European Commission
Directorate-General Financial Stability, Financial Services and Capital Markets Union
Mr J. Berrigan
Rue de Spa 2
B-1000 BRUSSELS
BELGIUM

Date 10 February 2022
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Subject AFM response to the Commission consultation on the Listing Act

Dear Mr Berrigan,

The AFM welcomes the Commission's targeted consultation on the Listing Act. Besides our more detailed responses to the questionnaire, and the collective input provided via ESMA, we would like to take this opportunity to share our main views on the different parts of the regulatory framework subjected to the consultation.

We fully support the objectives of the Capital Markets Union and encourage the Commission in its efforts to further strengthen the CMU by striving for liquid, transparent and accessible EU capital markets.[1] A healthy financial system breathes with two lungs: a robust banking system and resilient and diversified capital markets. Currently, Europe's financial system is still very much dependent on banks and the strong home-bias in bond and equity markets indicate that markets are not yet fully integrated. There is still a significant need as well as high potential for increased participation of retail investors in EU capital markets which would also increase the opportunity for SME funding. The AFM encourages the regulatory efforts taken by the Commission with this consultation, but would like to explicitly acknowledge that other factors, as *for instance* tax treatment, liquidity on secondary markets for smaller companies and a European equity/investment culture for companies and retail investors are also vital for creating a flourishing true European capital market.

In order to develop sound, effective and globally attractive EU Markets with more (SME) financing opportunities, we underwrite the goal to ensure that the initial and ongoing costs for listing, as well as the degree of regulation, is proportionate and balanced. It is crucial that this will be done without diminishing market integrity, proper market transparency and strong investor protection as these are the prerequisites of adequately functioning capital markets. The emphasis should be on striking the right balance between making the capital markets more attractive, creating less regulatory complexity and burdens for market participants, and safeguarding the prerequisites.

[1] See also *AFM's recommendations for stronger European Capital Market Union*, via link: https://www.afm.nl/en/nieuws/2020/april/aanbevelingen-europese-kapitaalmarktunie.

In our consultation response we have indicated where alleviations of the current rules might be appropriate to achieve the CMU goals. Besides these suggestions we are of course willing to liaise with the Commission regarding any potential concrete alterations it might consider. We are of the opinion that improvements could be sought in alleviations of administrative burdens (such as simplifying transparency procedures), improving harmonisation and streamlining the rules between different regulatory regimes, without changing the core principles and provisions of the different regulatory regimes as this could be detrimental to their goals. For instance, the core provisions of the market abuse framework should remain intact and uniform to preserve market integrity, to avoid potential regulatory arbitrage, and to ensure accountability in the event of attempted unlawful behavior such as manipulation. All of which are crucial for maintaining an environment that safeguards investors' trust in our financial system.

Please find our main views in relation to some of the key subjects of the targeted consultation. In our response to the consultation questions, we included more detailed proposals for alleviations and improvements.

Prospectus Regulation

The prospectus rules contain important requirements regarding transparency when securities are offered to the public or admitted to trading on a regulated market, which are vital for investors to base their investment decisions on. The Prospectus Regulation (PR) introduced several substantial changes in 2019, including new prospectus formats intended to alleviate administrative burdens on issuers. Furthermore, the PR was recently improved due to recent targeted amendments (SME Listing Act, Crowdfunding Regulation, Capital Markets Recovery Package). As prior to introduction of the new rules an extensive analysis on possible amendments and alleviations within the prospectus regime was done and the rules are currently still being embedded and stabilised, we feel it may be **too early** to draw definitive conclusions about these changes and see limited room for alleviations for already listed companies.

We do however understand the objective of the targeted consultation and support further simplification of the prospectus rules in order to reduce administrative burdens and compliance costs for companies. Consequently, in our consultation response we specified certain areas where we feel alleviations could be implemented, for example, in relation to companies that are already listed. Under current regulations, these companies can list up to an extra 20% shares per year without an approved prospectus. To facilitate easier and faster investment and acquisitions for listed companies, we propose to stretch this to, for example, 30% or even 40%.

With respect to the secondary issuances regime, we are not in favor of alleviating this regime for equity prospectuses, but we do see room to lift the obligation to draw up a wholesale prospectus for the admission to trading of non-equity securities of issuers who are already listed and thus already comply with, for example, the requirements of the Market Abuse Regulation (MAR). We are of the opinion that the added value of an approved prospectus is limited. Furthermore, we see benefits in limiting the approval by NCAs of supplements proved for publication. For example, supplements that only concern the inclusion of information that is already in a press release are not necessary to be approved.

Market Abuse Regulation

The AFM is of the opinion that the regime introduced by MAR works well. The current market abuse regime is crucial to safeguard market integrity and investor confidence. To keep the regime working well and provide a steady legal framework, the core definitions and principles laid down in the MAR should **remain unaltered**. They mainly stem from the Market Abuse Directive of 2003, provide market participants with almost twenty years of practice and guidance by a vast amount of adequate case law. These include the definition of inside information and the conditions to delay its disclosure, as well as the moment the MAR requirements start applying. Amending the MAR definitions may lead to rendering this jurisprudence not applicable. In general, we find that the MAR should remain leaning towards a system of rather principle-based requirements instead of more rule-based requirements. A principle-based approach suits best, since the MAR is aimed at a highly diverse group of market participants, such as issuers, trading firms and traders in all sizes (retail and professional).

Having said that, we do see merit in and room for certain targeted amendments and alleviations regarding the procedural requirements laid down by MAR to ensure proportionality and reduce burdens. These potential amendments inter alia relate to market sounding procedures (in line with ESMA's proposals), insider lists for SME's and liquidity contracts. Concerning the latter, we would like to underline the importance of stimulating better liquidity in the secondary market for (smaller) companies.

With respect to certain other targeted consultation questions on alleviating the MAR regime, it is important that amendments should only be considered if there is no risk of harming market integrity and investor confidence. For example, an alleviation of the managers' transaction regime by increasing the threshold of notifications by managers could be beneficial to reduce administrative burdens but should never undermine the necessary level of market transparency. With respect to investment recommendations, the AFM recently did an explorative investigation and concluded that the concerned rules are not followed continuously, and that there is often not enough transparency about the interest and remuneration of the person or entity who makes the investment recommendation. Accordingly, this subject deserves close attention and is in possible need of more strict rules instead of alleviations.

SPACs

Current national corporate and European law does not prohibit Special Purpose Acquisition Companies (SPACs) to offer and list their securities on (regulated) stock markets. The SPACs that are listed in the Netherlands (currently more than 15) closely mirrored the standard market practices that are custom by SPACs imitated in recent years in the United States.

In general, SPACs provide some benefits for the financial markets as they foster for a faster, easier, and less uncertain route for private companies to obtain a listing on a regulated market compared to a traditional IPO. However, for (retail) investors, investing in SPACs is highly complex and it has substantial risks. For example, shareholders of SPACs may experience significant dilution and costs, sponsors may have potential conflicts of interest and there may be stiff competition between SPACs to find a suitable/profitable target. Therefore, the AFM thinks SPACs are **suitable for only a (very) limited group** of retail investors in the stages up to the acquisition of the target company. For a more detailed analyses,

please see our recent publication on SPACs and the current Dutch SPAC market, including its risks and the supervision by the AFM.[2]

It is uncertain how the SPAC market will develop in the (near) future. In relation to current supervision, we would like to note that in the context of product governance, investment firms must ensure that SPACs are not distributed to investors for whom the product is not suitable (MiFID II). Besides that, the SPACs listed in the Netherlands are subjected to the transparency rules by the PR and the MAR.[3] The AFM will ongoingly assess the appropriateness of the current regulatory framework while closely monitoring the SPAC market and the development of the current market practice.

MiFID II

Concerning the MiFID II regime, we see room for targeted adjustments to ease and accommodate listing rules for EU entities, particularly for SMEs. For instance, we support the proposal to facilitate dual listing.
With respect to the issue of equity research coverage for SMEs, we question whether this is the time to further alleviate the research unbundling regime in MiFID II. To promote more funding for SME research, it might be appropriate to also explore non-regulatory options (e.g. initiatives to be taken by the markets themselves).

We also see merit in reviewing the framework for sponsored research, specifically regarding online influencers in the retail market. While there are currently a few influencer-analysts, the influencer market is developing quickly and gaining a lot of traction. At the same time, this group is commonly approached by firms for positive statements on an issuer, which under certain conditions can/could also be interpreted as 'research'. Accordingly, it is important that the rules applying to this group are future proof as soon as possible.

Listing Directive

The AFM supports a framework that coordinates rules regarding admitting securities to official stock-exchange listing, as well as information to be published on those securities in order to provide equivalent protection for investors at EU level. In general, the core elements of the Listing Directive (LD) – concerning expected market capitalisation, disclosure pre-IPO and the free float percentage – are still relevant. We are however in favor of a simpler model and harmonized approach, whereby the market operator still decides on the admission to trading, whereby the prospectus is approved by the national competent authority and whereby the listing rules are more harmonised at EU level. Accordingly, we propose transferring the relevant parts of the LD to another directive or regulation (MiFID II, MiFIR, PR) and repealing the LD. We support further analysis to reach a common view on the need for possible substantial amendments.

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[2] See Edition 5 of the AFM Market Watch: *An overview of the Dutch SPAC market*, via link: https://www.afm.nl/en/professionals/onderwerpen/afm-market-watch.

[3] Although there is no specific legal regulatory framework for SPACs, there is existing regulation based on which the AFM supervises SPACs. Regarding the distribution of SPAC-securities (including US-SPACs) to retail investors, investment firms located in the Netherlands that manufacture or distribute SPACs (units, shares, warrants) in the Netherlands must meet the product governance requirements. Regarding disclosure requirements (by SPACs listed/registered in the Netherlands), the AFM approves pre-IPO the PR prospectus required for the listing as required by the PR and post-IPO the AFM reviews post-IPO whether the ongoing (transparency and market integrity) requirements by the MAR are met once the SPAC finds a suitable target company.

We remain of course available to discuss the content of this letter and our response to the consultation and to further support the work of the Commission.

Yours sincerely,
The Dutch Authority for the Financial Markets

Laura van Geest
Chair

Hanzo van Beusekom
Board Member