

Revision of the Prospectus Regulation

POSITION PAPER

March 2023

Key messages

AFEP welcomes the review of the Prospectus Regulation (PR) and the Commission's objective to **simplify and alleviate the requirements** for companies seeking finance through financial markets. **AFEP supports the new exemptions** the Commission is proposing to introduce for the offer and admission of fungible securities with securities already admitted to trading on a regulated market. These exemptions **will not lower investor protection** since they would apply only to listed companies **making public information regarding their activities, prospects, risks, financial situation and non-financial performance**. These amendments will allow PR to strike the right balance between investor protection and facilitating access to financial markets.

We also support **the proposed changes regarding the description of risk factors, the clarification of the duties of intermediaries** when a supplement is published, **the possibility to publish an IPO prospectus 3 days before the end of the offer** and **enhanced harmonization of supervisory practices** through the standardisation of the scrutiny of prospectuses and more frequent peer reviews by ESMA. These amendments will contribute to improve the effectiveness of the prospectus framework. In addition and to further improve PR, AFEP considers that the **securities issued in connection to a take-over bid by way of exchange offer or in connection with merger and division transactions should be excluded from the scope** of the Regulation as they are covered by other pieces of EU legislation. Furthermore, incorporation by reference should remain voluntary and the scope of documents that can be incorporated in a prospectus should **be extended to all documents made available previously or at the same time on the OAM**. Finally, AFEP welcomes the fact that the **provisions regarding the universal registration document are maintained**.

On the contrary, AFEP does not support the limit of the number of pages of prospectuses (300 pages for share prospectuses) and **the requirement to comply with a standardised sequence** for the content and order of presentation. Introducing such a limitation could be counterproductive and would not meet the objective pursued. The best way forward to reduce the volume would be to review Delegated Regulation (EU) 2019/980 which defines the content of prospectuses and reduce the disclosure requirements. AFEP also considers that **extending the withdrawal right from 2 to 3 working days after publication of a supplement or of the final offer price would increase execution risks** when financial markets are volatile.

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AFEP's comments on the proposal for a Regulation amending the Prospectus Regulation

AFEP welcomes the review of the Prospectus Regulation (PR) as part of the Listing Act initiative and the Commission's objective to simplify and alleviate the requirements for companies seeking finance through financial markets as well as for intermediaries selling securities. AFEP members especially welcome the fact that the Commission is taking into account the great amount of information disclosed by public companies in order to strike the right balance between investor protection and facilitating access to financial markets.

1. New exemptions

AFEP supports the following exemptions the Commission is putting forward:

- The extension of the **exemption from the obligation to publish a prospectus to offer of securities fungible** with securities already admitted to trading on a regulated market, provided that the securities offered represent, over a period of 12 months, less than a determined percentage of existing securities.
- The increase of the percentage mentioned above, for both offer and admission to trading of securities, from **20% to 40%** of the number of securities already admitted to trading on the same market, calculated over a period of 12 months.
- The introduction of a **new exemption from the obligation to publish a prospectus for offer and admission of securities fungible** with securities that have been admitted to trading for at least the last 18 months, subject to conditions and in particular to the filing with the National Competent Authority of an information document.

The exemptions mentioned above **will not lower investor protection** since they will apply only to companies with securities admitted to trading and **making public information regarding their activities, prospects, risks, financial situation and non-financial performance (ESG)**. As regards AFEP members, large French listed companies publish every year on a voluntary basis a **universal registration document** which gives stakeholders a thorough and updated view of the company's business and condition and allows investors to **take informed investment decisions**. These universal registration documents are reviewed by the Competent Authority. **AFEP members are keen to see the universal registration document preserved.**

2. Take-over bid by way of exchange offer, merger and division transactions

As regards the scope of PR and in addition to the changes proposed by the Commission mentioned in paragraph 1, AFEP advocates for **the exclusion from the scope of PR of securities issued in connection with a take-over bid by way of exchange offer or in connection with merger and division transactions**. These transactions currently benefit from an exemption of prospectus provided that a document is made public describing the transaction and its impact. We consider however that these transactions should be **excluded from the scope because they are covered by other pieces of EU legislation and subject to specific disclosure requirements**. Furthermore, in practice, the current exemption is subject to publication of an information

document which can result, in certain circumstances, in a requirement from the National competent Authority to file the information document before the transaction takes place and in a review of said document as would be the case for a prospectus.

3. Description of risk factors

AFEP supports the proposed change to Article 16 of PR regarding the description of risk factors in order to remove the requirement to prioritize the risks identified. As mentioned on several occasions, **prioritization of risks factors significantly increases complexity and liability for issuers** since not all the risks can be identified, assessed and quantified. In particular materiality and probability of occurrence are very difficult to assess, given the different characteristics of risks.

However, we are **doubtful regarding the opportunity to amend Article 16, as proposed by the Commission, to explicitly require that risk factors should not be generic**: when generic factors are found in a prospectus it would generally be at the request of Competent Authorities. We believe therefore that this issue would be better dealt with through enhanced harmonization of supervisory practices (see below point 5).

4. Incorporation by reference

The Commission is proposing to require incorporation by reference in prospectuses of disclosures mandated by PR and already public. We understand that this proposal aims at alleviating prospectuses. We consider however that such change could be **detrimental to the comprehensibility of prospectuses and that flexibility should be given to issuers**. Therefore, we consider that **there should be no obligation to incorporate by reference** and support the current wording of Article 19. In this regard, extending the scope of documents that can be incorporated in a prospectus **to all documents made available previously or at the same time on the OAM**, provided that the language requirements of PR are met, would be a **more efficient solution to alleviate the content of prospectuses**.

5. Harmonization of supervisory practices

AFEP welcomes the proposal of the Commission to strengthen harmonization of supervisory practices. **Enhanced harmonization of supervisory practices** through the standardisation of the scrutiny of prospectuses and more frequent peer reviews by ESMA are necessary to ensure consistent and effective implementation of the requirements regarding prospectuses.

6. Duties of intermediaries

AFEP supports the changes proposed by the Commission regarding the duties of intermediaries in Article 23(3). **Clarification of the duties of intermediaries** as regards the investors who have purchased or subscribed to the securities when a supplement is published will offer legal certainty to said intermediaries.

7. Publication of prospectuses

Finally, AFEP supports the flexibility that would be offered to issuers regarding the **choice of the language**, provided that the summary is published in the official language of the home Member State, and the **possibility to publish the prospectus for an IPO 3 days before the end of the offer**. Such flexibility will contribute to improve the effectiveness of the prospectus framework. AFEP also supports allowing **the publication of prospectuses in an electronic format only**.

8. Changes AFEP does not support

AFEP does not support the following changes put forward by the Commission as they would make the drafting of prospectuses more complex and financial transactions more difficult when market conditions are volatile:

- **Limit the number of pages of prospectuses** (300 pages for share prospectuses) and **standardise the content and order of presentation**. We understand that the rationale for limiting the number of pages is to alleviate prospectuses and enhance their comprehensibility and accessibility, in particular for retail investors. We consider however that **introducing such a limitation could be counterproductive and would not meet the objective pursued**:
 - It is the **purpose of the summary to provide a short accessible overview** of the key material information (retail) investors need to know about the offer and/or admission.
 - **Some information** which can represent a significant volume, such as the financial consolidated statements for large companies, **cannot be summarised**. The financial statements can be incorporated by reference but this implies that there could be no historical financial information in prospectuses – except for key indicators – and can impair the comprehensibility of such prospectuses.
 - Some **other parts of prospectuses are likely to increase in terms of volume**, in particular with the implementation of the Corporate Sustainability Reporting Directive.

AFEP members are therefore **not in favour of introducing a limit** in terms of pages for share prospectuses and consider that the **best way forward to reduce the volume would be to review Delegated Regulation (EU) 2019/980 which defines the content of prospectuses and reduce the disclosure requirements**. A limit could however be introduced for prospectuses published by companies listed on SMEs Growth Markets.

Regarding the content of prospectuses, we have noted that the Commission is also proposing new annexes defining the different sections of the standard prospectus, registration document and securities note. AFEP members consider that **the content of prospectuses should be modified only if a major issue in terms of transparency has been identified or to streamline the disclosure requirement** but not every 5 years just for the sake of changing it even if not necessary. In this regard, we welcome in Annexes I (Prospectus) and II (Registration document) the reference to the management report, which

would be incorporated by reference, and the requirement to include only 2 years of historical financial information for equity prospectuses and 1 year for non-equity prospectuses. We also appreciate that there is no reference to the statement of capitalisation and indebtedness in Annex III (Securities note). We are concerned that the definition of the content of prospectuses through “level 2” measures would not allow for a proper consultation process.

- **Extend the withdrawal right from 2 to 3 working days** after publication of a **supplement or of the final offer price** where said final price and/or the amount of securities to be offered to the public were not included in the prospectus. Extension of the withdrawal right from 2 to 3 working **would increase execution risks when financial markets are volatile. Therefore, AFEP members do not support such an extension.**
- According to the Commission’s proposal, a **supplement would not be required when the final offer price differs by no more than 20% from the maximum price** disclosed in the prospectus. Adding this requirement would *de facto* limit the magnitude of the IPO price range. Offering conditions must remain the issuer’s decision. Article 23 of the PR, as it is currently drafted, requires a supplement to be published in case any significant new factor arises before the end of the offer or trading of the securities begins. A change in the pricing that would impact the use of proceeds for instance, currently triggers the obligation to publish a supplement. AFEP considers that this requirement is sufficient and that no specific threshold or condition on the terms of the offering should be added.

ABOUT AFEP

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Since 1982, AFEP brings together large companies operating in France. The Association, based in Paris and Brussels, aims to foster a business-friendly environment and to present the company members’ vision to French public authorities, European institutions and international organisations. Restoring business competitiveness to achieve growth and sustainable employment in Europe and tackle the challenges of globalisation is AFEP’s core priority. AFEP has 117 members. More than 7,5 million people are employed by AFEP companies and their annual combined turnover amounts to €2,200 billion. AFEP is involved in drafting cross-sectoral legislation, at French and European level, in the following areas: economy, taxation, company law and corporate governance, corporate finance and financial markets, competition, intellectual property and consumer affairs, labour law and social protection, environment and energy, corporate social responsibility and trade.

Contacts:

Lé Quang Tran, Director for Financial Affairs lq.tranvan@afep.com

Alix Fontaine, European Affairs Advisor, a.fontaine@afep.com