices already in place in and outside the EU. Among others, clever tax incentive schemes such as making research cost tax deductible for SMEs and for regional brokerage houses, should be considered.

#### 2. Proposal to fund SMC independent and sponsored equity research with funds from ERDF

The TESG recommends to support both independent and sponsored SMC research with funds from the ERDF, including with the aim of securing the long-term viability of regional brokerage houses.

For smaller companies, brokerage houses may not issue research spontaneously on commercial grounds. At the same time, for SMCs, financing sponsored research may also be a relatively high cost to incur. As the EU has dedicated tools to support SMCs and foster an investment-friendly environment, in particular through the EU Regional Development and Cohesion Policy, the TESG therefore suggests to the Member States to seek funding for SMC financial research from the European Regional Development Fund (ERDF).<sup>54</sup>

In doing so, the disproportion between Member State economies and their situations in terms of SMC research coverage should be carefully considered and accounted for. More specifically:

- Member States should adapt existing ERDF Operational programmes for the purpose of both sponsored and independent research, in compliance with the CMU Action Plan 2020.<sup>55</sup>
- Funding is to be provided to SMCs in the form of a lump-sum payment as proposed by the study on “The transfer of knowledge by the scientific research community to micro, small and medium enterprises”.<sup>56, 57</sup>
- Member States should be supported to adopt higher *de minimis* State aid for SMCs to overcome the economic crisis caused by the COVID-19 pandemic.<sup>58</sup>
- The maximum lump sum (payment) of EUR 30,000 should cover a significant portion of SMC research coverage costs by taking into account the market pricing in each Member State. For instance, sponsored research costs are indicatively around EUR 50,000 p.a. in Sweden, around EUR 40,000-60,000 in Italy and EUR 10,000-15,000 in Croatia, Slovenia and the Czech Republic.
- Guidelines on standard budget hours should be defined by the EU competent authority and transposed by national authorities for the following products: i) comprehensive research reports; ii) short notes; iii) attended meetings/calls with the company and with investors.
- The payment sum should take into account the implicit costs of covering the stock by identifying standard

<sup>54</sup> Regulation (EU) no 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R1301>.

<sup>55</sup> CMU Action Plan 2020

<sup>56</sup> [https://ec.europa.eu/regional\\_policy/en/projects/Poland/smes-in-podlaskie-poland-awarded-grants-to-boost-research-and-development](https://ec.europa.eu/regional_policy/en/projects/Poland/smes-in-podlaskie-poland-awarded-grants-to-boost-research-and-development)

<sup>57</sup> [https://ec.europa.eu/regional\\_policy/index.cfm/en/atlas/programmes/2007-2013/croatia/operational-programme-regional-competitiveness-for-croati](https://ec.europa.eu/regional_policy/index.cfm/en/atlas/programmes/2007-2013/croatia/operational-programme-regional-competitiveness-for-croati)

<sup>58</sup> European Commission, *De minimis rule, exemption of small aid amounts from notification*, [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A0802\\_2#:~:text=De%20minimis%20aid%20indeed%20refers,over%20a%203-year%20pe](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A0802_2#:~:text=De%20minimis%20aid%20indeed%20refers,over%20a%203-year%20pe)

budget hours per product – which in turn the broker will apply to the research analyst’s salary – and the number of research reports and short notes produced, as well as meetings/calls done with regard to the specific stock.

- In order to ease the process of selecting the brokers to conduct sponsored research, **national stock exchanges could introduce a list of authorised brokers, which are eligible to produce sponsored research based on track record of equity research and recognition in the financial markets.**

## Legal amendments

### 1. Commission recommendation to Member States

- The Commission should issue a recommendation to the Member States on supporting SMC equity research to strongly encourage them to put in place equity research coverage of all listed SMCs, looking into the following aspects:
  - Encouraging Member States to put in place measures supporting equity research for all listed SMCs.
  - Encouraging stock exchanges to publish lists of eligible research houses based on track-record of equity research and recognition in the financial markets.
  - Encouraging the financing of SME research through the exchange of best practices in the field of tax incentives
  - Identifying best practices on pre-IPO programmes supporting SMC research, including through resorting to sandboxes.

### 2. ERDF Support

The ERDF focuses its investments on several key priority areas: *Innovation and research; The digital agenda; Support for small and medium-sized enterprises (SMEs)* and *The low-carbon economy*.<sup>59</sup> Both independent and sponsored SMC research could be supported with funds from the ERDF, including with the aim of securing the long-term viability of regional brokerage houses.

- Member States should apply to the ERDF via the existing Operational programmes, where each Operational programme follows the aforementioned key objectives. SMC research could be covered by the objective of support for small and medium-sized enterprises (SMEs) based on the theme “Competitiveness of SMEs”.<sup>60</sup>
- Research must be understood as defined in article 24 of MiFID,<sup>61</sup> as amended by the Capital Markets Recovery Package.<sup>62</sup>
- Based on market practice, the TESG recommends that an introductory research report should include as a minimum: a description and analysis of the company’s activities, markets and competitors, historical financial data as well as financial projections based on analysis of activities, markets and competitors, a valuation (DCF, peer group and/or sum-of-the-parts), recommendation and target price (if local market practice) and a description of the company’s management and board. If the company has been involved in any legal or sustainability related incidents, this should also be clearly highlighted in the report. Following the more thorough introductory report, regular research updates can be of a simpler nature, focusing on relevant news, financials and valuation.

## Feasibility: Implementation process and possible risks

<sup>59</sup> Regulation (EU) no 1301/2013 of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32013R1301>.

<sup>60</sup> Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006, Article 5 (1)(a), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013R1301>

<sup>61</sup> 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>.

<sup>62</sup> See amendments to MiFID II made in the context of the Capital Markets Recovery Package, <https://www.consilium.europa.eu/en/press/press-releases/2020/10/21/capital-markets-recovery-package-council-agrees-its-position/>.

- The recommendation is fully aligned with the objectives of the Capital Markets Union as renewed in the CMU Action Plan 2020.<sup>63</sup> It is also consistent with the efforts of the Capital Markets Recovery Package adopted early 2021,<sup>64</sup> where the co-legislators allowed “rebundling” of research payments and execution fees for companies with a market capitalisation below EUR 1 billion.
- For the 2014-2020 ERDF period, Member States developed Operational programmes to increase the competitiveness of Poland<sup>65</sup> and Croatia<sup>66</sup> based on the SME strengths and assets. Funding was provided to SMEs in the form of lump-sum vouchers where the maximum in Croatia was EUR 10,000 EUR and in Poland EUR 23,550, based on the average cost of local service providers. The implementation process could be carried out in a similar way for the transfer of knowledge to micro, small and medium-sized enterprises.
- It should be noted that in order for it to work in practice, Member States need to submit dedicated requests to the Commission for SMC research to receive funding from structural funds. In terms of eligibility, the national legislator should reference a common definition of an SME as provided by EU legislation. The definition of an SME – as provided in the General Block Exemption Regulation<sup>67</sup> – should entail capitalisation criteria for listed SMEs (i.e. average market cap below EUR 1bn in the last 12 months from the latest approved accounting period).
- Expected results (KPIs to be tracked) are: number of listed SME funding applications, non-listed SME funding applications, published sponsored SME research, number of newly listed companies, enhanced liquidity, number of IPOs.

<sup>63</sup> CMU Action Plan 2020

<sup>64</sup> 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

<sup>65</sup> [https://ec.europa.eu/regional\\_policy/en/projects/Poland/smes-in-podlaskie-poland-awarded-grants-to-boost-research-and-development](https://ec.europa.eu/regional_policy/en/projects/Poland/smes-in-podlaskie-poland-awarded-grants-to-boost-research-and-development)

<sup>66</sup> [https://ec.europa.eu/regional\\_policy/index.cfm/en/atlas/programmes/2007-2013/croatia/operational-programme-regional-competitiveness-for-croatia](https://ec.europa.eu/regional_policy/index.cfm/en/atlas/programmes/2007-2013/croatia/operational-programme-regional-competitiveness-for-croatia)

<sup>67</sup> Regulation (EU) 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0651-20210405>.



## 8. Appropriate credit research and rating for SMCs

### Recommendation

- 1. The TESG recommends to facilitate the process of data collection, the TESG recommends to include relevant debt data in the European Single Access Point (ESAP), to be put forward by the European Commission later this year:**
  - Facilitate the process of data collection in the European single access point (ESAP),<sup>68</sup> to be put forward by the European Commission later this year. This would ensure access to reliable and timely financial and non-financial information pertaining to EU SMCs and foster the integration of ESG risks factors into credit analysis (research and ratings) and enable sustainable financing.
- 2. The TESG recommends promoting EU-based independent assessment of SMC's credit profiles and outlook.**
- 3. The TESG recommends designing and implementing an EU scheme conducive to a unified private debt market for SMCs across the Union through common market infrastructures and standards enhancing credit risk monitoring and private data processing.**
  - Launch an information campaign in the EU, so as to increase the awareness of private placements among potential issuers and investors to support further market participation.
  - Facilitate exchange of best practices within and among the Member States.
  - Evaluate benefits of providing an independent, regulated rating on the credit quality of private placement issuers.
  - Clarify the current application of the existing regulatory framework and encourage efforts at a national level to facilitate the development of private placements.
- 4. Subsidise SMCs paying for a regulated public rating to foster the development of a disintermediated debt market for SMCs.**

### Legal amendments

The Commission should assess in which legal instrument the following adaptation of CRAR's Article 8(d) should be included so as to ensure investors appoint at least one independent research provider:<sup>69</sup>

*"1. Where an investor in the credit/fixed income asset class intends to appoint at least one credit research provider, the investor must consider appointing at least one independent credit research provider based on ESMA's list referred to in paragraph 2, provided that there is a credit independent research provider available.*

*2. With a view to facilitating the evaluation by the investor under paragraph 1, ESMA shall determine and maintain a list of independent credit research providers supervised in the EU, indicating the asset classes on which they provide research, which can be used by the investor as a starting point for its evaluation.*

*3. For the purposes of this Article, is deemed independent a research provider who has no trading book nor order execution capabilities and with no market players owning a trading book or order execution capabilities holding more than 5% of either its capital or voting rights.*

*4. Compliance of EU investors with this Article is audited each year by the NCAs. Sanctions are defined in the case*

<sup>68</sup> [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/2021-european-single-access-point-consultation-document\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2021-european-single-access-point-consultation-document_en.pdf)

<sup>69</sup> Regulation (EU) 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0462>

*of a breach of compliance.”*

**Feasibility: Implementation process and possible risks**

The inclusion of an additional article to support the use of independent credit research could be assessed.

## 9. Simplifying ESG requirements

### Recommendation

#### **1. The TESG recommends to introduce a tailored and voluntary framework for SMCs in the NFRD.**

For all companies not currently in the scope of the NFRD (i.e. both listed and non-listed companies with less than 500 employees), the TESG proposes that the ongoing NFRD review includes a tailored framework of ESG information to disclose on a voluntary basis with proportionate and clearly set KPIs. This aims to limit the administrative burden and costs associated with sustainability reporting for companies with less than 500 employees and for SMCs (see proposal in the table below).

On 21 April, the Commission adopted a proposal for a Corporate Sustainability Reporting Directive (CSRD), amending the existing reporting requirements of the NFRD. The TESG notes that the Commission proposal is partly in line with the TESG recommendation of advancing a set of proportionate standards for SMCs tailored to the capacities and resources of such companies. Nevertheless, while the TESG suggests that these standards should be kept voluntary for all SMCs, the Commission proposal currently suggests that SMCs listed on RMs would be required to use these proportionate standards. The TESG strongly disagrees with such a proposal as it risks discouraging SMEs from going public on RMs. Should the new CSRD decide to expand the scope of the NFRD also to companies with less than 500 employees, the TESG proposes that Article 8 of the Taxonomy Regulation should exempt these companies from reporting Taxonomy data until the Taxonomy is fully completed, covering all sectors and environmental objectives.

#### **2. The TESG recommends introducing proportionate and clearly set KPIs for the framework**

The TESG insists on introducing proportionality in ESG reporting. This is particularly relevant in the case of the SFDR, as Article 7(2) in the draft Regulatory Technical Standards (RTS) of the SFDR does not necessarily protect SMCs from additional reporting. There should be a common set of voluntary KPIs for SMCs with less than 500 employees, applicable across both the SFDR and the revised NFRD, so that small cap funds also have proportionate reporting requirements

The TESG suggested in the final report a set of 19 relevant ESG KPIs, with the belief that they meet the information requirements both of investors (SFDR, see below point 3) and SMCs. Standardized templates and forms need to be developed by ESMA in order to have unified information and definitions of KPIs across the EU which can be used by all stakeholders (SFDR, CSRD and the Taxonomy).

#### **3. The TESG recommends ESG data be included in the Single Access Point (ESAP)**

The future European Single Access Point (ESAP) announced as part of the 2020 CMU Action Plan should include in its scope ESG relevant data stemming from the requirements of the NFRD and from Article 8 of the Taxonomy Regulation. In addition, the ESAP should consider also consolidating the sustainability data voluntarily reported on by SMEs and SMCs on the basis of the KPIs suggested in point 3.

#### **4. The TESG recommends to develop advisory services or teach-ins to support companies, and in particular SMCs, in their reporting process**

The TESG recommends that the Platform on sustainable finance is mandated to develop teach-ins on the Taxonomy disclosure data, with relevant instructions about which data is required and how it should be calculated. These teach-ins should also be accessible by institutional and retail investors, as well as by other interested parties, in order to increase their awareness on sustainable investing. Teach-ins will improve the EU citizens' financial literacy on sustainability matters, thus also fostering retail investor participation in green investments.

#### **5. The TESG recommends to introduce tax incentives for costs derived from sustainability-related reporting and supports the Commission's objective to include sustainability-related information in the ESAP.**

The TESG considers that tax incentives, to the extent possible aligned across Member States, should be used to

compensate SMCs for higher ESG reporting costs. A number of Member States already allow for the deduction of research and development costs for taxable income. Similarly, costs related to training and support services for the development of ESG reporting and disclosure by SMCs may also be considered for tax incentives. The Commission should issue a recommendation to Member States to share best practices in the field of tax incentives for costs derived from sustainability related reporting.

**6. The TESG recommends to make sustainability rating agencies and processes subject to regulation and proportionate supervisory oversight**

At present, sustainability ratings are not regulated. A new regulation should be put in place for sustainability rating agencies, in order to increase transparency of the sustainability rating process and insert proportional supervisory oversight. This would apply to the whole market but is even more relevant for SMCs as they find themselves in disadvantage, compared to large companies, in the rating process. Attention should also be paid to the articulation between MiFID II's research rules (to be reviewed in 2021) and further actions related to ESG rating providers.

**7. The TESG recommends to facilitate the development of the SMC ESG Index based on standard EU SMC ESG KPIs.**

An EU-wide SMC ESG Index could be introduced based on issuers' voluntary disclosure of the proposed SMC KPIs standard proposed in point 3. These issuers would be incentivised to disclose the proposed KPIs as to benefit from the creation of the SMC ESG Index, thereby gaining more visibility and liquidity in public capital markets. The proposal builds on the Commission-led feasibility study for the creation of an equity market index family which is investable, replicable and tradeable – calling for adequate criteria such as free float and liquidity measures.<sup>70</sup>

**Legal amendments (where available)**

**1. Include a tailored and voluntary framework of ESG information disclosed by SMCs in the ongoing NFRD review**

Include in the ongoing NFRD review (now CSRD) a list of simplified standards for voluntary use by the undertakings not covered by the sustainability reporting requirements based on the proposed set of KPIs. If the CSRD proposal to expand the scope of the directive to also companies below 500 employees is accepted, the TESG recommends to include a transition process whereby such companies will not be required to comply with Article 8 of the Taxonomy regulation until the Taxonomy is fully completed.

**2. Include sustainability data in the European Single Access Point (ESAP)**

The legislative proposal establishing the ESAP, which will be adopted by the Commission later this year, should include in its scope relevant ESG relevant data stemming from Article 8 of the Taxonomy regulation. In addition, the legislative proposal should make sure that the ESAP also includes the data published by SMEs and SMCs on a voluntary basis based on the voluntary framework of ESG information to be included in the NFRD/CSRD and in the SFDR, following point 1.

**Feasibility: Implementation process and possible risks**

**1-3.** The CSRD proposal has put forward the creation of a voluntary and proportionate reporting framework for SMCs, to be developed by EFRAG. Nevertheless, such proportionate reporting framework is mandatory for SMEs listed on RMs. Further reflection around simplified SMC reporting also includes the potential development of a green label for SMCs, which should enable SMCs to assess their sustainability performance and guide them through the transition, and which could benefit from the presented list of KPIs.

**4.** The exact scope of the data to be included in the ESAP, notably how to deal with voluntary information, is currently under discussion as part of the work on the ESAP's impact assessment. As the ESAP will not create new

<sup>70</sup> Feasibility study for the creation of a CMU Equity Market Index Family, ISBN 978-92-76-03739-2 <https://op.europa.eu/en/publication-detail/-/publication/1562efbd-cbc6-11ea-adf7-01aa75ed71a1/language-en/format-PDF/source-140558550>

reporting requirements, any new data to be included in its scope will need to be referred to in another piece of legislation (e.g. in NFRD/CSRD or SFDR as far as the recommendations of the present fiche are concerned).

5. While discussions have just started, and considering this measure will depend on the final decision to establish of a comprehensive voluntary reporting framework for SMEs (as proposed by the CSRD for all SMCs not listed on RMs), the inclusion of teach-ins supporting SMCs with their ESG-related reporting requirements and is likely to be considered.

6. The EC is currently assessing the current functioning of the ESG ratings markets as well as certain aspects of ESG research including through discussions with relevant stakeholders that should help decide on whether an intervention on this field is necessary and appropriate measures should be set out as part of the review of MiFID II.

7. The creation of a CMU Index has been recommended by the CMU HLF. However, following the publication of the feasibility study on the creation of such an index, it became clear that such an index would not be investible and would only be used for tracking investments. Questions were also raised as to the current market demand for such an index. ESG indexes already exist today, and the added value of creating a new one is not clear.

### Recommendation

The TESG recommends to design a set of corporate governance disclosures that could be beneficial to SMCs, namely:

**(i) reporting of related party transactions;**<sup>71</sup> **(ii) disclosure acquisition/disposal of voting rights;**<sup>72</sup> **(iii) appointment of a least one independent director for issuers having a market capitalisation above a certain threshold;**<sup>73</sup> **(iv) organisational structure to manage the relations with the investors; and (v) minimum requirements for delisting to protect minority shareholders.**<sup>74</sup> The TESG recommends to the Commission to consider three options for a possible initiative on corporate governance.

- **Reporting of related party transactions:** the aim is to introduce a higher level of transparency on related party transactions so that SGM issuers will be obliged to publicly announce material transactions with related parties at the time of the conclusion of such transaction (such as nature of the related party relationship, the name of the related party, the date and the value of the transaction) and to adopt an internal procedure to assess and manage these transactions.
- **Disclosure acquisition/disposal of voting rights:** the main objective of the proposal is to strengthen disclosure duties of issuers and shareholders, in order to allow investors to make informed decisions. The relevant thresholds would be determined by local operators and may include additional information (e.g., situation resulting from the transaction in terms of voting rights, chain of controlled undertakings through which the voting rights are exercised, date on which the threshold was reached/exceeded, identity of the shareholder and of natural person/legal entity entitled to exercise voting rights). SGM issuers would then be obliged to publish the notices received by its shareholders.
- **Investor relation manager:** the TESG believes that identifying a person within the company organization as the main contact person to investors on an ongoing basis can be a key tool to enhance the relations with shareholders and the liquidity. The presence of an investor relator meets the company's need of complete and transparent communication towards the market. In particular, the investor relator's activity aims at ensuring the correct positioning and attractiveness of the issuer, at developing a liquid and stable market for the company's securities, and at promoting a solid and diversified shareholders' base.
- **Independent directors:** the EU Commission has already recognised the crucial role that independent non-executive or supervisory directors play in a company listed on a RM. Even though the Commission's recommendation 2005/162/EC was directed only towards companies listed on RMs, the TESG believes that

<sup>71</sup> C. Di Noia, R. Viel, *SME Growth Markets*, in D. Bush and G. Ferrarini (eds.), *Regulation of the EU Financial Markets*, Oxford University Press, 2017, p. 549, noted that "several market operators have stipulated that corporate transactions, such as substantial transactions and fundamental changes of business, shall be disclosed. In most alternative markets, save for the Entry Standard and m: access, transactions between related parties shall be reported. In the United Kingdom, this disclosure obligation is regulated in detail, while most other market regulations only have a general disclosure obligation".

<sup>72</sup> *Ibidem*, where the Authors observe "(...) it is common that investors within alternative markets shall disclose the acquisition or the disposal of shares (as required by the Transparency Directive for major shareholdings in companies with shares traded on RMs). The legal bases for these obligations to provide information are set forth in statutory provisions of national capital market laws. In this sense, most alternative markets do not differ from the RMs. These disclosure obligations have a relatively long tradition in Europe's RMs. Primarily, they fulfil capital market law purposes as they tackle information asymmetries; however, they also contribute to evincing potential takeovers at an early stage. For issuers listed on alternative markets, disclosure of major shareholdings is generally not tied to any direct significant costs. This is because the issuer is merely obliged to publish the information it received from the investor. Where non-fulfilment of the obligation to provide information is not sanctioned with the loss of (voting) rights, the issuer sees no reason to check for the accuracy of the information transmitted to it. Therefore, in this respect they do not have to bear any relevant costs".

<sup>73</sup> A. Gurrea Martinez, *Alternative Investment Markets under Criticism: Reasons to be Worried? Lessons from Gowex*, in *Journal of Financial Regulation*, Oxford University Press, 2015, Volume 1, pp. 164–168.

<sup>74</sup> See European Commission, *Feedback statement of the public consultation on building a proportionate regulatory environment to support SME listing*, May 2018, p. 8, where it appears that the majority of stakeholders who participated to the consultation "saw merits in imposing minimum requirements for delisting at EU level" based on the observation that "harmonisation fosters efficient competition, by levelling the playing field, ensuring legal certainty on all MTFs, and incentivising investments in SME instruments (especially in a cross-border context). Some of them also claimed that in cases of voluntary cancellation, a shareholder approval should be required and market rules should provide protection by imposing a buy-out offer prior to any delisting".

this is even more valid for SMCs (**having a market capitalisation** over a certain threshold), whose corporate governance systems are more simplified than that of a company listed on a RM. Therefore, in our proposal, in order to ensure that the management function of SMEs (having a market capitalization over a certain threshold) is subject to an effective and sufficiently independent supervisory function, the supervisory board should comprise at least one non-executive or supervisory director, who plays no role in the day-to-day management of the company or of its group. Such director should be independent, in compliance with Commission's recommendation 2005/162/EC, and free of any material conflict of interest. The presence of independent directors, capable of challenging the decisions of the management, is widely considered as a means of protecting the interests of shareholders and other stakeholders. In companies with a dispersed ownership, the primary concern is how to make managers accountable to smaller shareholders. On the other hand, in companies with one or more controlling shareholders, the focus is rather on how to make sure that the company will be run in a way that sufficiently takes into account the interests of minority shareholders. Ensuring adequate protection for third parties is relevant in both cases.

- **Minimum requirements for delisting to protect the investors:** mechanisms protecting minority shareholders in case of issuers' delisting applied by market operators are well known among SGMs. Some of these (e.g., AIM Italia or AIM UK where a supermajority approval is required for the voluntary delisting of shares) have already identified appropriate provisions for this purpose, also considering the regulatory environment of each Member State. In this context, the TESG believes that existing practices of market operators should be translated into minimum requirements to protect minority investors, whilst leaving flexibility for market operators to adapt their rulebooks in compliance with local corporate law. Market operators could require supermajority approval (e.g., 75% or 90% of shareholders attending the meeting) for shareholders resolutions which directly or indirectly lead to the issuer's delisting (including merger or similar transactions) or sell-out rights assigned to minority shareholders if the company is delisted or if one shareholder owns more than 90% or 95% of the share capital.

Members of the TESG have agreed that the proposed corporate governance disclosures would be beneficial to SMEs. However, members have not agreed to a common approach. Therefore, this fiche proposes that the Commission takes into consideration the three different options below for a possible initiative on corporate governance requirements for companies.

#### **Option 1: Corporate Governance requirements for issuers admitted to trading on SGMs**

This approach would apply in two different ways:

- The first set of provisions (reporting of related party transactions, disclosure acquisition/disposal of voting rights, and minimum requirements for delisting) would be areas in which SGM operators would require in their own SGM regulation that issuers adopt specific rules (e.g. internal procedures and articles of association), tailored to local conditions, to be compliant with the corporate governance requirements when choosing to list on their platform.
- The second set (appointment of a least one independent director for issuers having a market capitalisation above a certain threshold and of an investor relator) would be recommended by SGM operators and applicable on a voluntarily basis by issuers. If not applied, SGM issuers would be required to issue a public document disclosing their arrangement.

Following this approach, it would be appropriate to make an amendment providing that an MTF shall define corporate governance rules for their issuers in the area sub (i) to (v) in order to qualify as SGM, following the two sets of rules outlined above and allowing for a tailored approach in a way that is appropriate to local markets conditions and local corporate law. This set of rules may be included in Article 33 of MiFID II and in Article 78 of Commission Delegated Regulation (EU) 2017/565, leaving SGM operators the flexibility to decline such requirements at local level.

#### **Option 2: Corporate Governance requirements for both non-listed and listed companies (admitted to trading on SGMs, MTFs and RMs)**

This option would require the harmonisation of corporate governance requirements at EU level for both listed

(issuers of shares) and non-listed companies, by introducing them in EU legislation related to company reporting, more specifically the Accounting Directive 2013/34/EU, Transparency Directive 2004/109/EC, and Shareholder Rights Directive 2007/36/EC. This would contribute to a unified SGM regime and increase the quality of the SGM brand, without creating an unlevel playing field in terms of disclosure requirements for both listed and non-listed companies.

### **Option 3: Include Corporate Governance criteria under the EU Champion label**

Rather than introducing corporate governance reporting requirements, this approach would incentivise additional disclosure requirements specific to SMCs (companies with a market capitalisation of less than €1 billion) who wish to gain the Champion status and benefit from a subsequent index. The corporate governance disclosures, as referred above, would be part of the SME EU Champion criteria for SMCs to benefit from the status (irrespective of their listing location) and allow for a voluntary framework for additional disclosures at the benefit of investors. In turn, SMCs would also benefit from increased visibility and SGMs from increased liquidity, thereby strengthening the price formation process.

In order for SMCs to effectively benefit from the EU Champion status, the TESG requests that the Commission publish a guideline to provide the steps necessary for SMCs to effectively be granted and benefit from the EU Champion status. This would allow for a harmonisation of corporate governance disclosures across all of the relevant markets.

## **Legal amendments**

### **Option 1**

- **Amend** Art. 33 of MiFID in order to provide for new corporate governance requirements by adding Art. 33(3)(b) providing that: “*appropriate criteria are set for issuer corporate governance*”.
- **Modify** Art. 78 of Commission Delegated Regulation (EU) 2017/565 of 25 April 2016 providing for a new letter (k) and (i), according to which: [With regard to the criteria laid out in points (b), (c), (d) and (f) of Article 33(3) of MiFID, the competent authority of the home Member State of the operator of an MTF shall not register the MTF as an SGM unless it is satisfied that the MTF]:

*“(k) Requires the issuers whose shares are traded on its venue to have an appropriate and proportionate corporate governance regime related to the approval and disclosure to the public of material related party transactions; the notification by the shareholder to the issuer and disclosure by the issuer to the public of the acquisition or disposal of voting rights if the total proportion held by the shareholder exceeds or falls below the thresholds which would be determined by the MTF; shareholders’ protection in case of voluntary delisting of the shares from the MTF or in case of decision of issuers’ relevant body leading to the removal of shares from trading on the MTF”;*

*(i) Recommends issuers to appoint: (a) at least one independent director for issuers having a market capitalisation above a certain threshold to be established by the MTF; and (b) an organisational structure to manage the relations with the investors. Where issuers do not appoint an independent director when needed or an organisational structure to manage the relations with the investors, an explanation by the issuer is required. This information should be reviewed annually.*

### **Option 2**

- **Amend** Article 9b of Directive 2007/36/EC in order to require issuers listed on SGMs to publicly announce material transactions with related parties at the time of the conclusion of the transaction;
- **amend** Transparency Directive 2004/109/EC to require issuers to disclose the acquisition/disposal of voting rights;
- **amend** the Accounting Directive 2013/34/EU to require companies to have an investor relation manager as the main contact person to investors on an ongoing basis can be a key tool to enhance the relations with



shareholders and the liquidity;

- **amend** the Commission Recommendation 2005/162/EC to ensure that the management function of issuer listed on SGMs is submitted to an effective and sufficiently independent supervisory function;
- **amend** the Transparency Directive 2004/109/EC to introduce minimum delisting requirements for both MTFs and RMs for market operators to define depending on the nature of their local markets

### **Option 3**

**Request** the Commission to publish guidelines to help companies be granted the EU Champion status and a level of harmonisation in the eligibility criteria, including their additional corporate governance disclosure.

## **Feasibility: Implementation process and possible risks**

### **Option 1**

#### **Perceived benefits:**

- These measures take into account the need for the requirements to maintain high levels of investor protection and to promote investor confidence in SGMs, while minimising the administrative costs and burdens for issuers. Indeed, the TESG believes that to set up an internal procedure to identify and manage related party transactions is not a complex work and to announce voting right acquisition/disposal is an easy task for issuers, as might be to modify its article of association to include a supermajority provision for delisting or a sell-out right. Moreover, to substitute a non-executive director with a non-executive independent director would not increase the cost of the board. Finally, since the CEO or the CFO or another person already working for the issuer may be appointed as an investor relations contact, no excessive costs would apply.
- Whilst the proposed rules might represent some limited additional but still manageable burden for the issuers, they are expected to potentially have a high impact on investors' trust and interest in SMEs. For issuers whose shares were already admitted to trading on an SGM, a transitional provision of 12 to 24 months would be needed.

#### **Perceived risks and disadvantages:**

- Whilst these proposals seek to introduce requirements to SGM issuers so that they are aligned with the obligation of RM issuers, it is important that these new obligations are also in line with the CMU's objective of making listing on SGMs less costly and burdensome for SMCs.
- There is a risk that these proposals introduce additional requirements to listed companies and further increases the gap in reporting obligations between non-listed and listed companies. To avoid this, the TESG recommends that the Commission assesses whether the introduction of any additional disclosure obligations to listed companies can also be introduced in the EU's disclosures framework of non-listed companies. If such requirements cannot be applied to non-listed companies, the Commission should deliver an impact assessment on the additional administrative costs or burdens these additional disclosure requirements would have on a listed company.
- Whilst these amendments seek a level of harmonisation in companies' disclosure requirements in the EU, a forum shopping risk could emerge in the implementation of these provisions across the EU, depending on the level of flexibility granted to market operators or national competent authorities.
- If the proposal to integrate MiFIDII TESG recommendations could be included in the review of MiFID II (and MiFID's Delegated Regulation 2017/565) which should be finalised by the end of 2021. In this context, an impact assessment will be necessary to assess the needs and priorities of such proposed rules.

### **Option 2**

**Perceived Benefits:**

- With a view of harmonising corporate governance standards, issuers of SGMs should not be the only companies subject to additional disclosure requirements. This option ensures a harmonised level playing field in the disclosure obligations for companies, irrespective of their listing venues (SGM, MTFs or RMs) and of whether they are listed.

**Perceived risks and disadvantages:**

- Whilst it was stated above that this proposal would not lead to increase costs or administrative burdens, it would still be crucial that the Commission carries out an impact assessment to verify this.
- There is a risk that this level of harmonisation would not grant flexibility to market operators to apply the relevant thresholds and criteria in respect to their relevant ecosystems. It is therefore important that, if this option is to be chosen, it is translated in level 1 under the Accounting and Transparency Directives.

**Option 3****Perceived Benefits:**

- This option would provide for a voluntary framework of additional disclosure requirements related to corporate governance, for the benefit of investors and issuers listed on SGM.
- Provided that this corporate governance requirements would not increase administrative burdens or costs for issuers, then SMCs would opt for this regime in order to benefit from increased visibility and from the index that would be associated to the EU Champion status.
- This approach would allow for additional corporate governance disclosures from SMCs irrespective of their listing venues (SGM, MTFs or RMs), but would ultimately benefit the liquidity of SGMs as the preferred venue for SMCs' listing following the publication of this report.
- Market operators would be granted the same level of flexibility today in the tailoring of disclosure requirements to their SMCs.

**Perceived risks and disadvantages:**

As this approach is based on incentivising companies to further disclose information, companies who do not wish to benefit from the EU Champion status may not choose to apply these criteria.

## 11. Creating tax incentives

### Recommendation

The TESG recommends that the Commission reviews in the RFG the definition of an SME listed on alternative venues (MTFs or SGMs) to allow a higher number of smaller companies to benefit from tax incentives which would be deemed compatible with State Aid rules to cope with the decline of EU public capital markets (see chapter 1.2.). Furthermore, TESG recommends to broaden the current exemption for “scouting costs” to costs of research which was conducted for SMEs listed on alternative venues (such as MTFs or SGMs).

- **Promoting the use of tax incentives for investing in SMCs:** tax incentives have been identified<sup>75</sup> as one of the key contributing factors that allowed some of the Member States (such as Italy and Sweden) to witness a large increase in listings on MTFs, specifically on AIM Italia, the Nasdaq First North market and Nordic Growth Market’s Nordic MTF. The TESG strongly believes that there is an urgent need to create fiscal incentives for investments in SMCs by encouraging Member States to promote the use of targeted tax incentives for SMCs, which choose to list on an MTF. While it is recognised that fiscal incentives are a scarce resource, the economic growth associated with SMCs represents a key element for European markets’ growth. This is in line with what has already been suggested by the Oxera report.<sup>76</sup>
- **Support the liquidity of SMC issuers: carving out SMC share transactions from the EU proposal on financial transaction tax (FTT) and removing a national transaction tax on SMC share transactions,** where it exists, could represent a meaningful tool for boosting liquidity and reducing the cost of capital for SMCs. The tax revenue loss would be small and there would be no material distortion to competition since SMEs are small relative to large issuers.
- **SMEs to SMCs: to allow MS to develop appropriate tax incentive schemes with regard to SMEs, it is essential to review Risk Finance Guidelines (RFG)<sup>77</sup> to broaden the definition of eligible undertakings, which may benefit from tax incentives, to all listed companies on MTFs having a market capitalisation below EUR 1 billion** (see recommendation 1 on SMC definition). That being said, it should be further investigated the possibility for SMCs listed on RM to be included in the definition of eligible undertakings since market failure stems from the asymmetry of information and illiquidity peculiar due to the limited size of the issuer rather than the listing venue. As a second-best scenario, it is proposed to extend the definition of **SMEs (SMCs) to all listed companies on an MTF having staff headcount up to 500 employees<sup>78</sup>** (alternatively 1,000<sup>79</sup> or even 3,000<sup>80</sup> could be considered), and turnover or assets equal to or less than (a) EUR 300million<sup>81</sup> or (b) EUR 500 million. The precise methodology and values for the proposed parameters could be refined by the Commission to ensure coherence with other applicable legislation.<sup>82</sup>
- **Amending the General Block Exemption Regulation (GBER)<sup>83</sup> in order to clarify that tax schemes aimed**

<sup>75</sup>Oxera Consulting LLP, *Primary and secondary equity markets in the EU*, 20 November 2020, p. 27.

<sup>76</sup>*Ibidem*

<sup>77</sup> European Commission, *Communication from the Commission – Guidelines on State aid to promote risk finance investments*, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52014XC0122%2804%29>

<sup>78</sup> LESG, *LSEG response to the European Commission consultation on the review of the SME definition*, May 2018, p. 2.

<sup>79</sup>See French government, *Réponse des autorités françaises à la consultation publique sur le réexamen de la définition des petites et moyennes entreprises (PME)*, June 2018, pp. 2-3.

<sup>80</sup> The Commission has recognised in the past the need to gain a better understanding of the reality of ‘intermediate’ enterprises. In this way, in Article 2 of the Regulation (EU) 2015/1017 on the European Fund for Strategic Investments the Commission has defined two types of enterprise of intermediate size where small “mid-cap companies” means entities having up to 499 employees that are not SMEs and “mid-cap companies” means entities having up to 3,000 employees that are not SMEs or small mid-cap companies. See European Consultation on the Review of the SME Definition, *Contribution from the Mouvement des Entreprises de Taille Intermédiaire (METI-Association of French Mid-Caps Enterprises)*, April 2018, p. 3. See also AGB, *Association of German Banks on the review of the SME definition*, May 2018, p. 2.

<sup>81</sup> LESG, *LSEG response to the European Commission consultation on the review of the SME definition*, May 2018, p. 2.

<sup>82</sup>This second-best approach is more in line with the traditional EU SME definition, which requires up to 250 employees and revenues of up to EUR 50 million or total assets of up to EUR 43 million. Having this in mind, one possible solution would be to adopt the same approach as the EU SME definition, but scale the thresholds up. This approach would be in line with the existing methodology.

<sup>83</sup> Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0651-20210405>

**to support SME investment research in unlisted SMEs and SMEs listed on alternative markets (jointly defined as “unlisted SMEs” under Article 2(76) of GBER) can be considered as “aid for scouting costs” in the sense of Article 24 of GBER and therefore should be deemed compatible with the internal market within the meaning of Article 107(2) or (3) of the Treaty and shall therefore be exempted from the notification requirement of Article 108(3).** This would require:

- an amendment to **Article 24(2) of GBER** to clarify that aid for scouting costs can extend beyond aid for the costs for initial screening and formal due diligence that is exclusively undertaken by managers of financial intermediaries or investors to identify eligible undertakings for risk finance aid and **can also include the costs of investment research in unlisted SMEs**, which are not linked to any subsequent investment or risk finance aid scheme pursuant to Articles 21 and 22 of GBER, provided this research is publicly distributed;
- an amendment to **Article 24 (2) of GBER** to clarify that, **in addition to eligible undertakings defined under Article 21(5) of GBER, aid for scouting costs can also be provided to any unlisted SME**, as defined in Article 2 (76) of GBER, as long as it takes the form of **investment research** and provided this research is publicly distributed.

### Legal amendments

The Risk Finance Guidelines were adopted in 2014 as part of the State Aid Modernisation package and they set out the conditions under which aid to promote risk finance investments may be considered compatible with the internal market. They are due to expire in 2021, following recent prolongation. TESG recommends to carefully consider the following proposal in the upcoming review of the Risk Finance Guidelines:

- **Provide for** a harmonised definition of tax incentives eligible undertakings in the Risk Finance Guidelines including all listed SMEs on an MTF (i.e., alternative trading venues) having a market capitalisation below EUR 1 billion.<sup>84</sup> The market capitalisation threshold shall apply independently from the other three criteria provided for in Recommendation 2003/361/EC<sup>85</sup> so that companies with public equity valuation of below EUR 1 billion are treated as SMCs, irrespective of whether they are below or above the thresholds specified for the other three criteria as provided for in the Recommendation. Issuers that exceed the EUR 1 billion threshold for three consecutive financial years may not be considered as SMCs. As second-best scenario the TESG suggests to include in SMEs definition all SME admitted to trading on a MTF having (at least) staff headcount under 500 and turnover/assets equal to or less than EUR 500 million;
- **Explore:** if SMCs listed on RM effectively could be supported through risk finance aid and if the fact that they are listed really demonstrates their ability to attract private financing;
- **Extend** the application of the Risk Finance Guidelines to ensure State aid compliance for tax incentives addressed at SMCs (as defined above), private and corporate investors in SMCs, SMCs founders and SMCs research service providers;
- **Ease** the use of the existing body of evidence regarding market failure by Member States to obtain State aid clearance by the EU Commission;
- **Clarify** that studies commissioned and funded by the Commission proving the existing public equity capital

<sup>84</sup> See the High Level Forum on the Capital Markets Union, *A new vision for Europe's Capital Markets. Final Report*, 10 June 2020, p. 70, [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/growth\\_and\\_investment/documents/200610-cmu-high-level-forum-final-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf), “While there is in principle a common SME definition based on the total staff headcount, annual turnover and annual balance sheet value that applies to all policies, programmes and measures that the European Commission develops and operates for SMEs, there are also some notable departures, such as in the case of financial legislation where a definition based on market capitalisation is applied or certain State Aid rules where the SME Definition can apply only in part or even does not apply altogether. The currently adopted definition based on market capitalisation may be considered too narrow to capture all companies sharing the SME features”.

<sup>85</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:124:0036:0041:en:PDF>

market failure in EU may be used by MS to prove such failure in the clearance procedure;

- **Develop and timely update** a practical guidance to MS, SMCs and operators with examples and explanations (e.g. via Q&As) on how and on what conditions State aid compatible tax incentive schemes can be designed.
- **Review Article 24 of GBER** to clarify that aid for investment research in unlisted SMEs can be deemed as compatible “aid for scouting costs”. Concretely, the Commission is invited to add the following second sentence in Article 24(2): “In addition, the eligible costs shall be the costs for investment research, as defined in Article 36 (1) of the Commission Delegated Regulation 2017/565, in an unlisted SME, provided this research is publicly distributed”.

In addition, the TESG **urges Member States to consider the development of the following tax incentive schemes:**

- **SMCs**: tax incentives (tax credit) to alleviate listing costs (similar to Italy, where there is a cap at EUR 500 000); lower tax rate for companies going public for a limited number of years, possibly based on the amount of capital raised as a proportion of total capital; tax relief on sponsored research and tax credit/higher tax deduction on the interest paid on bonds with a minimum maturity of 5 years to encourage balance sheet diversification and to offset higher costs vs. bank loans;
- **Entrepreneurs/Founders**: to boost listings through reduced capital gain tax for entrepreneurs/founders selling a part of their holdings in the context of an IPO and in the 5 subsequent years;
- **Investors**: income/capital gains/dividends/interest reliefs; reduced tax to be charged on the total amount of direct equity investments held by retail investors based on the total value of investments (similar to ASK in Sweden), replacing all capital gains tax and taxes on dividends/interest; tax credit on a percentage of investment in SMCs funds (similar to Venture Capital Trusts in UK where tax credit is 30% up to GBP 200,000 annual investment subject to holding the investment for at least 5 years);
- **Brokers**: tax relief on non-sponsored research published by regulated financial intermediaries, with a cap on the number of companies to be covered, to incentivise the production of independent research on small caps which would be otherwise uneconomical to produce.

#### **Feasibility: Implementation process and possible risks**

The proposed changes could be included in the upcoming review of the Risk Finance Guidelines that should be published by the end of the year and the upcoming review of GBER expected for 2022.

Any change in tax treatment (introduction of tax incentives) could only be done at a Member State level. The success of this recommendation would therefore depend on the good will and agreement of the Member States to follow up on this.

Under articles 107 and 108 TFEU, the Commission has exclusive competence to decide on the compatibility of State aid with the internal market.

## 12. Engagement of retail investors

### Recommendation

**The TESG recommends adding a specific category of “qualified retail investor” or “knowledgeable retail investor”, subject to certain criteria (detailed in the annex). The TESG also recommends revising the current definition of a professional client.**

The fiche describes two concrete proposals to amend the definition of investor categorisation in MiFID II, building on Action 8b of the CMU Action Plan 2020. The proposals aim to introduce a specific category of “qualified retail investor” and to revise the current definition of a professional client in MiFID II. These two proposals may be developed in parallel.

The criteria for reviewing the definition of the “professional investor” category would remain stricter than the criteria for defining a “qualified retail investor”.

1. Adding a specific category of “qualified retail investor” or “knowledgeable retail investor” upon request and based on the fulfilment of the requirements stated below. Such category may have the possibility to invest in primary or secondary market transactions both in equity and in fixed income, and be offered by listed or to be listed companies in RMs or in SGMs, without the obligation to register a prospectus.
2. Revisiting the current definition of professional client and reassess the appropriateness of existing criteria in order to ensure more effective categorisation, based on an individual’s knowledge and experience, and therefore make said category applicable to a wider pool of investors currently considered retail under the current scope of MiFID II. This second proposal may be developed in parallel with the first, because it would be applied to all kind of financial instruments and not only for “plain vanilla” investments in equity shares or corporate bonds. The requirements suggested for a reviewed definition of the professional investor category for natural persons would remain stricter than the ones for the category of “qualified retail investor”.

### Legal amendments

- Amend **Article 1.4. (a) of the Prospectus regulation (2017/1129)** by adding:

*(a) an offer of securities addressed solely to qualified investors or to qualified retail investors;*

- Amend in **Annex II of MiFID II**:

#### *III. CLIENTS WHO MAY BE TREATED AS QUALIFIED RETAIL INVESTOR UPON REQUEST*

*Retail investors may be offered the possibility to invest in primary or secondary market transactions both in equity and fixed income, offered by companies listed or to be listed in RM or in SGM, without the obligation to register a prospectus and therefore be considered as qualified retail investors upon request based on the fulfilment of the following requirements:*

- *A requirement for a written or electronic signature in a document clearly stating the risks the investor undertakes when entering those transactions where no prospectus is registered.*
- *Additionally, to fulfill one of the two following criteria:*

*1. The size of the client’s financial instrument portfolio, defined as including cash deposits and financial instruments, exceeds €200,000<sup>86</sup> or the client receives more than €100,000 in annual income. Alongside, the client has held a portfolio invested during a period of at least 3 years in equity, bonds, ETFs or other financial*

<sup>86</sup> The fixing of a certain threshold is a political decision. If a certain rational was used to establish the current amount of 500.000€, a different one might be stated for a new one.

*instruments traded in RMs or MTFs. The financial intermediary should assess this condition and check that a concentration limit for each investment of up to 20%<sup>87</sup> of the overall portfolio is not exceeded.*

*2. Expertise in financial markets, which can be demonstrated to the financial intermediary by the fulfilment of one of the following alternatives:*

- *The client holds a professional position in the financial sector, which required expertise and knowledge of the foreseen financial transactions or services. This professional condition also includes the CFO, CEO and board members of companies listed in RM or SGM.*
- *An individual who has earned a certification recognised by the National Competent Authorities, as those required for giving investment advice.*

- **Amend Section II.1 (Identification criteria) of Annex II of MiFID II under II. CLIENTS WHO MAY BE TREATED AS PROFESSIONALS ON REQUEST** by replacing the existing section with:

*[...] In the course of that assessment, as a minimum, one of the following criteria shall be satisfied:*

- *The size of the client portfolio of financial instruments including cash deposits exceeds EUR 500,000 and as a further enabling factor, clients may be considered to have acquired the elements of professional skills and knowledge through the professionalism of the financial service they receive.<sup>88</sup>*
- *The client proves to have enough financial knowledge either by having held a position in the financial sector which requires knowledge of the transactions or services envisaged or by being in possession of a certification of knowledge of the financial instruments they intend to include in their portfolio.<sup>89</sup>*

#### **Feasibility: Implementation process and possible risks**

- The imminent review of MiFID II and MiFIR (and related legislation) provides for optimal ground and timing to introduce changes to legislative acquis without entering an ad-hoc review procedure. The current economic condition in the EU, caused by the consequences of the COVID-19 pandemic, make it even more urgent to open investment opportunities to retail investors in order to improve the current status of debt markets. Ensuring that the proposed changes are targeted at only a sub-set of current retail investors with sufficient knowledge and experience would allow to maintain the proportionality of investor protection safeguards.
- The revision of the current definition of professional client category and the introduction of a new category of qualified retail investor could fit in the timeline of the upcoming retail investment strategy.

<sup>87</sup> See the AIPB (Associazione Italiana Private Banking) memo for the Stakeholder Committee of the European Commission on the occasion of the “Public Consultation on the review of the MiFID II/MiFIR Regulatory framework” of 2020 and its answer to the Consultation. <https://www.aipb.it/sites/default/files/all/2020-06/18%20MAGGIO%202020%20-%20COMMISSIONE%20EUROPEA%20-%20RISPOSTA%20AL%20DOCUMENTO%20%27PUBLIC%20CONSULTATION%20ON%20THE%20REVIEW%20OF%20THE%20MIFID%20II%20MIFIR%20REGULATORY%20FRAMEWORK%27.pdf>

<sup>88</sup> In this sense, active determination on the part of intermediaries will be based on the type of service provided to the client: portfolio management or investment advice. The eventual poor knowledge and experience of the client is compensated by the level of professional skills and expertise of the advisor or the portfolio manager. Again, Private banking institutions may play a good role in providing this experience. The current condition of completed transactions of a significant volume with an average frequency of at least 10 transactions quarterly during the previous four quarters is to be discharged and substituted by the professional skill of the advisor/portfolio manager.

<sup>89</sup> As proposed above, ESMA Guidelines for the assessment of knowledge and competence may be taken as a reference.

## ANNEX II – TABLE OF COMPARISON OF RECOMMENDATIONS

*Table of comparison of policy recommendations proposed by the TESG, CMU HLF and the Oxera study*

Issues to be addressed		TESG proposed recommendations	Oxera proposed recommendations	CMU High Level Forum proposed recommendations
The current SME definition is too narrow and lacks consistency	<b>SME Definition</b>	Define all publicly listed companies on any type of market whose market capitalisation is lower than EUR 1 billion euros as small and medium capitalisation companies (SMCs). Align the definitions of SMEs by referring to SMCs across different pieces of financial services legislation. Align the SME definition in the EU Risk Finance Guidelines with the SMC definition	No specific recommendations	Define small and Medium Capitalisation Companies (SMCs) as <i>“all publicly listed companies on any type of market whose market capitalisation is lower than one billion euros”</i>
Lack of regulatory flexibility	<b>Transitional period</b>	Introduce an optional transitional period for a duration of 3 years for SMCs wishing to transition from SGMs to RMs as well as SMCs wishing to list on RMs	No specific recommendations	Introduce a transitional period of up to 5 years for all newly listed companies on RMs, including those transitioning from SGMs, fitting the definition of an SMC
	<b>Sandboxes</b>	Create a pre-listing sandbox for SMCs listed on both RM and GMs (for up to 2 years)	Create a faster-track listing process for SME stock—for example, by introducing listing helpdesks and exploring the possible benefits of listing sandboxes	No specific recommendations
Public listing is too burdensome and costly	<b>Listing requirements</b>	Issue guidance to stock market operators to simplify their listing rules. Introduce alleviations in the Prospectus Regulation as regards maximum length, language, secondary issuances and transfer of listing, determination of “Home Member State”. Promote dual listing for issuers admitted to trading on SGMs	Set a page limit on the length of the prospectus, and/or limit the key risk factors that can be included among the ‘top risks’ in the summary. Facilitate the introduction of a centralised machine-readable database for prospectus and consensus analyst ratios	Introduce alleviations in the Prospectus Regulation as regards the thresholds, length of prospectus, deadline for NCA adoption and passporting
The costs of staying listed are too high due to regulatory requirements	<b>Market abuse</b>	Introduce alleviations in the Market Abuse Regulation as regards its scope, the definition of inside information, market sounding, insiders lists, managers’ transactions, and sanctions	Launch a holistic, bottom-up review of the approach to SME listing, involving ESMA, the NCAs, and the finance ministries of Member States, to reflect on the objectives and effects of the regime, and to redesign disclosure rules for small listed companies	Introduce alleviations in the Market Abuse Regulation to ensure 2 principles: <i>“think small first”</i> and proportionality.



Issuers risk losing control when going public	<b>Multiple voting rights structures</b>	Introduce the option for issuers who wish to list or are already listed on a RM or MTF to adopt multiple voting rights structures such as dual class share and / or loyalty shares	Make dual-class shares more flexible	Allow companies to opt for dual-class shares with variable voting rights when going public, with a sunset clause determined at the company's discretion
Lack of common corporate governance principles	<b>Corporate governance</b>	Design a set of corporate governance principles that could be beneficial to SMCs, namely: (i) reporting of related party transactions; (ii) disclosure acquisition/disposal of voting rights; (iii) appointment of a least one independent director for issuers having a market capitalisation above a certain threshold; (iv) appointment of one reference person to manage the relations with the investors; and (v) minimum requirements for delisting to protect minority shareholders. Recommendation to the Commission to consider three options for a possible initiative on corporate governance	Strengthen corporate governance to build public trust in equity markets and raise standards in jurisdictions where local requirements are in practice weaker. Policy actions could include (i) investigating the possible role of fiduciary rating agencies, (ii) recommend exchanges to adopt market-monitoring technology, and (iii) provide and publicise resources to support credible enforcement by NCAs and market operators	No specific recommendations
Lack of research coverage	<b>Equity research coverage</b>	Encourage Member States to put in place measures to promote equity research coverage of all listed SMCs. Support both independent and sponsored SMC research with funds from the ERDF, including with the aim of securing the long-term viability of regional brokerage houses	Adopt policies to promote the provision of equity research to encourage more investments in SMEs. This could include a review of the new rules on unbundling of trade execution and research	Exempt research in SMEs from unbundling rule in MiFID II
	<b>Credit research and rating coverage</b>	Facilitate the process of data collection by including relevant debt data in the ESAP. Subsidise SMCs paying for a regulated credit rating to foster the development of a disintermediated debt market for SMCs	No specific recommendations	No specific recommendations
Lack of visibility	<b>SMC visibility</b>	Create an EU Champion label to shine spotlight on best in class EU SMCs and a corresponding index	Recommended to reclassify small, nationally focused markets as 'emerging/frontier' to enable their inclusion in the relevant indices and to investigate the commercial barriers to the adoption of indices in SMEs	Assess how index visibility for SMCs can be improved and if a dedicated pan-European SME index should be created. Integrate SMC disclosure into the ESAP in comparable format
SMEs are unable to devote large resources to manage ESG disclosures	<b>ESG</b>	Simplify and foster ESG disclosure by SMCs, facilitate the setup of a CMU ESG Index	No specific recommendations	No specific recommendations

<p>The participation of retail investors in capital markets is low</p>	<p><b>Client classification</b></p>	<p>Revise the current MiFID II definition of professional client and introduce a new “qualified retail investor” category. Amend Prospectus Regulation to allow qualified retail investors access to securities offered to professional investors</p>	<p>No specific recommendations</p>	<p>Amend MiFID II to introduce a new category of non-professional Qualified Investors. Amend Prospectus Regulation to allow qualified retail investors access to securities offered to professional investors</p>
<p>The attractiveness of SMEs to investors is low</p>	<p><b>Tax incentives</b></p>	<p>Review in the RFG the definition of an SME listed on alternative venues (MTFs or SGMs) to allow a higher number of smaller companies to benefit from tax incentives which would be deemed compatible with State aid rules. Broaden the current exemption for “scouting costs” to costs of research which was conducted for SMEs listed on alternative venues (such as MTFs or SGMs)</p>	<p>Encourage Member States to promote the use of targeted tax incentives to stimulate investments in stocks on SGMs</p>	<p>Member States should consider tax incentives to promote long-term investment into SMCs through ELTIFs</p>

## ANNEX III – GLOSSARY

<b>CMRP</b>	Capital Markets Recovery Package
<b>CMU</b>	Capital Markets Union
<b>CSRD</b>	Corporate Sustainability Reporting Directive
<b>ELTIF</b>	European Long-Term Investment Fund
<b>ERDF</b>	European Regional Development Fund
<b>ESAP</b>	European Single Access Point
<b>ESEF</b>	European Single Electronic Format
<b>ESG</b>	Environmental, Social and Governance
<b>EuVECA</b>	European Venture Capital Fund
<b>GBER</b>	General Block Exemption Regulation
<b>HLF</b>	High Level Forum on CMU
<b>IPO</b>	Initial Public Offering
<b>MAD</b>	Market Abuse Directive
<b>MAR</b>	Market Abuse Regulation
<b>MiFID II</b>	Markets in Financial Instruments Directive
<b>MTF</b>	Multi-lateral Trading Facility
<b>NCA</b>	National Competent Authority
<b>NFRD</b>	Non-Financial Reporting Directive
<b>RFG</b>	Risk Finance Guidelines
<b>RM</b>	Regulated Market
<b>RTS</b>	Regulatory Technical Standard
<b>SFDR</b>	Sustainable Financial Disclosure Regulation
<b>SHRD</b>	Shareholders' Rights Directive
<b>SMC</b>	Small and Medium Capitalisation Company with market cap less than €1 billion
<b>SME</b>	Small and Medium Enterprise
<b>SGM</b>	SME Growth Market
<b>TESG</b>	Technical Expert Stakeholder Group on SMEs
<b>UCITS</b>	Undertaking for Collective Investments in Transferable Securities
<b>URD</b>	Universal Registration Document

## ANNEX IV – LIST OF FIGURES

**Figure 1:** *Listing on SME markets in Europe*

**Figure 2:** *Costs and benefits of listing*

**Figure 3:** *Global market share of GDP, market capitalisation, and the value and number of domestic IPOs (2015 to 2020)*

**Figure 4:** *Rise in the dual class structure of tech IPOs in the US*

**Figure 5:** *Current national rules on share class structure in EU Member States (2019 data)*

**Figure 6:** *Barriers to investors' interest in SMEs*

**Figure 7:** *Change in firm's research budget since entry into application of MiFID II*

**Figure 8:** *Voluntary, limited, standardised set of ESG KPIs*

