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AFME comments on Capital Markets proposals for a COVID-19 recovery

Primary and Secondary Markets

Capital Markets proposals for a COVID-19 recovery	Reference	AFME's position
MIFID		
Trading Obligation for Shares. Proposal to streamline, if removal is not palatable at this juncture.	Article 23 MIFIR	AFME's primary view on the STO is that it should be removed. Should the STO continue to exist, we strongly suggest that the scope of the STO should be adjusted to ensure that all third country shares, and shares simultaneously admitted to trading in the EU and in a 3rd country at the request of the issuer are excluded from its scope. AFME considers this to be the best recommended approach for any country with a STO.
Costs and charges information and disclosures should apply to retail clients only.	Article 24 (4) MIFID	AFME supports the full disapplication of MiFID II costs and charges disclosures for professional clients and eligible counterparties. Allowing for an opting out option for these clients would not be enough to deliver meaningful economic benefits.
Double Volume Cap. Proposal to streamline, if removal is not palatable at this juncture	Article 5 MIFIR	AFME members support the removal of the DVC. Should the DVC continue to exist, we oppose further restrictions which would only serve to add more complexity. We would rather propose that the actual DVC thresholds are removed from level 1. The DVC thresholds should be made flexible, at the determination of the European Commission and upon advice from ESMA, to limit possible unintended impacts to end investors and to the attractiveness of the EU capital markets. The overall cap should be set only subject to possible impacts on the EU price formation process, which should be documented by thorough data evidence.
Best execution reporting	Article 27 (3) MIFID	AFME does not support that best execution reporting should be limited to a bare minimum set of reporting obligations only based on execution price and deviation from mid-point on the most liquid exchange. We do not think such an approach would match the execution objectives of clients and are concerned that would make the best execution reports less useful to them. For

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		example, such a reference point takes no consideration of the size of the trade or its type (e.g. negotiated trade, risk trade), nor of the investor's intention (e.g. if the investor wants to trade at the closing auction, the benchmark should be the closing price). Changes to these set of obligations require extensive and costly IT developments. AFME supports a considered and rigorous consultation process in advance of a review of this regime. Changes may include streamlining or deletion, but any changes requiring technology change should be done at an appropriate time. Any change in short term would be costly and resource intensive, distracting resources that would otherwise be engaged in the recovery effort, and adding complexity to the regime. If change is felt necessary, a suspension of RTS27 on best execution reporting would be welcomed to reduce administrative burden and ongoing costs.
Semi-professional clients	Article 25 MIFID (new). This would indicate which investors will be able to opt out – free from any thresholds; based on an enhanced suitability test and signed statement by the investor	AFME position on a new semi-professional client category is so far the following: 1. If Level 1 was to be reopened with the intention of allowing more "access" to expert retail clients then: (i) It should remain possible for retail clients to opt up into any of the existing elective professional category; and (ii) the existing categorisations should not need to be reviewed (i.e. the same grandfathering arrangements as were argued for in the transition from MiFID to MiFID II). 2. Commission should seize the opportunity to iron out issues with existing categories: newly-established companies should be able to draw on the trading history and assets of their principals (in the same way as they draw on their experience / knowledge) to allow them to opt up into elective professional category. AFME supports a considered and rigorous consultation process in advance of the determination of the new set of investor protection obligations for these investors. If adopted, this measure may only have a marginal benefit for the economy if investors that currently are barred from investing in products that would otherwise be suitable for them are eventually allowed to invest in those products.

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Client suitability and appropriateness framework – repeating suitability testing.	Article 25 (2) MIFID	No AFME position. A proposal to remove the requirement to repeat suitability testing each time investor does a new investment, except if the circumstances of the investor changes, may provide for limited economic benefits.
Phase out the paper as the default form of disclosure. General to all investors.	Article 25 (6) MIFID	Initial feedback from AFME members confirm that the majority of wholesale clients prefer receiving information in non-paper format and therefore fully support a phase-out of paper-based information in order to reflect this. In addition, AFME members note that the phasing-out of paper-based information would reduce waste and support the EU's sustainable finance agenda. AFME completely supports that this measure is taken in the short term.
Distance communication.	Articles 24 (4) & 25 (6) MIFID	No AFME position. A proposal to introduce the concept of an acceptable delay for the transmission of costs information may provide for limited economic benefits.
Record keeping. Proposal to opting out from systematic telephone recording.	Article 16 (6) MIFID	AFME notes that rules should be uniform across client categories and that a regime of opting outs or opting ins would simply not be practicable, would increase costs and require lengthy, difficult to implement and costly IT project. Adjustments of these requirements may only provide for limited economic benefits.
End of day loss reporting requirement	Article 25 (6) MIFID	No AFME position. A proposal to remove or to make the "end of day loss reporting requirement" more targeted may provide for limited economic benefits.
Investment Research unbundling	To be brought to Level 1; Potential specific MIFID SME rulebook on the issue	AFME does not support a bespoke treatment for SME or any further changes that might introduce further complexity. If there is a separate regime it needs to apply equally to all research providers, i.e. scope to be defined based on the company to be covered, not on the type of research provider.
PRIIPs		

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PRIIPs Regulation shall not apply to non-equities securities issued by corporates	Recital 6 and 7 of the PRIIPs Regulation Article 2 (2) and article 4 (1) of the PRIIPs Regulation	AFME supports the recommendation of the Chairs of the ESAs in their 24.10.2019 Supervisory Statement to *"specify more precisely which financial instruments fall within the scope of the Regulation"*, reflecting *"more expressly the stated intention of the PRIIPs Regulation to address packaged or wrapped products rather than assets which are held directly, to avoid any legal uncertainty on this point."* Uncertainty over the scope of the PRIIPs rules and their possible application to simple corporate bonds was much reduced by the 24.10.2019 Joint ESAs Supervisory Statement on the application of the scope of the PRIIPs Regulation to bonds. Considering the increased need for corporates to raise finance on debt capital markets easily, tapping not only institutional investors but also the retail market, we recommend that this would be the ideal time to heed the ESAs Chairs' recommendation. This could be achieved, for example, by amending recital 7 of the Regulation as follows (addition underlined): *"Assets that are held directly, such as corporate shares, corporate or sovereign bonds, are not PRIIPs, and should therefore be excluded from the scope of this Regulation."*
Prospectus Regulation		
Working capital statements in circulars / prospectuses -	Item 3.1 of Annex 11 and item 3.3 of Annex 12 to Delegated Regulation 2019/980	AFME supports a pragmatic and constructive approach from the EU Commission and other policymakers to this matter. Being able to refer to certain specific assumptions concerning the disruption to an issuer's business resulting from the coronavirus will make it easier for issuers to provide meaningful disclosure to investors without having to give a qualified working capital statement.
Class 1 circulars / prospectuses – profit forecasts	Items 11.2 and 11.3 of Annex 1 to	In the present circumstances, it may be preferable from the perspective of both companies and investors for companies not simply to disavow any outstanding profit forecasts but to rather provide updated guidance to investors.

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	Delegated Regulation 2019/980	It would be helpful for policymakers to: (i) provide guidance to define more clearly the type of assumptions which are permitted to be disclosed in connection with a profit forecast, including all those that the issuer and its directors deem reasonable in the circumstances; and (ii) permit the inclusion of disclosure explaining the inherent uncertainty of certain assumptions in light of the restrictions imposed on businesses by governments constraining issuers' abilities to execute their business plans.
Requirement for prospectus where company seeks to admit to trading new shares that represent 20% or more of its existing traded shares	Article 1(5)(a) PR	AFME does not support raising the current threshold in the PR for producing a prospectus above 20%, specifically because of potential liability associated with undertaking such a large share offering on an undocumented basis.
Short form secondary issuance prospectus	Article 14 PR	We do not consider that it would be useful to develop a short-form secondary issuance prospectus as we consider that listed issuers requiring additional equity capital already have sufficient offering options available to them. For many, the increased 20% threshold for undocumented offerings already provide sufficient headroom, and where it does not, we consider that it is important that issuers provide carefully drafted disclosure to investors and the markets via a prospectus, given the relative size of the offering and associated impact on the listed issuer. This is to ensure a fair and clear understanding for investors of the investment proposition in the challenging circumstances in which an issuer finds itself, and to protect the issuer, its directors and the underwriters from litigation risk for claims from investors that disclosure (especially where it is based on disclosure published by the issuer in very different times) was inaccurate, misleading or incomplete with the benefit of hindsight. It is in the interests of issuers, underwriters and the market to have the disclosure for an issuance over 20% to be considered and drafted in one document with care and detail to ensure that accurate and complete disclosure of the issuer's business and situation are properly disclosed in the light of the circumstance requiring the capital raise along with all the investment considerations that an investor should take account of at such time.

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		Furthermore, the Prospectus Regulation already contains an alleviated disclosure regime for secondary issuances which issuers are able to use where they are unable to prepare a full form prospectus. Finally, we note that use of such short form prospectus might not be feasible where the relevant offer has a non-EU component in a jurisdiction with its own disclosure requirement (i.e. U.S.).
18-month requirement for secondary issuance prospectuses	Article 14 PR	We disagree with this proposal. The 18 month requirement is designed to ensure that the alleviated disclosure regime is only accessible to issuers that are established listed entities whose internal systems and controls for disclosure and other matters have been in place for a reasonable period of time and that have been subject to a period of external scrutiny by investors, analysts and regulators. In our view, allowing companies that have only just been listed to raise equity using an alleviated disclosure document would increase significantly the risk of investors acquiring shares on the basis of inadequate disclosure (e.g. omissions, misstatements) and suffering loss as a consequence, as well as negatively impacting the proper functioning of the market for listed equities, and leaving issuers, directors and underwriters exposed to litigation risk from claims brought with the benefit of hindsight.
Temporarily increase of the threshold of 150 persons below which offers of securities are exempted from the publication of a prospectus	Article 1(4)(b) PR	We have not in practice found the limit of 150 persons per Member State to be an obstacle to equity offerings. For documented offerings such as rights issues, there is a well-established practice of passporting the prospectus to the Member States where there are a significant number of shareholders. For undocumented offerings, which are generally only suitable for institutional investors given the lack of a prospectus, the 150 persons has not been problematic as almost all investors targeted are able to fall within the definition of 'qualified investor'.
Convertibles - temporary suspension of the 20% cap on the issuance of	Article 1(5)(b) PR	AFME does not support a temporary suspension of the 20% cap. We have not as a practical matter found the 20% cap to be a significant obstacle to the issuance of convertibles, since convertibles do not typically compromise a large portion of listed

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convertible instruments (shares issued upon conversion of convertible bonds)		issuer's capitalisation due to their specialist nature, and in the rare cases where the cap is in danger of being breached due to issuances of straight equity around the same time, the issuer has been able to publish a listing prospectus at a later date (i.e. since it is only required at the time of conversion, not the time of issuance). However, we note that the convertible bond cap of 20% is causing an obstacle, which, in the current climate seems less justified, in respect of so-called "combo" capital raises where a company wants to do an accelerated bookbuilt placing of new shares combined with a convertible bond issue. We would suggest that the 20% cap be temporarily amended so as to permit a company to issue up to 30% without a prospectus in such a "combo capital raise" with a combination of up to 20% of equity in an accelerated bookbuilt placing and up to 20% via a convertible bond offering (provided that the total issuance does not exceed 30%).
Market Abuse Regulation		
Market Soundings	Article 11 (4) MAR Delegated Regulation 2016 / 960	AFME does not support a wholesale suspension or disapplication of the protections afforded to market participants under Article 11 of MAR but is supportive of modifications to streamline the regime. In relation to transactions in scope of Article 11 where inside information will be disclosed, the safe harbour at Article 11(4) MAR provides a valuable protection against the unlawful disclosure of inside information. Removing this protection would be contrary to the intended objectives of the proposal. Accordingly, we do not think that a complete suspension of the market soundings regime where inside information is being disclosed would be appropriate. AFME would support the retention of the current market soundings regime with a simplification and streamlining of the current detailed process and record keeping

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		obligations that apply to market soundings. In particular AFME supports: (i) replacing the requirements of Article 6 of Delegated Regulation 2016/960 with a broader and more general obligation to keep proper records; and (ii) clarification that, where a telephone process continues to be used, the disclosures and consents do not need to be repeated for follow up conversations (for example, a call back from an investor after an initial MAR sounding script has been undertaken).
Non-independent investment recommendations	Article 20 MAR	Sales and trading commentary stimulate trading business, which finances the real economy, and assists the buy side. If trading ideas can be produced in a more streamlined way, this will assist the recovery initiative. Sales and trading commentary provide an important, immediate response to emerging issues. Accordingly, in order to address this, AFME would support a Level 1 carve-out for sales and trading ideas made to Eligible Counterparties and Professional Clients.
Insider lists	Article 18 MAR	While we see the attraction for potential issuers of not having to comply with the requirement to maintain insider lists for the first five years, the firms that advise those issuers would be required to operate a two tier system for new and existing issuers. Maintaining two different systems and processes would be operationally difficult for firms and would significantly add to the burden on firms compared to the current position. In addition, the requirement to obtain a signed non-disclosure letter from all employees would be a significant additional burden in itself and would not add to the confidentiality and non-disclosure obligations that employees of financial services institutions are already subject to in this regard.
Managers' transactions	Article 19 MAR	AFME supports consideration of the proposal to raise the threshold above which managers have to notify transactions in the issuers shares or bonds (today 5.000 EUR), noting that NCAs currently have the option under Article 19(9) of MAR to increase the threshold to 20.000 EUR (which, as confirmed by ESMA, has already been utilised by a number of Member States).

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CSD Regulation		
The entry into force of the new settlement discipline framework should be delayed and the mandatory buy in regime should be reassessed	Article 76 (5) CSD Regulation Article 7 (3) CSD Regulation	AFME supports a cautious, phased-in approach of the new framework to ensure the successful implementation of the cash penalty regime and to allow for the reconsideration of the mandatory nature of the buy in, which should be further deferred until the effects of penalties and other measures are implemented and its positive effects properly assessed. AFME supports the replacement of the mandatory nature of the buy-in with an optional right of the receiving party, underpinned by law, to allow a buy-in of a non-delivering counterparty.
Securitisation		
LCR treatment of STS securitisation	COM Delegated Regulation (EU) 2018/1620	Adjust the LCR regime to allow rating levels AAA and AA (or CQS equivalents) STS securitisation senior tranches to be eligible at Level 1A and widen the eligibility criteria on ratings to AA- or even A- (or CQS equivalents) for lower buckets.
LCR treatment of STS securitisation	COM Delegated Regulation (EU) 2018/1620	Correct the unintended consequence under the new LCR regime whereby qualifying tranches must be AAA (as opposed to AA- under the previous LCR regime).
Disclosure: continue the existing differentiation between public and private securitisations, as per current practice	RTS under Art 7 & 17 Regulation 2017 / 2402	This was always the intention of the Securitisation Regulation and will reverse ESMA's current unhelpful (and we believe unjustified) interpretation.

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Disclosure: refrain from implementing until a more appropriate time imminent major regulatory changes which have major operational implications such as the RTS on disclosure, accompanying ESMA templates and repository data completeness and completion thresholds	RTS under Art. 7 & 17 of Regulation 2017 / 2402	More time to implement would take some pressure off IT and reporting infrastructure which is suddenly being faced with additional CV19-related demands. This timing is within the control of the Commission.
Commission to engage constructively with the ECB to encourage the broadening of, and better facilitate access for, securitisation under its repo and purchase programmes, whilst respecting the ECB independence	ECB	This will bring securitisations back on to a level playing field with other fixed income sectors such as government bonds, covered bonds and corporate bonds which benefit from long-established, easy to access repo and purchase programmes.