

ESME report on MiFID and admission of securities to official stock exchange listing

1. Introduction

The term Official Listing was first introduced in 1979 through *the Admission Directive*.¹ Besides the interest of providing a framework for investor protection, the key driver behind the directive was to facilitate easier access to listing for issuers across Europe. The directive provided a set of minimum standards to be met by issuers in order to be granted admission to official listing at any stock exchange in the EU. Hence, the directive was based – as many other directives at the time – on the principle of subsidiarity, and any differences between member states resulting in higher standards could thus be kept. However, it was also recognized that the Admission Directive was only the first step towards subsequent closer alignment of the rules in the various member states.² One important remark to be made at the outset is that the Admission Directive defined the scope of the admission to listing –concept as capturing;

- (i) conditions pertaining to securities, and
- (ii) obligations imposed on issuers of such securities.³

The Admission Directive recognized that the competent authority for admission to listing could be either a public authority or a stock exchange, and many member states assigned initially that responsibility to the local stock exchanges.

The Admission Directive and the definition of admission to official listing were subsequently referenced to when other related securities markets directives were introduced. Thus, *the Listing Particulars Directive*⁴ set out the requirements and procedures, which issuers had to comply with in terms of initial disclosure of information pertaining to the issuer and the securities (notably

¹ Council Directive 79/279/EEC coordinating the conditions for the admission of securities to official stock exchange listing.

² Recital 5.

³ Article 3 and Annex (Schedule A and B for conditions pertaining to securities, and Schedule C and D for obligations imposed on issuers).

prospectus requirements). *The Disclosure Directive*⁵ followed suit in 1982, by setting standards for regular disclosure from listed companies (e.g. by requiring half-yearly financial reports).

The idea at the time was that issuers would seek parallel listing at more than one stock exchange, and that a framework for mutual recognition between the competent authorities would simplify such development without setting the investor protection concerns aside.

Also other securities markets directives – which did not have issuers but rather the broader range of participants in the securities markets as addressees – made direct references to official listing, for example

- ❑ *The 1985 UCITS Directive*⁶; made references to securities subject to official listing (and to some extent also securities that are “dealt with on another regulated market”).
- ❑ *The 1989 Major Holdings Directive*⁷; required public disclosure of holdings when certain defined thresholds pertaining to voting rights in companies subject to official listing were passed.

The legal framework set out above supported the practice amongst European exchanges to provide a two-tier system for their markets. Most exchanges did – and still do – offer a main market segment subject to the official listing regime as well as a second tier market subject to requirements set by national regulators.

The first time the notion of “admission to trading” appeared in the EU-context was with the introduction of the *1989 Insider Dealing Directive*⁸. The directive recognized the existence of all regulated markets operated by exchanges across the EU, notwithstanding their status of being main markets or second tier markets. However, the directive was limited in its scope, and was only aiming at harmonizing the insider legislation across EU member states, and to coordinate the supervision.

⁴ Council Directive 80/390/EEC coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing; subsequently amended by three amendment directives; Directive 87/345/EEG, 90/211/EEG and 94/18/EEG.

⁵ Council Directive 82/121/EEC on information to be published on a regular basis by companies the shares of which have been admitted to official stock-exchange listing.

⁶ Council Directive 85/611/EEC on the coordination of laws, regulations, and administrative provisions relating to undertakings for collective investments in transferable securities (UCITS).

⁷ Council Directive 89/298/EEC on the information to be published when a major holding in a listed company is acquired or disposed of.

⁸ Council Directive 89/592/EEC coordinating regulations on insider dealing.

In the interest of creating clarity and for rationality reasons, the Admission Directive, the Listing Particulars Directive, the Disclosure Directive and the Major Holdings Directive were grouped together in one single directive in 2001 – *the Codified Listing Directive*.⁹ As the name of the directive suggests, this was only a structural change and no amendments on substance were made.

2. The developments in the UK

London Stock Exchange (LSE) was for a long time carrying out the function as competent authority for the purposes of admission to official listing, approval of listing particulars and other requirements for listed companies on the UK-market. However, following the demutualization of the exchange in 2000 and the raise in number of competing recognized investment exchanges and other trading venues in London, it was considered appropriate to transfer the responsibility as competent authority for listing matters to the Financial Services Authority. For such purpose, the UK Listing Authority (UKLA) was instituted as a separate body within the UK FSA.

The UK-model is, simply put, based on interaction between two notions, notably “admission to official listing” and “admission to trading”. UKLA will not grant admission to listing unless it is satisfied that the security in question will also be admitted to trading on any of the regulated markets or other “prescribed markets” established in the UK.

The Alternative Investment Market (AIM) was launched by LSE in 1995 and was at the outset carrying a status as a regulated market under EU-law. However, with effect from 12 October 2004, AIM ceased to be classified as a ‘regulated market’ under EU Law and became an “exchange regulated market”. This change was driven by changes in EU Law (under the Prospectus Directive and Transparency Directive), which affect AIM’s regulatory environment. AIM’s change of status enabled LSE to preserve the existing admissions process and regulatory structure as far as possible, allowing AIM to continue to offer the flexibility that smaller growing companies need, while also retaining the high standards of regulation that had characterized and supported AIM’s development.

3. Developments under the Financial Services Action Plan (FSAP) and the Reports of the Committee of Wise Men

⁹ Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities.

FESCO – the predecessor to CESR – concluded in a report to the Commission in 2000 that the mutual recognition for prospectuses did not work in practice.¹⁰ The reason for this was that member states imposed inconsistent requirements for e.g. prospectuses, which in effect posed a major obstacle for risk capital allocation across national borders. To provide a more efficient and flexible model, FESCO proposed to overhaul the structure and instead implement a model based on notification, i.e. a “European Passport for Issuers”. Thus, the model so envisaged reflected the European passport regime for investment firms as set out in the Investment Services Directive. The responsibility to scrutinize and approve prospectuses should rest with the competent authority of the home country of the issuer, and the issuer should be given a right to approach investors and markets in other members states based on a passport received following a notification to the competent authority in the host country.

The ideas promoted by FESCO were not new to the Commission. In fact, the Commission raised already in its *Risk Capital Action Plan* presented in 1998 the need to review the regime for prospectuses to facilitate for companies to raise cross-border capital.¹¹ The commission reiterated its position in the 1999 Financial Services Action Plan, where *inter alia* the need to change the European legal framework for prospectuses and ongoing disclosure requirements for issuers was identified as two out of a total of 42 prioritized measures to be accomplished by 2005.

The Committee of Wise Men proposed in its initial report that the due date for implementation of FSAP should be shortened and that the measures should be completed not later than by 2004.¹² The Committee envisaged as one out of five top priorities “making cross-border capital raising as easy as domestic capital raising”. For such purpose, the Committee emphasized the importance of introducing a single passport for issuers as well as introducing a distinction between admission to listing and to trading.¹³ The Committee concluded in its final report that necessary European rules were missing, and that one of the 13 most important gaps was “outdated rules on listing requirements, no distinction between admission to listing and to trading and lack of a definition of public offering”.¹⁴ Thus, the Committee suggested 6 priorities to be brought into effect not later than

¹⁰ A “European Passport” for Issuers, Report by FESCO to the EU Commission on 20 December 2000, Ref. Fesco/00-138b.

¹¹ “Risk Capital; A key to job creation in the European Union, Action Plan”, June 1998.

¹² The Initial Report of The Committee of Wise Men on the Regulation of European Securities Markets, Brussels, November 2000.

¹³ The Initial Wise Men Report, Page. 92.

¹⁴ The Final Report of The Committee of Wise men on the Regulation of European Securities Markets, Brussels, 15 February 2001, Page 12.

by the end of 2003. One of those priorities was “Modernization of admission to listing requirements and introduction of a clear distinction between admission to listing and trading”.¹⁵

The Commission presented in May 2001 as one of its first initiatives under FSAP a proposal for a new prospectus directive.¹⁶ The Commission reiterated in the Explanatory Memorandum that the need to upgrade the older prospectus directives had been listed as a top priority in FSAP as well as in the Risk Capital Action Plan. The Commission also referenced the report issued by FESCO (see above). In the proposal, the Commission proposed to abolish the mutual recognition model and replace it with a system based on notifications between competent authorities in the member states. The Commission recognized in its proposal that the new prospectus requirements would apply to all securities admitted to trading on a regulated market, and not – as the previous requirements – only in respect of admission to listing. The Commission gave the following justification for this approach:

“The wording “admission to trading” has been selected in order to avoid possible loopholes in the implementation of the Directive. “Admission to the official list” is not defined in Community legislation. In many cases it has been interpreted as admission to the official segment of the national stock exchange (in certain cases even if trading does not take place). This implies that disclosure requirements for other types of regulated markets (definition introduced by the ISD) are not fully harmonized at EU level and in several cases mutual recognition is not allowed. In other Member States the implementation of the ISD has led to the removal of the wording “official list”. They have introduced first tier, second tier markets etc. In any case, the ISD definition of regulated markets requires that rules should be provided for in order to ensure that certain requirements are met before the securities can be negotiated on the market (being the requirements provided for in the listing admission Directive 79/279/EEC when applicable or specific national requirements). The aim of the new Directive is to ensure, as far as initial disclosure requirements are concerned, that these are the requirements set forth in this Directive.”

One important principle in the proposal for a new prospectus directive was that the responsibility as competent authority should always rest with a public body, and not with a for-profit entity like a stock exchange. However, the Commission emphasized in the FAQ which it issued together with the proposal that it still should be within the powers of an exchange to determine the minimum listing standards in their respective rules, e.g. in respect of market capitalization, minimum turnover, size of the free float, years of existence of the company etc. According to the Commission, such

¹⁵ The Final Wise Men Report, Page 13.

requirements of high quality standards were expected to be an integral part of exchanges' branding as quality exchanges, and thus subject to competition.

The considerations expressed by the Commission in the context of the Prospectus Directive have subsequently been used as a basis for extending the scope in respect of other issuer-related rules set out in the 2001 Codified Listing Directive – where the scope was limited to securities subject to admission to official listing - to cover all securities that are admitted to trading on a regulated market.¹⁷ However, this has been done without further comments in respect of the distinction between “admission to listing” and “admission to trading”.

MiFID has replaced the Investment Services Directive (ISD) with full effect as of 1 November 2007. The concept of regulated markets is addressed also in MiFID. However, while the regulation in ISD pertaining to regulated markets was very general, MiFID introduces a more detailed regime intending at harmonizing the requirements for regulated markets across the Member States.

MiFID also sets out detailed minimum requirements pertaining to admission to trading on a regulated market, both in the Framework Directive on Level 1, as well as in the Level 2 Regulation.¹⁸

The one reference in MiFID to admission to official stock exchange listing is to be found in Recital 57, which reads as follows.

“The provisions of this Directive concerning the admission of instruments to trading under the rules enforced by the regulated market should be without prejudice to the application of Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities. A regulated market should not be prevented from applying more

¹⁶ Proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, COM(2001)280 final.

¹⁷ For example, the following directives covers all securities that are admitted to trading on a regulated market; the IFRS-regulation (Financial reporting), the Market Abuse Directive (Ad hoc –disclosure), the Prospectus Directive (Initial disclosure), the Transparency Directive (Regular information, disclosure of major holdings and procedures for disclosure), the Take Over Directive (Take over-requirements), amendments to the 4th and 7th Company Directives (Corporate Governance-disclosure based on the comply or explain-principle).

¹⁸ The Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive.

demanding requirements in respect of the issuers of securities or instruments which it is considering for admission to trading than are imposed pursuant to this Directive.

Hence, MiFID acknowledges the existence of the two notions, but does not provide guidance on how to draw the distinction between them. In fact, the Level 2 Regulation partly comingles the two concepts by acknowledging that the requirements set out in the Codified Listing Directive are accepted as a proxy for determining whether a transferable security is freely negotiable and capable of being traded in a fair, orderly and efficient manner for the purposes of admission to trading on a regulated market.¹⁹ Thus, the Level 2 Regulation implies that admission to official listing is a sufficient – but not necessary - condition for a security to be admitted to trading.²⁰

Finally, it is worth mentioning that MiFID recognizes that exchanges shall be entitled to operate alternative trading systems in parallel with their regulated markets. In such circumstances, all admission criteria for issuers and their securities will be determined nationally (either by the local regulator or by the exchange in its rules). The Community legislation will thus not apply on such issuers at all. The major European exchanges have during the recent years established such alternative markets with reference to that the Community legislation would be inappropriate for some growing small and mid size issuers with a need to raise risk capital or for third country issuers.²¹ Thus, while the scope of the EU-wide rules have been extended during recent years to comprise all securities traded on a regulated market, new market segments have evolved to keep flexibility on the local level.

4. Some justifications behind the remaining parts of the Admission Directive

There are predominantly four justifications behind the regime for official listing set out in the Codified Listing Directive.

1. The directive accepts *super equivalence* in the sense that individual member states are allowed to impose higher standards, because it only sets minimum standards in terms of listing. This

¹⁹ Cf. Article 35.5 in the Level 2 Regulation as well as Pages 10 and 11 in the Commissions Background Note to the Level 2 Regulation.

²⁰ Cf. MiFID, Article 40.1 Second Paragraph.

²¹ Examples of such markets are: AIM (London Stock Exchange), Alternext (Euronext), Entry Standard (Deutsche Börse), First North (OMX), the Alternative Capital Market (MAC; Borsa Italiana), the Mid Market (Wiener Börse), the Professional Securities Market (UK) and EuroMTF (Luxembourg Stock Exchange).

is a highly valid point in the circumstances where a public authority, like in the UK, has been designated as competent authority for both setting the standards and applying them. However, this justification is less valid in the circumstances where an exchange has been designated as competent authority for admission to listing, since MiFID explicitly recognizes that exchanges may set higher standards for admission to trading and thus achieve the same result. This is particularly the case, since there is no guidance at EU-level as to the differences between the two concepts.

2. A second argument that is sometimes raised is that admission to listing is a quality label, which adds value to the markets and their participants, including investors, and thus that it may enhance the competitiveness of the European financial markets. This argument is hard to understand if only the minimum requirements in the Codified Listing Directive are considered. It could reasonably be assumed that most regulated markets across Europe apply higher standards for admission to trading than the EU minimum requirements for admission to listing. Hence, it would only be in such circumstances where a particular market has endorsed super equivalent rules that it could be argued that admission to listing provides any “higher quality” to the markets and their investors. In fact, it could also be seen to be somewhat misleading to investors if, as suggested in some member states, it would be possible to provide access to official listing on an MTF-market. Thus, what this argument really means is that a regime for official listing creates a perception of higher quality, rather than adding higher quality in substance.

However, if admission to listing on a stock exchange and admission to trading on a regulated market were to be totally separated so that the admission to listing were to be decided upon by an independent listing authority (not being a regulated market), then the decision on admission to listing could be seen as a “rating” adding value from a credibility point of view. In such a model, the issuer could first seek admission to listing from a designated listing authority, and then decide the trading venue where it wanted its securities to be admitted to trading. It would then be possible to admit such securities to trading also on other regulated markets even without the consent of the issuer. However, it seems like this model would require an adjustment to the Codified Listing Directive, so that the competent authority under that directive would have to be independent from any regulated market. We also recognize that this would be highly controversial, since the role of exchanges as listing authority in some member states still is undisputed (even though the function as competent authority for e.g. prospectuses has or will be transferred to a public authority).

3. A third justification which can be combined with the second, is that admission to listing **imply the request** of the issuer while admission to trading can be performed by a regulated market operator **even without the consent** of the issuer, (eventually after a first admission to trading on request).

4. Finally, as a fourth justification, many institutions are limited through their investment policies to invest – fully or partially – in other instrument than those that are officially listed. In many cases, such policies are designed by the institution itself but the procedures to make changes to the policy might prove to be very complex for a variety of reasons. In our understanding, there might also be external factors, such as statutory requirements, that put constraints on the ability for certain institutions to amend their policies. To this end, a thorough pan-European analysis would be required if the notion of admission to listing were to be abolished, in order to understand properly whether or not this is a genuine concern.

5. MiFID implications

As indicated above, there is a close connection between the notion of admission to trading on a regulated market, and issuers obligations under various EU-directives. However, the implications of admission to trading go far beyond the scope of issuers obligations. MiFID also makes a direct link between certain requirements for intermediaries towards investors and the fact that a certain financial instrument is admitted to trading on a regulated market. For example, Art. 22.2 about client limit orders imposes certain transparency requirements on investment firms for trades in instruments that are admitted to trading on a regulated market and which can not immediately be crossed internally by the firm. Another example is the execution-only provision in Art. 19.6, which only recognizes simplified requirements in respect of shares “admitted to trading on a regulated market or in an equivalent third country market”²². Equivalent references are also made for example in the pre- and post trade transparency requirements set out in Art. 27 and 28, which only deals with instruments that are admitted to trading on a regulated market.

If the assumption is that admission to listing should reflect some sort of “higher standard”, it could be disputed why MiFID differentiates between admission to listing and admission to trading.

²² Such services are also accepted for trading in some other non-complex financial instruments, such as money market instruments, bonds and UCITS, in so far as such instrument do not embed a derivative component.

Another complexity might arise in relation to markets established in third countries, because the distinction between trading and listing might not be as clear as in the EU-jurisdictions. In fact, also within EU the many references in MiFID to admission to trading might give cause to ambiguity, since - in some jurisdictions – admission to listing is feasible also in circumstances where the instrument is not also admitted to trading. One such example is Luxemburg, where such separation between the two notions has been recognized by the regulator during the transposition of MiFID.

Consequently, the fact that MiFID does not recognize the notion of admission to listing other than by reference in one of the recitals in effect means that many of the investor protection rules set out in MiFID do not apply at all for instruments that are admitted to listing without simultaneously being admitted to trading on a regulated market. In fact, this observation is also valid for other directives such as the Prospectus Directive, the Market Abuse Directive and the Transparency Directive, which effectively have resulted in that requirements that previously applied in respect of officially listed instruments have been abolished for such instruments (unless they are admitted to trading on a regulated market).

6. Conclusions and recommendations

The introduction of the concept of admission to listing in 1979 was the first step towards further regulatory convergence across EU Member States. The admission requirements were minimum requirements, and it was envisaged that the requirements should be more closely aligned in the longer perspective. The over all objective was to facilitate for issuers to reach investors across Europe. The concept of admission to listing added value not only on its own merits but also due to the fact that it in combination with e.g. the regime for mutual recognition of listing particulars and other EU-rules pertaining to disclosure standards for issuers provided a comprehensive legal framework for listed companies in Europe. It was also recognized in many member states that exchanges should carry out the function of being responsible for monitoring compliance with all these rules.

The developments in respect of exchanges and other trading venues, notably demutualization and enhanced competition, resulted in a change in position in terms of responsibility for the supervision. The change that took place due to FSAP and the measure under it transferred most of the supervisory powers from exchanges to the supervisory authorities in the member states. That has evidently been the case for prospectuses as well as for ad hoc information (MAD) and regular information (the Transparency Directive). The only part that is left unaffected in the Codified Listing Directive is the regime for admission to official listing.

The measures adopted under FSAP have also resulted in that the scope of EU rules for example on financial reporting, prospectuses, ad hoc and regular information from issuers etc. have become wider. Previously, such EU rules only applied on the official segment at European exchanges, whereas they now apply on all trading on a regulated market. This is clearly one of the drivers behind the recent trend across European Exchanges to institute alternative markets under the MTF-concept set out in MiFID.

The Committee of Wise Men raised in its reports the importance of making a distinction between admission to listing and to trading, and both the Council of Ministers and the European Parliament have endorsed the report. MiFID recognizes that both notions coexist and that they to some extent overlap.

The fact that the Codified Listing Directive was adopted prior to FSAP means that it is not fully clear how the regime for admission to official stock exchange listing relate to similar features in MiFID. Of particular importance is therefore to bring clarity on how the notions of admission to official listing on a stock exchange, admission to trading on a regulated market and trading on an MTF relate to each other. In our experience, the understanding of such relations differs between most member states, which during the course of transposition of MiFID have resulted in different national approaches. The goals set out under the Lisbon agenda to create an environment for more efficient and competitive European financial markets therefore run the risk of being negatively affected unless some guidance is provided on these matters.

A first ambiguity is whether or not the Codified Listing Directive requires member states to apply a regime for official listing or not. As mentioned above, the importance of the concept vary from member state to member state, where the extremes are that, in some member states, official listing is deemed to be a highly important feature, whereas it in some other member states is perceived to be of marginal importance. There is no evidence of a market failure justifying a need to accommodate one single EU wide approach by way of regulation. The efficiency of the markets would instead be better served if it were to be left to individual member states to determine whether or not to recognize the notion of official listing on markets in their respective jurisdictions. Thus, this would be an issue about competition across EU markets, which certainly would provide added flexibility and also promote enhanced efficiency to the benefit of all market participants. It appears that admission to listing should not be limited to stock exchanges but apply equally on all regulated markets: a formal clarification in the codified directive, though not urgent, might be useful.

A connected issue is the determination of the competent authority under the Codified Listing Directive. Clearly, the tendency under the FSAP-measures has been to designate public authorities only as competent authorities. However, the Codified Listing Directive recognizes that also national stock exchanges can be assigned as competent authorities under that directive. We conclude that both regimes are used in EU member states as of today. There is in our opinion no need to recommend that this should be changed in any way.

A highly complex and controversial issue is how the distinction between admission to official listing (the Codified Listing Directive) and admission to trading (MiFID) should be made. Even though this was highlighted in the Wise Men Report, no clarity has been provided as of today, despite of the fact that MiFID recognizes that both notions still apply. It should be recognized that both notions coexist, and that there are overlaps in some respects. However, it should also be recognized that there are some differences in terms of the objectives behind the two concepts. The rationale behind admission to trading is primarily to facilitate that a particular financial instrument is appropriate for trading purposes, for example in terms of liquidity and other circumstances which would support orderly trading and market integrity. Official listing has to some extent a higher objective than only to facilitate a proper trading environment. The intent behind official listing is also to add quality not only to the financial instrument but also on the issuer as such. For example, in some markets there are regimes for official listing without intentions to provide a trading facility for the instruments concerned. In our opinion, it should thus be recognized that both concepts may coexist (as is already expressed in the recitals in MiFID), that they have slightly different objectives and that official listing may be provided without a requirement that the financial instrument (or security, as is the term used in the Codified Listing Directive) concerned at the same time will also be subject to admission to trading on a regulated market or even subject to continuous trading on another trading venue.