Comments

on **EC Proposal for a** REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises ("Listing Act")

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The **German Banking Industry Committee** is the joint committee operated by the central associations of the German banking industry. These associations are the Bundesverband der Deutschen Volksbanken und Raiffeisenbanken (BVR), for the cooperative banks, the Bundesverband deutscher Banken (BdB), for the private commercial banks, the Bundesverband Öffentlicher Banken Deutschlands (VÖB), for the public-sector banks, the Deutscher Sparkassen- und Giroverband (DSGV), for the savings banks finance group, and the Verband deutscher Pfandbriefbanken (vdp), for the Pfandbrief banks. Collectively, they represent approximately 1,700 banks.

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GBIC Comments on EC Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises ("Listing Act")

A. Introductory remarks

The German Banking Industry Committee (GBIC) welcomes the opportunity to provide its view on the European Commission's proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises ("Listing Act"). In general, GBIC welcomes the proposed amendments to the Prospectus Regulation ((EU) 2017/1129, PR) and to the Market Abuse Regulation ((EU) No 596/2014, MAR) to reduce administrative burdens for all issuers (not only for SMEs). However, to promote the European public market and increase its attractiveness further improvements are necessary in the context of the Capital Markets Union.

B. Comments on the proposed amendments to Regulation (EU) 2017/1129 (Prospectus Regulation, PR)

Art. 1 para. 4 PR – Exemptions for offers of securities to the public

With regard to capital increases from stock corporations the obligation to publish a prospectus set out in Art. 3 para. 1 PR should not apply to an offer of subscription rights to shares addressed exclusively to existing shareholders. The current regime provides for no statutory exemptions especially for unlisted issuers. Unlisted issuers also do not benefit from the proposed exemptions in Art. 1 para. 4, 5 PR, which are to be introduced because, inter alia, the issuer is already known to investors, much information is already available to investors and to address obstacles stemming from the length, complexity and high costs of the prospectus documentation. Consequently, a prospectus must be published even if trading in subscription rights is excluded and subscription rights are only offered to the existing group of shareholders. This results in unlisted stock corporations incurring additional costs and facing burdensome prospectus approval procedures without added value for the shareholders who are already sufficiently aware of the risks of their investment due to their shareholder position. This makes it more difficult and time consuming for unlisted stock corporations to raise capital which contradicts the objective of the Listing Act to reinforce the attractiveness of public capital markets in the Union. If the subscription rights from the capital increase are only granted to existing shareholders who are already sufficiently aware of the risks of their investment, there is however no investor or market interest worth protecting. We therefore would recommend to add an exception to Art. 1 para. 4 PR that an offer of subscription rights to shares addressed exclusively to existing shareholders.

Art. 1 para. 4 lit. da, 5 lit.a PR – Exemptions for secondary offers

The proposed amendment extends a similar exemption that currently applies only for admissions to trading also to offers that have not previously been exempted, in particular offers to non-qualified (i.e. retail) investors, even if their number equals or exceeds 150 per member state. More importantly, the maximum volume of that exemption is raised to 40% (from previously 20%). The same applies to the related exemption for the purposes of admission of such securities to trading on a regulated market. However, it should be clarified, that securities which are to become fungible (i.e. securities issued under TEFRA D rule which will only become fungible with existing securities 40 days after their issue date) may benefit from this exemption as well.

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Art. 1 para. 4 lit. db, 5 lit. ba PR, Annex IX – Exemptions for secondary offers with 'summary note'

The option to enable listed issuers to raise capital by issuing even more than 40% of its already outstanding securities without a prospectus only using a summary note seems to follow a good intention to facilitate a quick access to market for established issuers.

However, it should be considered that the disclosure regimes under PR and the ongoing reporting under the Transparency Directive and MAR are not harmonized amongst each other. More specifically, certain important elements of prospectus disclosure such as the Operating and Financial Review (OFR) or Management's Discussion and Analysis (MD&A) is not required for the annual and interim financial reporting. Also, the disclosure requirements for (changes in) the issuer's business model, legal and regulatory framework, litigation and other disputes and other non-financial information are not consistent. The required level of detail, especially in the case of placements also to non-qualified investors, is unclear as are the peculiarities of the applicable liability regimes in the various member states. Further, the requirement that the summary note shall have a maximum length of 10 A4 pages makes sufficient disclosure quite challenging, especially if issuers take a cautious approach. Also, given the dramatically reduced size, a clearly defined reduced liability regime is missing.

It appears from the annexes to the Listing Act that the section "Operating and Financial Review" will no longer be required for equity prospectuses. It is no longer part of the list of categories of prospectus information in Annexes I and II. Although this deletion is not specifically mentioned in the explanatory memorandum, in the recitals or in the impact assessment the impact assessment mentions the OFR as "rather / very burdensome" on page 167. This may be correct from an issuer's perspective but does not consider the importance of this section for investors. Also, having no OFR would make a prospectus incompatible with requirements for a placement to US investors.

Finally, the proposed approach seems to deviate significantly from US capital markets practice. However, private placements to institutional investors in the USA will often be required, especially for share issues of the contemplated size. US market usually expect disclosure on a level substantially consistent with that for an offering registered under the U.S. Securities Act of 1933. Hence, it does not seem unlikely that most issuers will decide to execute offerings of these volumes rather based on a voluntary prospectus.

Art. 1 para. 4 lit. j, 5 lit. i PR

We welcome the provision in Art. 1 para. 4 lit. j, para. 5 lit i. The threshold, which was raised to EUR 150 000 000 under the Capital Markets Recovery Package (CMRP), ensures funding for credit institutions and gives them necessary space to support their clients in the real economy.

Art. 6 para. 2, 4 PR – Standardized format

The suitability of the standardized format and sequence will depend on the details to be specified in delegated acts to be adopted by the Commission according to Art. 13 PR. The sequence provided in the existing annexes to PR does not exactly follow international market practice – which is especially driven by customary structure of prospectuses in the US market. EU issuers and NCAs have become comfortable to take this established approach and provide a cross-reference list to NCAs to facilitate their review. Therefore, strictly prescribing the sequence of disclosure items at the expense of deviating to a greater extent from international market practice does not seem to add value.

The existing format and minimum disclosure requirements under the annexes to the Delegated Regulation have already led to a certain level of harmonization. Market practice shows that prospectuses for non-equity securities, including debt instruments, are largely comparable. Therefore, there is no need for a predetermined order or further requirements for the format. Additionally, issuers must be able to draw up prospectuses in a way that they can meet civil law/liability aspects. Predefined standardization could not take into account the needs of the issuers and could expose them to additional liability risks.

It is welcome, that there is no size limitation for non-equity securities because of the significant variation in terms of structures and complexity. Such a variation of structures and complexity is true also for equity offerings/listings. In the latter case this may result from the size and complexity of the issuer's and his group's business model, the number of his subsidiaries, the size of the issuer's group, his legal and regulatory framework and the number of legal disputes, just to name a few aspects. Therefore, the absolute size limit of 300 A4 pages appears inappropriate. It would be preferable if NCAs should be authorized to grant a waiver from the size limit if a longer prospectus appears appropriate under the circumstances of a specific case, or, allow the prospectus to exceed the maximum size. Nevertheless, not taking into account the summary, the information incorporated by reference or the additional information relating to a complex financial history or a significant financial commitment, is regarded as useful.

Art. 13 PR – Minimum information and format

- <u>Separate statement of capitalization and indebtedness no longer required</u>

It appears (according to the annexes to the draft Listing Act) that the requirement to include a statement of capitalization and indebtedness as currently required under Annex 11, point 3.2 Delegated Regulation 2019/980 has been deleted. The deletion of that requirement is strongly appreciated.

The statement as required at present does not add much value given that information on capitalization and indebtedness is already provided in the issuer's balance sheet forming part of its financial reporting to be included in the prospectus anyway. The absence of specific accounting standards for these line items results in a lack of comparability between issuers. In addition, the fact that the statement must not be older than 90 days might currently urge issuers to prepare a new balance sheet (and derive the non-IFRS items therefrom) as per a date within a reporting period just for this purpose.

- <u>Incorporation of management reports</u>

The amended draft Annexes to the PR seem to now provide that the management reports for the periods covered by the historical financial information have to be incorporated by reference in their entirety (see Annex I item IV, Annex II item III and so on).

A mandatory incorporation of the entire management reports by reference as it seems to be required by the proposed amendments is questionable as the management reports also contain statements with respect to the expected future development of the company and thus forward-looking statements that have so far been rarely and cautiously been used due to the uncertain liability that may arise therefrom. This is almost necessarily the case for the (as of their date) forward looking statements in the management reports for the "older" financial years. They are not only obsolete, they may even potentially be misleading. Also, the level of assurance so far provided by auditors with respect to management reports is much more limited than in the case of financial statements, especially with respect to the historical sustainability reporting. Those investors seeking more information can receive such information in the "documents available" section according to the Level-2-Regulation.

Additionally, such a requirement put underwriters in a very difficult position if they are deemed responsible (and, hence, liable) for information to be mandatorily included into a prospectus that they could not influence. Therefore, this requirement should be reconsidered.

- Incorporation of ESG reporting

This incorporation requirement should only apply to issuers to which the new Corporate Sustainability Reporting Directive (Directive 2022/2464 - CSRD) applies – when implemented in their respective member state. This expectation is expressed in the explanatory memorandum for the draft Listing Act (p. 20 of the draft COM (2022) 762 of 7 December 2022). However, this needs to be reflected in the text of the regulation as well.

As currently drafted, Recital 23 refers to Directive 2013/34/EU instead, as does the proposed change to Art. 13 PR. This is regarded as not appropriate since the existing rudimentary sustainability disclosure pre-CSRD implementation lacks standardization and substantive auditor assurance. Thus, the current sustainability disclosure does not appear suitable for capital markets disclosure as it may result in an expectation gap and liability risks resulting therefrom.

We are of the view, that issuers should only be required to disclose their ESG reports in accordance with the proposed Art. 13 para. 1 lit. f PR in the case when marketing non-equity securities offered to the public or admitted to trading on a regulated market with ESG factors or objectives in accordance with Art. 13 para.1 lit. g PR where such factors relate to the issuer (and not to the use of proceeds or the respective issuance). In other words, the ESG reporting requirement does not apply if the issuer issues non-equity securities which are not marketed as "green" or if the "greenness" only refers to the use of proceeds – which is an important feature of green bonds as a transition finance instrument.

Additionally, incorporation of product-related sustainability information in base prospectuses seems impossible in practice. Product-related sustainability information is usually known at the time of the respective issuance. Thus, such information can only be specified and included in the final terms of a base prospectus, for which it should be permitted (e.g. in the "use of proceeds" section). Mandatory ESG disclosure in a base prospectus should not be required.

Art. 14b PR – Follow-on prospectus

The term prospectus in the Prospectus Regulation is used as a generic term for all different types of prospectuses and therefore would also encompass the EU Follow-on prospectus. From our perspective, this allows to prepare the EU Follow-on prospectus as a base prospectus in accordance with the base prospectus regime. This is also indicated by the following:

- Proposed Recital 24: „*To enable issuers to fully benefit from this alleviated prospectus type, the scope of the EU Follow-on prospectus should be broad and encompass public offers or admission to trading on a regulated market of securities that are fungible or not fungible with securities already admitted to trading*."

- Proposed Recital 33: "*The EU Follow-on prospectus and the EU Growth issuance document <u>should complement the other forms of prospectuses</u> laid down in Regulation (EU) 2017/1129. Therefore, unless explicitly stated otherwise, all references to the term 'prospectus' under Regulation (EU) 2017/1129 should be understood as referring to all different forms of prospectuses, including the EU Follow-on prospectus and the EU Growth issuance document*."
- For the information an investor receives in the case of an EU Follow-on prospectus pursuant to Art. 14b PR and Annex IV or V, it makes no difference whether a separate EU Follow-on prospectus is drawn up for each individual issue or whether an EU Follow-on prospectus in the form of a base prospectus is drawn up for a number of issues.

For these reasons, it is preferable to include a clarification that a combination of an EU follow-on prospectus and a base prospectus is possible. It should be in the discretion of an issuer to draw up an EU follow-up prospectus as a base prospectus in accordance with Art. 8.

The size limit of 50 DIN A4 pages (Art. 14b para. 5 PR) does not take into account that special circumstances could make it necessary to exceed the number of pages. The rigid size limit therefore appears disproportionate. As a compromise NCAs should be authorized to grant a waiver from the size limit if a longer prospectus appears inappropriate under the circumstances of a specific case or allow the prospectus to exceed the maximum size.

Art. 15a PR – EU Growth issuance document

The proposed provision appears unbalanced. SME issues in particular carry a structurally higher risk resulting from the typically more volatile and uncertain business models of issuers and less sophisticated accounting and control structures. Restricting disclosure requirements for SMEs could lead to an information gap to the detriment of investors. Furthermore, the proposed provision does not clarify whether and to what extent the liability principles of prospectus law apply. This leads to legal uncertainty.

Limiting the size of the disclosure and thus, necessarily, level of detail may reduce issuance cost at first sight but appears counter-intuitive from a risk and investor protection perspective. Moreover, it appears questionable to expect an EU Growth issuance document to provide, under the foregoing circumstances, the information necessary to enable retail (!) investors to take an informed investment decision. The proposed concept provides for an imbalance of (i) a reduced level of information, (ii) structurally higher level of risk that may result from SME issuers' often more volatile and uncertain business models as well as less sophisticated accounting and control structures, (iii) the strict limitation of size at a low fraction of the size limit for "ordinary" prospectuses and (iv) undefined and, hence, unclear liability standards that do also not differentiate among the different types for prospectuses, their size (limits) and level of detail.

Taking into account the interests of the addressees of the provision on the one hand and the protection of retail investors on the other hand, this concept could only work if it were allowed to (i) assume a minimum level of knowledge and expertise of investors, (ii) to define such level in a clear disclaimer, and (iii) to limit the liability that may arise from the prospectus (resp. issuance document) accordingly.

Art. 16 PR – Risk factors
The deletion of the requirement to rank risk factors according to their materiality within each category of risk factors (Art. 16 para. 1 PR) is welcome. This assessment has been highly speculative and, as a result, not meaningful for investors whilst potentially creating unforeseeable liability risks for issuers.

The new prohibition of generic, disclaimer type risk factors seems to be based on the ESMA Guidelines on Risk Factors under the Prospectus Regulation of 1 October 2019 (ESMA31-62-1293), especially Guideline 2. While the approach is understandable in principle, it should be clarified that this must not prevent issuers from inserting cautionary language explaining the nature of a short form disclosure document (such as a follow-on prospectus or an EU Growth issuance document) and to clarify the different level of detail and the expected level of knowledge and expertise of the reader.

Art. 17 PR – Final offer price and amount of securities
Art. 17 PR has remained largely unchanged compared to the existing wording. The inserted flexibility as to a slight overrun of the final offer price compared to the maximum offer price disclosed in the prospectus is helpful, adds more flexibility for issuers and avoids the closing of an offering being delayed. Otherwise, the expiry of the period for investors' withdrawal rights would have to be awaited or securities be allocated at a lower price within the initial price range – at the disadvantage of the issuer. Investors are still sufficiently protected as they can limit their highest order price.

Art. 19 PR – Incorporation by reference
The proposed amendment in Art. 19 para. 1 subpara. 1 PR moves from a discretion to a requirement. Issuers should be allowed to incorporate information in a prospectus by their discretion.

The clarification in the proposed para. 1 lit. b of Art. 19 PR that a base prospectus does not need to be supplemented just to incorporate new annual or interim financial information that is routinely published to comply with the issuer's financial reporting requirements is very useful. It avoids the hassle of routine supplements that do not add value as the relevant information is already officially published and, hence, available to the public and in particular the investors in the issuer's debt instruments.

That said, we would suggest to amend Art 19 para. 1 PR to provide for the optional incorporation by reference of future annual and interim financial statements as and when published. Such optional dynamic reference to financial statements (as updated from time to time) would underpin one of the aims of the Capital Markets Union rendering the access to capital markets less burdensome and costly.
The idea of mandatorily incorporating management reports should be reconsidered. Apart from the challenges of being required to incorporate outdated forward looking statements from an "old" management report, the risk reporting in a management report may be inconsistent with the risk factors and create an unfortunate tension within the prospectus disclosure.

According to Commission Delegated Regulation (EU) 2019/980, Annex 6 "Registration Document For Retail Non-Equity Securities", item 14.1.a., the articles of association are only to be indicated among "Documents Available". That means a reference to the possibility of inspecting the articles of association is sufficient. In contrast, Art. 19 para. 1 lit. k PR now provides for the complete inclusion of the articles of association by reference. In our view, this is neither necessary nor consistent with the objectives pursued by the CMU package and the EU Listing Act to simplify capital market information.

With regard to the newly included non-financial sustainability reporting in the management reports according to Art. 19 para. 1 lit. f PR, we refer to what has already been said above regarding Art. 13 para. 1 lit. f/lit. g PR.

Art. 20 para. 11 lit. c PR - Scrutiny and approval of the prospectus
In terms of the timeline of an approval we would like to reiterate our position from the public consultation as of November 2021. The standard timeline for an approval of a prospectus within 10 working days from its submission is rather adequate. However, applying the exact same time limit on subsequent revised prospectuses pursuant to Art. 20 para. 4 subpara. 2 PR is disproportionate.

In cases where the longer timeline of 20 working days is applicable – namely when the offer to the public involves securities issued by an issuer that does not have any securities admitted to trading on a regulated market and that has not previously offered securities to the public –the time limit for approval is cut to 10 working days where subsequent submissions of the prospectus are necessary.

Therefore, we consider a “10-5-3 regime” to be fair and appropriate, meaning that in the standard scenario the timeline of 10 working days is cut to 5 working days, when deciding upon a revised prospectus (2nd phase) and to 3 working days, when deciding upon a re-revised prospectus (3rd phase).

Art. 21 para. 11 PR – Publication of the prospectus
We are very critical of the removal of the limitation to jurisdictions where the public offer takes place. Delivering the prospectus only to jurisdictions *“in which the offer of securities to the public is made or where the admission to trading on a regulated market is taking place”* is essential and should be retained.

Art. 23 PR – Supplements
We welcome the changes made to Art. 23 PR incorporating the temporary amendments introduced by the so-called recovery package on a permanent basis in general.

The clarification of the scope of the obligation for financial intermediaries to inform and contact investors who purchase or subscribe the offered securities through that intermediary is positive in general. Nevertheless, it needs to be clarified that the requirement to inform and contact investors serves to protect those investors who have sought investment advice from a financial intermediary, in particular due to a lack of knowledge or experience. This group of investors is particularly in need of protection and requires support in obtaining information relevant to the investment decision. In contrast, clients who use execution only services have shown that they do not need support by the financial intermediary and therefore can rely on the issuers' supplement publication. This would also serve to avoid information overload.

We understand the proposed changes to limit the requirement to inform and contact investors in the case of a supplement to those investors who have agreed to be contacted by electronic means. Therefore, the text of Art. 23 PR should clarify that this includes as a condition for being so informed and contacted that the respective investors have provided their relevant contact details enabling the financial intermediary such contact by electronic means. As the term "electronic means" is currently not defined, this could also be understood to mean contact by telephone. It is obvious, however, that contacting every investor by telephone would not be possible in practice, especially since investors are not permanently reachable by telephone. It should be clarified that "*electronic means*" mean those that enable the information to be provided in an electronic format within the meaning of Art. 2 lit. za PR.

With regard to the proposed changes to the intermediaries' information duties in Art. 23 para. 3 subpara. 1 PR:

- The provision in Art. 23 para. 3 subpara. 1 PR could be misunderstood to mean that the financial intermediary has to inform his clients separately about points mentioned in lit. a - d each time he sells a security. This would lead to an information overload that has no added value for investors. It should therefore be clarified that the information mentioned in para. 3 lit. a - d only has to be communicated once in a general and abstract form (comparable to the provision in Art. 24 para. 5 sentence 2 of the Directive (EU) 2014/65).
- The proposed wording in Art. 23 para. 3 subpara. 1 lit. a PR *"including on its website"* is misleading and should be reconsidered. The same applies to the wording in Art. 23 para. 3 subpara. 1 lit. d PR *"or the financial intermediary´s website*. The proposed new wording could be interpreted in a way, that the intermediary must also publish the supplement or reproduce the issuers information about the supplement on its website. By setting up the necessary infrastructure to fulfil this requirement, intermediaries would incur considerable expenses, especially when intermediaries are involved in securities issues of several issuers. Moreover, and perhaps more importantly, there is no added value for investors in requiring intermediaries to duplicate an information. Investors are already sufficiently informed by intermediaries due to the existing provision. A duplication of that information on another website could moreover cause confusion and carries the risk of contradictory information. Art. 21 PR already provides a sufficiently clear provision for the publication of information, which should not be watered down by any additional provision.
- Apart from that the introduction of an additional electronic contact solely for the purpose of receiving information about prospectus supplements (Art. 23 para. 3 lit. c PR) is impractical and should therefore be deleted. An investor will either open an electronic communication channel or not. If the investor has not provided his consent for electronic communication, he would not use an electronic communication channel only for this purpose either. Moreover, the investor shows that he would use alternative sources of information. Conversely, the technical implementation of the proposed requirement causes unnecessary effort without any benefit. A customer who has not agreed to be contacted by electronic means can only be warned that he will not be informed by the financial intermediary about the publication of a supplement.

It also seems appropriate to harmonize the regulation in Art. 23 para. 3 PR with the regulation Art. 24 para. 5 lit. a of Directive 2014/65 to simplify communication between investment service providers and their clients (recital 10 of Directive (EU) 2021/338). The information of the financial intermediary pursuant to Art. 23 para. 3 subpara. 2 PR should be part of the information that can be provided to investors in electronic format pursuant to Art. 24 para. 5 lit. a of Directive 2014/65.

Further remarks:

The COM's draft proposal would introduce major changes to the current EU prospectus regime. It's implementation imposes an additional burden to issuers. To minimize the conversion costs involved and avoid any sudden impairment of existing structures we urge for a transition period of at least 18 months before the amendments enter into force.

With regard to Art. 23 para. 3 PR we welcome the introduction of a definition of the term "initial offer period" in Recital 43 which corresponds to our opinion that it "*refers to the period during which issuers or offerors offer securities to the public as prescribed in the prospectus and excludes subsequent periods during which securities are resold on the market*…." It should however also be clarified that the obligation in Art. 23 para. 3 PR refers exclusively to primary market transactions. We further propose to include the definition of the term "*initial offer period*" as provided under recital 43 in Art. 2 PR.

C. Comments on the proposed amendments to Regulation (EU) No 596/2014 (Market Abuse Regulation, MAR)

Art. 5 MAR – Buy-back programmes and stabilisation

The proposed changes in Art. 5 para. 1lit. b and para. 3 constitute useful clarification and are very welcome.

However, we are still of the view that the existing safe harbour for share buy-backs should be widened in scope to include

- all reasons for share buy-backs permitted under applicable corporate law (see Art. 21 et seq. Directive 2012/30/EU) and
- buy backs of debt instruments.

The limitation of the safe harbour to only certain purposes of share buy-back programmes permitted under corporate law is not justified. The market impact of a buy-back is unrelated to the underlying (economic) purpose. A clarification to that effect would be useful and promote regulatory convergence.

Also, buying back outstanding debt securities that trade significantly below nominal value has proven to be a useful tool to reduce an issuer's debt burden and to adapt an issuer's debt exposure to more favorable market conditions when interest levels decline. Therefore, there is an economic need to execute these bonds repurchases. It does not appear justified from a market integrity perspective not to have a safe harbour for debt buy-backs as well.

Art. 7 MAR – Inside information

The proposed extension of Art. 7 para. 1lit. d MAR relating to "front running" of major client orders that may have a significant effect on prices to "by other persons acting on to the client's behalf [in addition to those charged with the execution of orders] or information known by virtue of management of a proprietary account or of a managed fund makes sense. We deem this a clarification as, arguably, this scenario could already be captured by the general definition in Art 7 para. 1lit. a MAR.

Art. 11 MAR – Market soundings

It is very helpful for market participants that the Commission now clarifies the nature of the market sounding regime as a "mere option" (Recital 56 draft Listing Act) and restates that there should be no presumption that disclosing market participants that do not comply with the requirements set out in Art. 11 MAR when conducting a market sounding have unlawfully disclosed inside information.

Likewise, it is welcome that the explanatory memorandum to the draft Listing Act (page 23 et seq.) confirms the safe harbour nature of the market sounding procedures. We therefore suggest that this clarifying statement be reflected in the amended MAR, at least in a recital.

The proposed relaxation of the requirement to inform recipients if disclosed information no longer constitutes inside information (Cleansing) appears useful. Indeed, where the respective information has meanwhile been announced publicly otherwise there does not seem to be a need for an additional cleansing process.

As an announcement of the transaction to potentially follow a market sounding is no longer re-quired, thus, the scope of application is widened, also based on Recital 55 stating that *"The definition of market sounding should be broad in order to cater for the different typologies of soundings and different practices across the Union."* In this generality, however, it appears challenging since certain terms defining the scope are still undefined, such as – for example – *"transaction"*.

It should also be considered, in the forthcoming review of the delegated acts on Level II, whether the level of detail of the required documentation – such as the recording and minuting of all communications between the disclosing market participant and all persons that received the market sounding (Art. 6 para. 19 lit. d Commission Delegated Regulation (EU) 2016/960) could be reduced.

Art. 17 MAR – Public disclosure of inside information

The treatment of intermediate steps in a protracted process constituting inside information according to Art. 7 para. 2 and 3 MAR is one of the most challenging obligations for issuers under the current MAR. Therefore, the proposal to carve-out from the disclosure requirement under Art. 17 MAR intermediate steps in a protracted process is generally welcome. That said, a number of questions as to the interpretation of the proposed amendments and their practical implementation remain.

- <u>Types of inside information in scope</u>

It does not seem entirely clear which kind of intermediate steps are in scope of the exemption from the disclosure requirement. Based on the proposed wording it appears that not all intermediate steps referred to in Article 7 para. 2 and 3 can be deemed exempted from the disclosure requirement. Moreover, it shall only apply *"where those steps are connected with bringing about a set of circumstances or an event"*. Taken literally, it appears that – by its very nature – any interim step is connected with bringing about a set of (final) circumstances or a (final) event – such as, for example, an M&A transaction. Where Recital 58 of the draft Listing Act points out that the issuer should only disclose the information related to the event that this protracted process intends to bring about, at the moment when such information is sufficiently precise, it fails to provide a sufficiently clear distinction to the current MAR regime. For the element of being "precise" is already a requirement for an information to constitute inside information according to the general definition in Art. 7 para. 1 lit. a, 2 MAR stating that the relevant set of circumstances has to be of a "precise" nature to constitute inside information. That said, the example given in Recital 58 *"such as when the management board has taken the relevant decision to bring about that event"* at least indicates the desired distinction. It would appear helpful, though, if it was clarified more clearly that the *"event that this protracted process intends to bring about"* is meant to be the final result of that process such as, for example, the conclusion of a definitive contract, the formal appointment or dismissal of a board member and the like. Accordingly, it should also be clarified that the management board decision that Recital 58 refers to is the decision to definitely implement the event – and not any preliminary decision of principle or intention.

Further clarification of the relevant information captured by the exemption of "intermediate steps" by way of a delegated act to be adopted by the Commission setting out a non-exhaustive list of relevant information and specifying the moment when the issuer can be reasonably expected to disclose it, appears useful.

- <u>Information of the NCA</u>

The proposal significantly brings forward the information of the NCA so that regulatory scrutiny is potentially initiated while the delay is still ongoing. Also, the NCA will even be informed if it may turn out later that the information is no longer price sensitive and thus ceased to be inside information (maybe because an expected material event did not actually happen). Under the current regime the NCA does not have to be informed in that scenario.

It appears questionable whether the earlier information of the NCA actually addresses deficiencies in the current practice. However, it potentially increases the administrative burden for issuers as they will be required to interact with the NCA, respond to inquiries as to the circumstances of the delay and as to whether the conditions of the delay are or were given and when while the delay may be ongoing. This appears unfortunate as issuers relevant functions (such as IR, Compliance, Legal, Accounting) may be stretched in such a delay phase anyway and would now have to simultaneously monitor the development of the set of circumstances constituting inside information, whether the conditions for a delay are still given and the publicity in the market (including indicators for rumours), keep the draft disclosure up-to-date and (now) respond to potential requests by the NCA.

Also, the envisaged course of action is unclear. The proposed wording of Art. 17 para. 4 subpara. 2 MAR requires the information of the NCA already at a stage where the issuer *"<u>intends</u>"* to delay. This is obviously before a decision to delay has been taken. However, the obligation to disclose inside information applies "as soon as possible" when an inside information arises. Therefore, it is conceptually unclear whether in practice there may be a phase when the issuer *"intends"* to delay – without already resolving the delay. This may only be possible in a situation where a development bringing about an arising inside information is foreseeable – which is not always the case. The issuer also has to provide a written explanation of how the conditions for a delay were met immediately after the decision to delay is taken. It appears, therefore, that the NCA has to be informed twice within a typically short timeframe – while the trigger events for these information requirements often occur simultaneously.

While these proposed timing requirements appear somewhat complex, they are also in-consistent with the explanation both in the explanatory memorandum and in the recitals of the Listing Act.

In the explanatory memorandum (p. 23) the proposed amendment is described as
"… the timing of the notification of the delay to the NCA is advanced <u>to the moment immediately after the decision to delay disclosure is taken by the issuer</u> (instead of the moment immediately after the information is disclosed to the public)."

Recital 61 of the Listing Act states
"Article 17(4) of Regulation (EU) No 596/2014 provides that an issuer or an emission allowance market participant, may, on its own responsibility, delay disclosure to the public of inside information provided that specified conditions are met. In such a case, an issuer is obliged to inform the competent authority that disclosure of the information was delayed and to provide a written explanation of how the conditions set out in that Article were met immediately after the information is disclosed to the public. To enable competent authorities to receive information on delays in a timely manner an issuer should notify the competent authority <u>immediately after that issuer takes the decision to delay disclosure</u>. However, competent authorities should not be required to authorise those delays."

From our perspective, there is no sufficient empirical evidence to justify the increased pressure on issuers resulting from an advanced disclosure. In the case that the proposed concept is to be maintained, the details of the wording should be critically reviewed because of the aforementioned inconsistencies. It should furthermore be taken into account that the obligation to inform the NCA needs to be reduced to *"without undue delay after the issuer has taken the decision to delay disclosure"*. At this point in time, the issuer should also be able to provide the necessary documentation to evidence that the requirements of Art. 17 para. 4 MAR were met. Before that point in time, an involvement of the NCA does neither appear meaningful nor proportionate. The proposed change of the timing requirements for the information of the NCA of a delay should therefore be deleted.

- <u>Rumours</u>

According to Art. 17 para. 7 subpara. 1 MAR an issuer is no longer entitled to delay the disclosure of inside information if the confidentiality of that inside information is no longer ensured. Therefore, it shall thereupon disclose that inside information to the public as soon as possible.

This includes, as set out in Art. 17 para. 7 subpara. 2 MAR, situations where a rumour *explicitly* relates to inside information the disclosure of which has been delayed, where that rumour is *sufficiently accurate* to indicate that the confidentiality of that information is no longer ensured.

The draft Listing Act slightly modifies the presumption in Art. 17 para. 7 subpara. 2 MAR by adding that a relevant rumour also has to be *reliable* to trigger such indication. It appears the change is meant to help issuers to continue a delay when a rumour could just be based on speculation. However, it is unclear how the *"reliability"* of a rumour should be assessed with sufficient certainty, particularly as often the source of such a rumour is unclear.

Thus, it is proposed to specify the term *"reliable"* by adding that a rumour is (only) deemed reliable if it contains the most significant details of the delayed inside information and does not contain wrong or misleading information.

Further, issuers should be entitled to use a *"no comment"* strategy (instead of prematurely publishing the delayed inside information) where the publication of inside information would jeopardize the financial viability of the issuer.

Art. 18 MAR – Insider list
Instead of maintaining a list of all persons having access to inside information, the draft Listing Act proposes to limit the obligation to drawing up a list of only those persons who have regular access to inside information due to the nature of their function with the issuer (so-called permanent insiders).

This extends the restricted concept introduced by Regulation (EU) 2019/2115 for issuers of financial instruments listed on SME growth markets generally to all issuers. However, persons acting on the issuer's behalf or account shall continue to be obliged drawing up a more com-prehensive insider list of all persons having access to inside information (proposed Art. 18 para. 1a MAR).

Further, member states may opt for "full" insider lists being maintained by issuers listed on a regulated market for the last 5 years.

Finally, the required acknowledgement by persons on the insider list of their legal and regulatory duties will be sufficient to be provided in a durable medium (instead of "in writing").

The proposed changes appear generally useful as they reduce the administrative burden for is-suers. In the context of a harmonized insider regime under MAR it should be clarified that "permanent insiders" means individuals who have access at **all** times to **all** inside information in accordance with Art. 2 para. 2 (EU) 2016/347. The proposed wording in Art. 18 para. 1 lit. a MAR conflicts with the wording of Art. 2 para. 2 (EU) 2016/347 and needs therefore to be amended in the sense of the latter. Keeping the *"full"* insider list requirement for persons acting on the issuer's behalf or for its account (e.g. advisers) makes sense as they are typically not exposed to inside information on a regular respectively permanent basis.

However, the option for Member States to require a *"full"* insider list from issuers listed on a regulated market for the last 5 years appears arbitrary and may result in an uneven playing field for issuers across the EU. Thus, this *"opt in"* right for member states should be deleted.

The technical facilitation to document the acknowledgement by persons on the insider list in a durable medium is welcome. In some member states it already reflects existing regulatory practice (e.g. in Germany).

Art. 19 MAR – Managers' transactions
The obligations for persons discharging managerial responsibilities at an issuer (PDMRs) and related persons to disclose transactions in the issuer's financial instruments (Managers' Transactions) and to prohibit Managers' transactions in the 30 days ahead of the announcement of new financials by the issuer (Closed Periods) generally make sense. The PDMR-regime can be cumbersome in practice, especially due to the low disclosure threshold and the wide scope that also includes transactions without an active investment decision.

GBIC Comments on EC Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulations (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises ("Listing Act")

The proposed changes are generally a step into the right direction, but some modifications should be considered. More specifically:

- Raising the disclosure threshold from EUR 5 000 to EUR 20 000 follows the approach taken already by a number of Member States (including Germany) using an option that exists under the current MAR regime already.
- The draft provides for a Member State option to further raise the threshold to EUR 50 000. This would reduce the administrative burden for PDMRs, their related persons and issuers further. However, the proposed optionality would maintain the existing lack of harmonization that does not appear justified. Rather, a general introduction of the higher threshold of EUR 50 000 appears preferable.
- The Issuers' right to permit certain transactions in a closed period is expanded to
  - instruments other than shares and related entitlements,
  - transactions not implying any active investment decision, resulting from third parties or exercise of derivatives on predetermined terms, including transactions executed by an independent discretionary asset manager, duly authorized corporate actions, acceptance of inheritances, gifts and donations, or exercise of derivatives agreed outside the closed period.

The increased flexibility to waive the prohibition of transactions during the closed period is generally welcome. However, where the purpose of the closed period (avoidance of even a theoretical risk of insider dealing) is not affected as there is no active investment decision by a PDMR during the closed period, transaction should generally be allowed without requiring the issuer's explicit consent.

This may include, for example, automatic conversions of financial instruments or investment decisions taken by an independent portfolio manager without the involvement of a PDMR as indicated in Recital 67 of the draft Listing Act.

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