

REVIEW PROSPECTUS REGIME

POSITION PAPER DUTCH BANKING ASSOCIATION

Key Points

The Nederlandse Vereniging van Banken ('NVB')¹ welcomes the Commission's proposal - published on 30 November 2015 - to review the prospectus regime. The NVB is strongly supportive of the objectives of the proposal and we think it is indeed an important step to building a Capital Markets Union. The suggested amendments will contribute to the objective of making capital markets more accessible for investors. The Commission's proposal highlights current shortcomings in the regime such as the costs, complexity, the length of prospectuses, and differences in application between Member States.

The NVB is of the opinion that the proposed prospectus regime will contribute to a more streamlined and coherent approach across the European Union, reducing fragmentation on a national level and reducing the scope for differences in national legislation. However – in order to *ensure* a European coherent approach – a greater degree of harmonisation would be favourable. Further harmonisation throughout the European Union would be needed on the following key points: i) the need for harmonisation for offerings below EUR € 10 million; ii) less discretion needs to be granted to Member States for supervising marketing materials, warning signs and texts; and iii) streamlining the requirements regarding the approval process (including the approval period). Finally, we are concerned about the proposed abolition of the wholesale / retail regime and strongly disapprove the proposal to categorise the riskfactors.

Specific remarks on the review of the prospectus regime:

- Maximum harmonisation
- Uniform prospectus for non-equity securities – abolition of the wholesale / retail regime
- Presentation of risk factors through ESMA guidelines
- Passporting of registration documents
- Incorporation by reference
- The universal registration document
- Secondary issuances - specific optional disclosure regime
- Exemptions for secondary issuances
- Access to the prospectus

Maximum harmonisation

The NVB favours maximum harmonisation in Europe regarding prospectus legislation. A common framework could be considered to address administrative, criminal, civil and governmental liability, for the sake of both clarity to market participants (including investors) as well as a level playing field across the European Union. The NVB therefore strongly support the proposal to turn the current directive into a regulation. This step will contribute to a more streamlined and coherent approach across the

¹The Nederlandse Vereniging van Banken ('NVB') is the representative voice of the Dutch banking community with over 90 member firms, large and small, domestic and international, carrying out business in the Dutch market and overseas. The NVB strives towards a strong, healthy and internationally competitive banking industry in the Netherlands, whilst working towards wider single market aims in Europe.

European Union, reducing fragmentation on a national level and reducing the scope for differences in national legislation. However – in order to *ensure* a European coherent approach – a greater degree of harmonisation would be favourable. Further harmonisation throughout the European Union would be needed on the following key points:

1. *Need for harmonisation for offerings below EUR 10 million*

The proposal does not provide for a harmonisation for offerings below EUR 10 million. This area is left entirely to the discretion of Member States and will lead to divergence in local supervisory practices. Obviously, this will likely impact SMEs more than other businesses and it will unlikely contribute to better cross-border access to capital markets for SMEs, which is a key element of the Capital Markets Union of the Commission. Consistency in setting this threshold should be pursued in order to improve the effectiveness of a single market for capital within the EU. Advantages occurring from such freedom of choice are not repaid by the disadvantage of inconsistency between EU Member States and the effect of regulatory arbitrage that would derive from it.

Doubling the threshold from EUR 5 million to EUR 10 million itself is questionable. Although the NVB supports the importance of strengthening the position on and the access of SME to the European capital markets, the thresholds under the current regime provides sufficient possibilities for SMEs and as such modification does not seem necessary.

Further reduction of the disclosure requirements for SMEs is undesirable as it affects the investor protection where this is most needed. It should be considered that SMEs generally have a high risk profile for investors. Lowering of disclosure requirements could therefore put the position of investors at risk.

2. *Less discretion for Member States for the supervision of marketing materials and warning signs*

The proposal does not amend any of the existing provisions in respect of advertisements for public offerings of securities (article 21 of the proposal). Issuer and underwriters are often confronted with varying expectations and differences between national competent authorities as to the minimum requirements that have to be met in respect of advertisements (minimum content, presentation, communication method, etc.). This is often cited as a source of additional costs for issuers and a cause of delays in the process of offering securities in another Member State. The same applies for warning signs. A typical example is the so-called “wild-west sign” (*wildwestbordje*)² for prospectus exempt offerings in The Netherlands. The NVB calls for a harmonised and standardised approach to (exemption) warnings and other requirements of offering materials throughout the EEA.

3. *Streamlining the requirements regarding the approval process.*

European consistency in the requirements regarding the approval process (including the approval period) between EU Member States should be pursued in order to improve the effectiveness of a single market within the EU.

² E.g.:



Uniform prospectus for non-equity securities – abolition of the wholesale / retail regime

The NVB underlines the importance to promote more buying and selling interest which enhances market liquidity and investor base in the EU bond markets. Especially, as governments currently are withdrawing from collective pension schemes and building up private capital in anticipation of these developments will become increasingly important. Therefore accessibility to the bond markets is of great importance.

However, the NVB is of the opinion that the proposed abolition of the wholesale / retail regime split does not contribute to the objective to make the bond markets more accessible to a wider investor audience. Abolition of the dual regime in itself does not lead to issuers decreasing denominations of their bond issues. At present most wholesale issuers choose a high denomination of at least EUR 100.000 because they focus their offering to wholesale investors only. The NVB does not expect this practice to necessarily change following the abolition of the wholesale / retail dual regime; issuers may still choose high denominations in line with their intended investor audience. In the end, the NVB expects this to result in an increase of both costs as well as the administrative burden on the issuer, making financing via the capital markets throughout the Union more expensive.

Presentation of risk factors through ESMA guidelines

Article 16 (1) of the proposal requires a presentation of the risk factors in three distinct categories. We strongly disapprove of this idea, as we believe that a categorisation can be a subjective exercise, or at least have an outcome that can be interpreted in different ways, as there will always be grey areas. As a result, this could potentially mislead the reader of the prospectus and as such even be contrary to the envisaged investor protection.

The categorisation would also raise the question whether a prospectus supplement is required if the issuer comes to assess a specific risk as belonging to another category than originally presented at the time of approval of the prospectus. A lack of clarity on this point will most likely lead to the issuer supplementing the prospectus more frequent to be on the safe side and therefore an increase of both costs as well as the administrative burden on the issuer.

Passporting of registration documents

The current regime does not provide for passporting of registration documents (except as part of a complete prospectus) – it only contemplates passporting prospectuses and prospectus supplements. The proposal should provide for an approved registration document, including an universal registration document, that can be (itself) passported.

Incorporation by reference

Article 18 of the proposal (helpfully) provides for alignment with the Transparency Directive where companies are subject to ongoing disclosure obligations thereunder. The NVB would like to see more clarification on the use of a standard prospectus by issuers of debt and equity securities to also incorporate future publications so that a supplement is no longer strictly required upon publication of such a future document

The universal registration document

The NVB is supportive of the proposal of the universal registration document as this should enable listed issuers to conduct large offerings more efficiently, both in terms of cost and time, while at the same time providing better and earlier disclosure to potential investors.

Secondary issuances - specific optional disclosure regime

Issuers will benefit from an optional lighter disclosure regime for secondary issuances if the new securities are fungible with existing securities already listed for at least 18 months. It is envisaged that such a prospectus will only contain limited financial information covering the last financial year. The NVB is supportive of this proposal.

Exemptions for secondary issuances

The NVB supports the increase of the sub-10% exemption for secondary issuances to 20%. This will decrease both costs as well as the administrative burden on the issuer, making financing via the capital markets throughout the Union more attractive.

Access to the prospectus

We are supportive of measures to make access to the prospectus easier for all investors. Investors will then have better access to information on companies that have listed shares or corporate bonds; this will enable investors to make (better) informed investment decisions.

For more information, please contact:

Dutch Banking Association