

# SWEDISH SECURITIES DEALERS ASSOCIATION

SVENSKA FONDHANDLAREFÖRENINGEN

2015-05-13 final

The European Commission

Response to the Consultation Paper on review of the Prospectus Directive

The Commission has launched a project called Capital Market Union or CMU in an effort to create new economic and job growth through deeper and more integrated capital markets. As part of the consultation process, a separate consultation was issued with focus on a review of the prospectus directive. The Swedish Securities Dealers Association (SSDA)<sup>1</sup> welcomes the opportunity to respond to the Consultation paper from the Commission.

## General Comments

The SSDA in general supports the response from the EBF. Apart from the support for the response from EBF the SSDA wants to add some general comments and also on certain topics add further reasons and arguments.

SSDA supports initiatives that create a level playing field and identify specific areas where the EU capital market is fragmented and hindering cross border investment in Europe.

SSDA supports a complete review of the prospectus directive including analyzing what effects other regulatory initiatives have had on the prospectus regime and what local regulatory issues and practices hinder a harmonized European prospectus regime.

In the opinion of SSDA the Prospectus regime is too complicated and add some unnecessary administrative burdens. There is a lack of flexibility and the regime is in many parts too detailed. We are not convinced that the Prospectus regime serves as an important tool for investor protection.

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<sup>1</sup> SSDA represents the common interest of banks and investment-services-firms active on the securities market. The mission of SSDA is a sound, strong and efficient securities market in Sweden. SSDA promotes member's view in regards to regulatory, market and infrastructure-related issues. It also provides a neutral forum for discussing and exchanging views on matters which are of common interest to its members.

SSDA have a close cooperation with other trade associations in Sweden, in the Nordic area and in the UK. SSDA is also active on European arena via EBF (European Banking Federation) and EFSA (European Forum of Securities Associations) and globally through ICSA (International Committee of Securities Associations).

Investor protection via high quality information should be a priority of the CMU and therefore also the prospectus directive review and the Commission should take a stance of improving information on SMEs rather than reducing the quantity of pertinent information contained in the prospectus.

Finally, the SSDA wants to stress the importance of a coordination between the rules regarding the Summary and PRIIPS KID. Such coordination is of utmost importance and the SSDA would prefer that KID should substitute the Summary.

## **Questions**

### *Q 1*

In the opinion of SSDA it should not be any difference in the treatment between an admission to trading-prospectus and an offer to the public-prospectus. Both situations are handling investor protection in investing in a certain security and we think that investors should have the same protection in both cases. A difference in the treatment would also make comparison harder and would decrease the predictability in producing the prospectuses.

### *Q 11 -12 Extending the prospectus to admission to trading on an MTF*

The Commission considers whether the current requirement for publication of a prospectus for admission to trading on a regulated market should be extended also to admission to trading on a multi-lateral trading facility, and if so, whether there should be a differentiation between different types of multi-lateral trading facilities (including SME growth markets).

SSDA does not support the suggestion that the prospectus requirement should be expanded to non PD regulated markets or platforms. The advantage of most of these markets is ease of access to capital – the current process is very streamlined, flexible and smooth combined with high standards. We believe expanding the prospectus requirement to admissions to trading on an MTF could add unnecessary administrative burdens and entry barriers on SMEs looking to raise capital.

### *Q 15 Balancing the favorable treatment of issuers of debt securities with a high denomination per unit, with liquidity on the debt markets*

Currently, a prospectus is not required in relation to the offering of securities with a denomination of at least EUR 100,000. The original reason behind this exemption was that it was considered that private or retail investors (who were the primary focus of the investor protection provisions of the prospectus regime) were less likely to invest in high-denomination debt (and in fact, this exemption is commonly known as the “wholesale exemption”). In terms of what was considered high-denomination, the amendments made to Prospectus Directive in 2010 increased that amount from EUR

50,000 to EUR 100,000. The European Commission is asking the question as to whether the wholesale exemption is still appropriate or whether having a high threshold may create an incentive to issue in larger denominations and limit the issuance of debt securities in smaller denominations.

From SSDA's standpoint it is of utmost importance that the wholesale exemption and its benefits are maintained. The wholesale exemption allows for the possibility for banks to offer securities throughout the Union, without the pass-porting requirement or the translations of the prospectus summary, a process which is repeated for each update of the programme documents. As this type of cross border offering is in line with the overall goals of CMU, it is our view that the wholesale exemption should be maintained.

We would encourage the Commission to consider that the liquidity in the corporate bond market is not a function of the denominations of the securities, but a function of efficient market making activities. The participation of market makers remain critical to supporting liquidity and the overall functioning of the secondary markets in addition to the size of issuance which remain a serious question mark in an any capital markets funding for SMEs. The exemption for subsequent fungible tranches of securities already listed, for which a prospectus was prepared for the original tranche, may have a positive impact on the liquidity since it would operate positively on the size of the total issued amounts.

#### *Q 20 - 22 Creating a bespoke regime for companies admitted to trading on SME growth markets*

The objective of the review of the Prospectus Directive is to reform and reshape the current prospectus regime in order to make it easier for companies, in particular SMEs and companies with lower market capitalization, to raise capital throughout the EU and to lower the associated costs, while maintaining effective levels of consumer and investor protection. It focuses on the proportionate disclosure regime that was introduced in 2010 for SMEs and companies with "reduced market capitalization". The Commission's concern is that the proportionate disclosure regime has not delivered on its intended effect and is still not widely used, as it is still perceived as too burdensome by smaller entities.

There is according to the opinion of SSDA no evidence that a lighter regime for smaller companies would be appropriate from an investor protection stand point, arguably there may be grounds to believe that the risks may be larger or at least the risks may not be as transparent as for a larger company with a relatively high market capitalization, which is continuously subject to scrutiny. In fact this means that for larger companies the prospectus probably contain lesser information about the company than what is known to the market through reports and press releases. For example there is full disclosure requirements for huge, well-known companies but a lighter regime for SMEs. We are not convinced that such disclosure regime is positive for the investors. In our view the prospectus should be comparable and equally good. If the requirements for

SMEs are too burdensome, the right way to go forward may be to reduce the requirements for all issuers instead of only SMEs.

*Q 23-26 Making the "incorporation by reference" mechanism more flexible and assessing the need for supplements in case of parallel disclosure of inside information*

The Prospectus Directive allows for prospectuses to incorporate certain information by reference only, where that information has been published and approved or filed with the relevant authority. The Commission invites responses on whether the provisions on incorporation by reference should be recalibrated to achieve more flexibility and allow other documents to be incorporated by reference, including (but not limited to) documents already required pursuant to other financial regulation, such as the Transparency Directive and the Market Abuse Directive.

The incorporation by reference could potentially have positive effects on and simplify the administrative burdens involved in establishing of prospectuses. According to our view the Commissions should consider if it is necessary to repeat any issuer related information already published in accordance with the Transparency Directive. Also future regular information, such as annual reports, from the issuer should be reviewed. It is however very doubtful if this initiative would make any difference for a SME trying to enter the capital markets, given what would most likely be a limited amount of publically available information.

The European Commission is concerned about the trend towards overly long prospectuses. The European Commission asks whether respondents would support the concept of introducing a maximum length for a prospectus, or a maximum length for certain specific sections of the prospectus.

The Commission's concern regarding the length of the base prospectuses and whether there would be support for the concept of introducing a maximum length for a prospectus, or a maximum length for certain specific sections of the prospectus, is interesting given the fact that it is the inflexible approach to the use of final terms and supplements that was introduced in the amending prospectus directive in 2010 that drives the length of the base prospectuses. A better approach would be to rethink the use of the supplements and the final terms and to introduce a more flexible prospectus regime. The ability to use supplements to address issues not covered in the base prospectuses, e.g. introducing new pay-out structures, is one of the most important improvement areas under the current regime. Furthermore, this issue cannot be considered without at the same time considering the current liability standards for prospectuses, given that it is the latter in combination with the above that primarily drives the level of disclosure.

Q 25

Regarding the question if ad-hoc publication in accordance with Article 6 (1) of MAD that such publication could substitute the requirement of the Prospectus Directive to publish a supplement we are of the opinion that it could be beneficial but the issue should be part of a detailed analyze.

*Q 27-28 reassessing the objectives of the prospectus summary and addressing possible overlaps with the key information document required under the PRIIPs Regulation*

One of the key criticisms of the approach to the recent PRIIPs regulation is the fact that, for a packaged retail product in the form of a security, when the PRIIPs regulation comes into force, there will be a need to provide a key investor document (“KID”) summarizing the essential features of the product, in addition to the separate prospectus summary required in relation to debt securities with denominations below EUR 100,000. There will be a large degree of overlap in the information required for these two documents, yet there is no proposal in either the PRIIPs regulation or the Prospectus Directive to address this overlap in an efficient manner.

(27) a) Yes, regarding the concept of key information and its usefulness for retail investors.

SSDA substantially agrees with EBF in the statement that a summary should not be used when a KID is required for the relevant instrument under the PRIIPs Regulation.

For instruments for which a KID will not be required, SSDA agrees with EBF in their view that in case the summary continues to be required, the summary should be limited to the essential characteristics of, and risks associated with, the issuer.

(27) c) Yes, regarding the interaction with final terms in a base prospectuses

The way the rules are interpreted and used as of today, much of the issue specific summary consists of information copied from the final terms. Such duplication of information does not enhance investor protection and increases the administrative burden for issuers and the SSDA believes the requirement for issue specific summaries should be eliminated.

In case the European Commission determines that issue specific summaries still serves a purpose for investor protection and will continue to be required, the SSDA believes that the summaries should be shorter and easier for investors to assimilate. To reduce an unnecessary administrative burden for issuers, SSDA, in accordance with above, then suggests that the summary only should consist of information from the base prospectus not included in the final terms, i.e. information about and risks regarding the issuer. Together with the information provided in the final terms for the issue, such summary should give sufficient investor protection, without the requirement to state the same information in more than one place.

The Commission asks whether there is a need to reassess the rules regarding the prospectus summary (for instance, regarding the concept of key information and its usefulness for retail investors, regarding the comparability of summaries of similar

securities and regarding the interaction of the prospectus summary with final terms for securities issued under a base prospectus). It also asks for views as to how the overlap of information between the PRIIPs KID and the prospectus summary should best be addressed—whether that may be by providing for information already contained in the KID not to be duplicated in the prospectus summary. Another suggested alternative is the alignment of the format and content of the prospectus summary with that of the PRIIPS KID, with the view to minimizing costs and promoting comparability of products.

The proposal to clarify the overlap between PRIIPS and the Prospectus Directive requirements for a transaction specific summary for issuances, with denominations below EUR 100,000, would most likely have no consequence for issuers of corporate bonds in particular SMEs, but would have a significant impact on large financial institutions. Further clarifying the overlap between PRIIPS and the prospectus directive requirements for transactions specific for summary of issuance with denominations below EUR 100,000 would reduce entry barriers significantly. We believe that this is further evidence that a complete review of the prospectus directive is warranted

#### *Q 29 - 30 Imposing a length limit to prospectuses*

This is a hard question since shorter prospectuses would be beneficial for all market participants. The problem with long prospectuses should however be handled by addressing the real problem, which is the content necessary in prospectuses according to the regime and the liability fear, especially in certain jurisdictions.

#### *Q 31 -32 Liability and sanctions*

The SSDA is very skeptical to any harmonization in this field. The reasons is that any prospectus liability is closely related to administrative, criminal, civil and governmental liability and thereby deeply embedded in the legal system of each Member State and closely interacts with other liability and sanctions regime, e.g. advisory liability, miss selling etc. Full harmonization would imply a disproportionate interference with the Member States legal systems.

The need for the special liability rules for the summary should also be reviewed as part of the consideration regarding the relationship between the KID and the summary.

#### *Q 33 - 39 Streamlining further the approval process of prospectuses by national competent authorities (NCAs)*

The final section of the consultation focuses on the issue of how prospectuses are approved. It invites views on how the approval process by national competent authorities can be streamlined and made more consistent between different jurisdictions. In particular it asks what the involvement of national competent authorities should be in relation to prospectuses, including whether the requirement to review all prospectuses before the relevant offer or admission to trading should remain,

or whether authorities should review only a sample of prospectuses beforehand, with other prospectuses being reviewed only after the offer or the admission to trading has commenced. It also asks whether the EU passporting mechanism is functioning in an efficient way or whether improvements could be made, such as whether the approval notification procedure between home and host member states could be simplified.

The SSDA wants to stress the importance of a predictable process with for example updated guidelines regarding interpretation issues. It should be possible to get information from the Authorities on their interpretation of the requirements before the approval process. Furthermore, too detailed rules should be avoided.

The idea driving the passporting mechanism facilitating cross border issuances is a very good idea. However, it is significantly complicated by the requirement for local translations of the prospectus summary and tax disclosure to be included in the Base Prospectus for all passporting jurisdictions. These requirements affect timing, cost, complexity and time to market, and it is assessed as difficult for a less professional issuer to take benefit of the passporting regime. On the other hand there are no real evidence in the consultation that cross-border transactions would even be relevant for an SME, given limited transaction size, limited transparency and name recognition

#### *Q 40 Extending the base prospectus facility*

Generally, the SSDA is of the opinion that information according to PD, TD and MAR/MAD should be synchronized as far as possible to avoid that the same information is repeated.

Base prospectuses are currently only available for the issuance of debt securities for up to 12 months after the approval. However, views are now sought by the European Commission as to whether base prospectuses should be allowed to be used for all types of issuers and issues (including equity securities) and whether the base prospectus should remain valid for more than one year.

Our best assessment is that to extend the maturity of a base prospectus from one year to three years could potentially have large benefits from an administrative and cost point of view. For this proposal to have any real impact, such a proposal would have to be combined with review of the restrictions in respect of the use of supplements and the possibilities regarding incorporation by reference. A less restrictive regulation regarding the use of supplements may compensate for a fairly rigid regime and may serve to preserve flexibility and the preservation of the accuracy of the base prospectus. This would however require a clarification to Article 16 of the Directive where a supplement is allowed to be filed only if information is deemed to be significant. The prevailing practice has been not to allow supplements to be filed to address new instruments or tweaks to existing instruments, or circumstances that has not been addressed in the registered base prospectus. It is important that it is clarified that the issuers are allowed to address issues not addressed in the base prospectus or which are specific to individual issues by way of a supplement.

The SSDA welcomes the proposition for an increased period of validity for prospectuses. However, we also wish to make a proposal for a 'transition period'. By the following example we wish to describe the benefit of the increased flexibility such a transition period would offer the issuers.

A bank has a base prospectus for its MTN, warrant and certificate programme under which the bank issues securities on an ongoing basis. For instance, securities are issued in the form of offerings-to-the-general-public, where investors during a specified subscription period may acquire securities through a subscription application. A subscription period usually extends over several weeks.

When the annual update of the bank's base prospectus occurs during such subscription period, the bank would introduce the following wordings in the final terms and in the marketing material for the relevant issue. Potential investors are made aware that the annual update of the Bank's prospectus for the relevant offering programme will take place during the subscription period and that a new base prospectus will be published with updated information about the bank.

“Complete information regarding the Bank and the offer may only be obtained through both the final terms and the new Base prospectus which will be published on or about [date]. Investors who have chosen to subscribe to the offer at the time of such publication are entitled to, within two (2) business days following the publication, withdraw their subscription application. The terms of the offer will, notwithstanding the publication of the new base prospectus, be the same as specified in the Base Prospectus dated [date of closing base prospectus] including any supplements.

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