

CAPITAL MARKETS UNION Mid-Term Review 2017

- AMAFI's contribution

1. Financing for innovation, start-ups and non-listed companies

Are there additional actions that can contribute to fostering the financing for innovation, start-ups and non-listed companies? Please propose complementary policy measures, explain their advantages, and illustrate any foreseeable challenges to their implementation.

- **Crowdfunding**

There are some arguments in favour of creating a European framework for crowdfunding, if only to provide participants with legal certainty with respect to the scope of the securities placement service as governed by MiFID. Indeed, the national frameworks that allow them to offer company securities to investors without having investment firm status do not comply with MiFID provisions insofar as these provisions govern the service of securities placement defined as an investment service that may be provided only by investment firms authorised for that purpose and complying with the applicable regulatory framework.

On the other hand, there are also arguments against imposing on crowdfunding harmonised rules at European level. Indeed, crowdfunding has developed in a few Member States essentially as a local financing alternative and it could be counterproductive to impose harmonised rules at European level since it could create inappropriate constraints and would not take sufficiently into account the local needs to which crowdfunding may respond.

Consequently, AMAFI believes that it would be desirable to have a general and flexible framework at European level designed to secure the legal basis of the crowdfunding activity wherever it is carried out throughout the EU, for as long as the more specific terms and conditions under which such activity is conducted in a given Member State are left to the determination of such Member State.

- **Developing venture capital**

Venture capital is a critical asset class for growth in Europe. Financing for start-ups is crucial: too often, young companies with global ambitions struggle to find the capital they need in Europe, which slows their development or forces them to look for funds elsewhere by shifting their centre of gravity outside the EU. In this perspective, tax aspects are vitally important here.

2. Making it easier for companies to enter and raise capital on public markets

Are there additional actions that can contribute to making it easier for companies to enter and raise capital on public markets? Please propose complementary policy measures, explain their advantages, and illustrate any foreseeable challenges to their implementation.

▪ Prospectus regulation

AMAFI is paying close attention and supports the Commission initiative regarding the new Prospectus regulation. On several occasions, it has commented on the detailed provisions of this draft Regulation (*see in particular AMAFI's response to the EC consultation on the review of the Prospectus Directive, AMAFI / 15-27 of 11 May 2015*).

At this point in time, however, while the trilogue is over but the Regulation has not yet been published, nor even been adopted definitively, it is impossible to express any sensible comment on the Level 1 Regulation.

As to the Level 2, the contents of which are even more unknown at this stage, it can only be stated that the expectation is high regarding in particular (i) the simplified disclosure regime for secondary issuances and (ii) the EU Growth prospectus. Indeed it is expected that the simplified/proportionate disclosure regimes that should result from the delegated acts to come on these two topics will achieve the objectives pursued. In the first case, AMAFI believes it is important to facilitate the raising of new capital by issuers whose securities are already admitted to trading on a regulated market (or an SME growth market) since the investors already benefit in that case from ongoing disclosures. In the second case, it is important to encourage and facilitate the use of capital market financing by SMEs.

AMAFI will of course remain closely involved in the process and comment in due course on the proposals that will be made at Level 2.

▪ MAR – Market Soundings

AMAFI has concerns on the outcome of MAR provisions regarding market soundings. If we fully support the goal of providing a European regulatory framework for such practises, mainly where insider information may be involved, it appears however that the definition of market soundings provided by MAR is very wide and may cover several practises where in fact there is never insider information. It results in very burdensome exchanges of formal communications and documents between issuers, investment firms and investors that are detrimental to the success of such operations.

In addition, AMAFI wishes to highlight that it could become more and more difficult for market participants to make investors agree to be tested within market soundings procedure because of legal and regulatory risks they fear to bear. Yet, market soundings are essential to adjust the parameters of financial operations in order to ensure that the placement is successful if it goes ahead, thereby avoiding the risk of failure for the issuer or seller of the securities. At the end, it is the cost of capital of companies raising funds on the market which is at stake.

Therefore, AMAFI would like to suggest that an impact study be planned to assess the efficiency of MAR new market soundings measures on a European level. Probably it could lead to identify adjustments needed in the Regulation to stick to the original purpose that is providing safeguards for the execution of primary and secondary placements, with respect to market integrity, especially regarding coordination between participants when inside information is disclosed.

- **Providing liquidity on the market is an important challenge**

3. Investing for long term, infrastructures and sustainable investment

Are there additional actions that can contribute to fostering long-term, infrastructure and sustainable investment? Please propose complementary policy measures, explain their advantages, and illustrate any foreseeable challenges to their implementation.

- **Supporting the EC's proposal on ACE - Allowance for Corporate Equity**

As stated in its general observations, AMAFI considers that there is a urgent need for **giving equity financing the absolute priority**, even whether this issue can be difficult to treat at European level as it touches on tax aspects involving both corporate taxation (reverse the preferred treatment of debt over equity) and individual taxation (establish the principle that shares enjoy more advantageous tax treatment than any other investment).

As the EC's proposal on ACE (Allowance for Corporate Equity) shows it, it is possible to take some useful initiatives. In most jurisdictions today, companies' financing choices are influenced by taxation, which tends to favour financing through debt rather than equity, as already noted in a number of studies by the Commission. This is why, in an environment where corporate funding is becoming more scarce and is increasingly dependent on companies' ability to raise capital, lowering the additional tax cost of capital relative to borrowing has become a key issue. Furthermore, in the opinion of both the IMF and the European Commission, this fiscal bias on corporate finance constitutes a systemic risk that should be reduced precisely by adopting mechanisms that discourage the excessive use of leverage. In this regard, the Association approves of the Commission's initiatives in favour of a deduction against capital, as incorporated into the recently proposed directive on a common corporate tax basis^[1]. Under these proposals, a fraction of companies' cost of capital would be deductible for the purposes of determining of their taxable income, as with the Italian ACE experience.

^[1] Proposed directive COM (2016) 685 of 25 October 2016 – Article 11: Allowance for Growth and Investment – AGI

4. Fostering retail investment and innovation

Are there additional actions that can contribute to fostering retail investment? Please propose complementary policy measures, explain their advantages, and illustrate any foreseeable challenges to their implementation.

- **Personal pensions**

AMAFI reiterates its full **support to the setting up of a European pension fund scheme**, in addition to existing schemes, with a clause ensuring that retirement products are entitled to coverage by the most advantageous locally available tax treatment. This would address the threefold need to provide a common framework for mobile Europeans, promote pension funds where these schemes are underdeveloped, and facilitate long-term financing, particularly equity financing.

- **Retail investor**

Costs and burdens for providing investment services have dramatically increased in the course of the new regulations. They have become such that they may seriously constitute a barrier to sell products to retail investor. AMAFI is particularly worried to see that simple products as shares and bonds – which are crucial for the financing of the real economy – are more and more submitted to stricter rules: for example the possibility to apply the full MiFID II Governance products rules to shares and bonds would be detrimental. Thus, considering different type of products, a reflection on the necessary arbitrage between the need of an increasing protection of retail investors and their capacity to invest in the economy and to participate in its development has to be conducted.

- **PRIPs**

AMAFI wishes to **stress out how big is the challenge for the implementation of PRIPs**. Because of a very tight and yet uncertain timeline, final texts are still expected, less than one year until the Regulation applies. A lot of questions about scope, definitions and several provisions of the text remain unclear. Surely the objective of PRIPs is ambitious: covering all investment products despite their differences and providing a one and single template for information of retail investors is appealing but at the end it turns out that it is a very difficult one to reach. PRIPs manufacturers have high concerns about legal and regulatory uncertainty and their capacity to implement requirements in line with regulators expectations (still unknown) for 1st January 2018.

5. Strengthening banking capacity to support the wider economy

Are there additional actions that can contribute to strengthening banking capacity to support the wider economy? Please propose complementary policy measures, explain their advantages, and illustrate any foreseeable challenges to their implementation.

- **Securitisation:**

The STS proposals submitted by the Commission in September 2015, together with revisions to the CRR prudential treatment of securitisation for E-U banks, aimed at defining sound principles to foster a revival of the market; this would help bank grow their lending to the economy by diversifying funding sources and transferring risk exposures.

The proposals have become a long collection of complex rules, adding numerous constraints on transactions and parties to the market, not only to obtain STS eligibility but also more widely on the whole market. Some of these constraints, such as very tight limitations on authorized investors, could severely reduce the market. The addition of all constraints clearly threatens the very existence of the market. And to cap it all, the proposed “benefits” are inexistent so far: capital necessary to hold securitisation positions will increase for banks compared to the existing situation, and any reductions for insurers (which have almost completely disappeared from the market since Solvency 2) have not yet been defined.

Unfortunately the proposed regulations are proving to be a missed opportunity: securitisation will become, even more than it already is, a financing tool so constrained by regulation as to render it widely unusable. One of the ironies of the STS proposals is that the only areas of the market currently enjoying strong activity or interest (balance sheet synthetic structures used by banks to transfer risks, structures to transfer portfolios of non-performing loans, for example in Italy) have been excluded from STS eligibility, proving that investor interest is not defined by STS rules.

At this late stage in the legislative process (trilogue under way since January), our recommendation to the co-legislators can only be to exercise maximum possible restraint in the creation of new rules in order to minimize the damage that will be done to the market. It would also be useful to mandate E-U regulatory entities (EBA, ESMA...) to assess and possibly amend the new rules where they prove not to work properly.