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POSITION PAPER

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LISTING ACT: MAKING PUBLIC CAPITAL MARKETS MORE ATTRACTIVE FOR EU COMPANIES AND FACILITATING ACCESS TO CAPITAL FOR SMES

Background

The EU must invest at an unprecedented level to meet the challenges of energy, climate change mitigation, ageing population, economic and digital transitions, and transform its economic production model. In such a context, access to finance, specifically long-term debt financing and equity investment, is a pre-condition for companies to thrive and make the investment necessary to drive growth, maintain competitiveness and provide jobs and prosperity to citizens.

In order to both ensure stability and meet the different financing needs of companies – many of which are small and medium-sized companies (SMEs) – and of the EU economy in general, finance needs to be available through a variety of channels and on reasonable terms. We need to reinforce and implement the Capital Markets Union to provide EU companies with a genuine single market in financial services and support initiatives at Member States' level to develop complementary sources of finance to bank lending. There is a clear predominance of bank financing compared to capital market finance in Europe. Also, venture capital investments are ten times higher in the US than in Europe (as a share of GDP).

Equity-based financing can offer an efficient source of finance to meet the twin transitions. It is better suited than banks in high growth sectors such as digital, largely dependent on intangible assets, and it is quite efficient in relocating funds towards more green sectors and technologies.

There is a clear need to simplify rules to promote SMEs' access to the market such as listing requirements, including post-listing. This should make public capital markets more attractive for EU companies and facilitate access to capital for SMEs. We also strongly support measures to encourage company research especially in smaller companies which dropped considerably after the rules on market research (MiFID) required stockbrokers to charge investors separately for company research and securities trading, which made capital markets less accessible for these companies.

As the Commission rightly states, the public listing process is cumbersome and costly for EU companies, especially SMEs and this deters them from raising funds on capital markets. The all-in cost of listing and issuance are particularly important for companies. Overall, the costs linked to the growing number of non-financial disclosure requirements (e.g. taxonomy, CSRD, due diligence), together with the direct costs linked to the initial public offering (e.g. drawing up the prospectus, liaising with the relevant competent authorities and stock exchanges) are extremely substantial. The cumulative costs and increased complexity of the framework, especially for SMEs, may undermine the important objective of making public capital markets more attractive for EU companies and facilitating access to capital for SMEs. The rules with regard to the market abuse regulation are also particularly important in this context.

Making capital markets more accessible and competitive, without prejudice to the investor's protection, is strategically relevant. The Listing Act initiative could nourish a virtuous leverage effect also in light of the national recovery and resilience plans.

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Main messages

- Evidence[1] shows that the EU legal framework relating to company listing – and staying listed – is still too complex, excessive and heterogeneous. In particular, the costs and uncertainties related to the post Initial Public Offer (IPO) compliance and uncertainties should be reviewed with the aim to simplify and clarify (applies both to companies on regulated markets and SME growth markets). As for the IPO process, especially SMEs lack overview and need more transparency as they depend on costly legal advisors to comply with the regulatory requirements. SMEs are also often very surprised about the high costs of staying listed due to the need for external services. Documentation and regulatory listing requirements continue to represent obstacles that weigh on the evaluation of costs and benefits when thinking about listing. This is even more true for SMEs if we consider that the current EU regulation still provides an insufficient degree of proportionality for them. It is therefore important to consider possible simplifications of the prospectus and listing requirements, such as: limiting the number of pages of an IPO prospectus for SMEs issuers to 300, including the summary, allowing issuers to draw up the prospectus in English independently from the official language accepted by the national competent authority or abolishing the requirement to print a prospectus and incentivizing the use of electronic forms.

- A high level of investor protection is important for equity markets to work well. However, we believe there are several post-IPO requirements that could be simplified without compromising the important investor protection objectives. Therefore, many listed companies – both companies listed on regulated markets and SME growth markets – find the current requirements disproportionate on specific points especially when they need to replicate the formalities already carried out for the IPOs. The burden is probably felt the most by SMEs as the ongoing bank fees, listing fees, paying-agent fees and costs of legal advisors and auditors on top of investor relation costs etc. are more onerous for less established and robust companies.

- Market Abuse Regulation (MAR) regime is not proportionate because it is indistinctly valid for large and small issuers. This regime should be revisited to: a) distinguish between “a definition of inside information for the purposes of market abuse prohibition, and a more ‘advanced’ notion of inside information, typically linked to a higher degree of certainty of the information, triggering the disclosure obligation”; b) simplify obligations in relation to insider lists, market soundings and Person Discharging Managerial Responsibilities (PDMR) transactions. It is important to remove the obligation for SMEs issuers to keep an insider list or provide only for the obligation to keep a register of permanent insiders; c) establish a more proportionate punitive regime.

- It is also important that SMEs and midcaps have access to alternative types and sources of funding, such as hybrid equity-accounted structured products, as this would allow for a greater number of SMEs to gain access to funding without relinquishing control of their organisation (“traditional” equity with voting rights), one of the main concerns of SMEs.

[1] Oxera Consulting LLP (2020), Primary and secondary equity markets in the EU.

- We support measures to introduce a European consolidated tape. Currently markets are still very much dispersed and there is a strong home bias for retail investors. Creating a European consolidated tape, bringing together market data for the whole EU, would help to overcome this limitation and increase cross-border investments in European companies. Although we are favourable to a consolidated tape, this should not be seen in isolation, as may not sufficiently increase visibility of SMEs.

- It is also important to review the impact of fiscal incentives (tax deductibility) and withholding taxes on cross-border equity investment. The practice of withholding taxes on dividends on cross-border portfolio investments constitutes one of the main obstacles to an integrated capital market in the EU. Whilst respecting Member States' competence in the field of tax, such practices should be reviewed as they constitute a significant barrier to deepening integrated capital markets.

- A new category of "qualified retail investors" should be introduced in MIFID II under the definition of clients considered professional upon request, subject to the fulfilment of certain requirements in terms of amount of portfolio or experience in financial field. The aim is to combine the protection of retail investors with greater flexibility in terms of new opportunities for a more experienced group of retail investors.

- Insolvency regimes are also very different across EU Member States and there is a need to find ways to address those differences. For example, SMEs will need to ensure that equity and their corporate debt issuance is subordinated below the rights of all its other creditors, in the event of an insolvency as otherwise it might be difficult to raise debt from traditional sources.

- With respect to dual listing, this is primarily relevant for regulated markets where there is sufficient liquidity. For growth markets it is better to stay in one market. Also, costs play a role as there are additional costs for being dual listed, which weighs more heavily for the growth company than the more mature company.

- Allowing issuers to use shares with multiple voting rights when going public would increase EU companies' propensity to access public markets. This would potentially make equity markets more attractive for some current owners. However, while favourable in principle to the idea of creating more flexibility in this area, in those equity markets where this is a challenge, we do not believe there is a need for the EU to legislate in this area. Rules on multiple voting rights is rooted in national company law. Some Member States allow it, while others do not or do only with limitations. Already today issuers can therefore choose to list their shares in markets where multiple voting rights are possible or not, whatever it accommodates best to their needs and situation. The need to legislate this at the EU level is therefore unconvincing. We strongly advise against interference with current national corporate governance systems that have a flexible view on multiple voting rights.

- We see no merit in introducing minimum corporate governance requirements for companies listed on SME growth market with the aim of making them more attractive for investors. Corporate governance is generally regulated by national company law supplemented by national codes subject to a comply-or-explain principle. The different national corporate governance models in the EU have been fine-tuned over decades overcoming the specific challenges they have encountered. Legislation on Corporate Governance at the EU-level is more likely to do harm than good. If EU-level legislation is contemplated, it should be rigorously evidenced what specific shortcomings exist, and whether those potential shortcomings justify EU intervention through hard law.

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