ESMA - *Consultation on the functioning of the regime for SME Growth Markets under the Markets in Financial Instruments Directive and on the amendments to the Market Abuse Regulation for the promotion of the use of SME Growth Markets.*

1. Introductory remarks

Spanish CNMV Advisory Committee (hereinafter "the Committee") welcomes the public consultation on this *ESMA - Consultation on the functioning of the regime for SME Growth Markets under the Markets in Financial Instruments Directive and on the amendments to the Market Abuse Regulation for the promotion of the use of SME Growth Markets*.

We very much welcome that ESMA consults on the state of play of the SME Growth Markets (SME GMs) regime in the EU and seeks stakeholders' views on the amendments proposed to the existing regime. We also appreciate the possibility to give input and proposals on suggested initiatives to improve the attractiveness of the SME GMs regime and on ESMA's proposal for the draft RTS on liquidity contracts and the draft ITS specifying the format of the insider list.

SME GM is a category of multilateral trading facility (MTF) created under MiFID II/MiFIR to facilitate access to capital for SMEs. In May 2018, the Commission proposed to adopt more proportionate rules for SME GMs. The initiative included amendments to the Market Abuse and Prospectus Regulation and a MiFID II delegated regulation.

The new rules aim to:

- reduce the administrative burden and high compliance costs faced by SME GMs issuers while ensuring a high level of market integrity and investor protection
- foster the liquidity of publicly-listed SME shares to make these markets more attractive for investors, issuers and intermediaries
- facilitate the registration of multilateral trading facilities as SME GMs.

These rules were agreed by the co-legislator in 2019 and apply as of 31st December 2019. However, Article 1 (amending MAR) shall apply from 1st January 2021.

We consider that these changes are a step in the right direction, but that more tangible benefits should be created to promote the use of SME GMs. The revision of the prospectus rules was a very important step to reduce costs and burdens for companies whilst improving their access to financing. We especially welcome the amendment that allows issuers listed on SME GM for at least two years who intend to transfer quotations to the Regulated Market, to only have to produce a simplified prospectus. This will be very beneficial for smaller companies in earlier stages of growth, that are more dependent on local investors for financing.

While the intention behind creating SME GMs was to attract smaller companies to listing, the fact is that there is no real increased interest from issuers to list on an SME GM compared to MTFs, since the difference in requirements is limited, making it hard to make the distinction and promote SME GMs. Therefore, there should be further benefits for the SME GM label. However, the most important is to find a balance between maintaining a liquid and trusted market with reduced burdens for issuers and adequate levels of investor protection. SME GMs should retain a certain level of flexibility whilst ensuring efficiency and integrity.

A suggestion would be to pass specific European regulations regarding financial and economic information to be publicly disseminated by companies receiving funds from PE/VC firms, specially, when financing includes the participation from Public entities, like national development banks. Transparency is a core value in the financing of companies and is asked by Market regulations to protect investors and other stakeholders interest.

2. Overview of the current state of play of the SME GMs regime

Q1: Do you have any views on why the SME activity in bonds is limited? If so, do you see any potential improvements in the regime which could create an incentive to develop those markets?

In our view, there are a number of reasons why SMEs activity in bonds may be limited.

Firstly, SMEs generally have smaller size financing needs compared with bigger corporates, and therefore their capacity to gain financing from the banking channels is easier, faster and cheaper. They are closely connected with bank managers and do not normally know the capital market dynamics.

When this is combined with SMEs' fear of the cost of a capital market transaction and the post listing publicity that it brings, it is often the case that bank financing is seen as a much preferable option. If an SME can secure bank financing, they only must disclose their books to the bank. For smaller entities, who are not so used to public transparency and reporting, this element is extremely important.

It should also be highlighted that continuing obligations that apply post-listing on the capital market side are very intrusive and costly. For example, the requirement to publish regular market announcements and disclose financial statements are often disincentives to issue bonds and are often a key reason why issuers choose not to list on a public market. The more regulation that is applied to them (both with the initial listing and on periodical obligations), the more cumbersome it is to issue a bond and potentially makes bonds less competitive from a cost perspective versus bank financing. In particular, the Market Abuse Regulation regime is particularly onerous and cumbersome for SMEs.

SMEs often have few employees which makes it even more challenging to meet the regulatory requirements, and alleviations remain quite poor for the SME GM from an issuer's perspective. It is often considered that the legal costs in preparing the bond documentation and carrying out the required due diligence for listing on a public market are prohibitive. Contractual documentation in private placements is standardised and perceived as much more cost effective.

On the other side, investors require a minimum investment capacity and ticket size that compensate the necessarily analysis, due diligences, etc… they have to perform to include any company's assets in their portfolios. As SMEs, due to their reduced balance sheet, structure and financing needs, have low issuing capacity, normally institutional investors do not analyze and discharge this type of business directly, as they know they will not permit their minimum buying standards.

We would have the following proposals to improve activity on SME GMs for debt trading.

The MAR provisions, in general, are deemed to be onerous for issuers of bonds as they are not sufficiently tailored to the characteristics of debt securities. We, therefore, urge

ESMA and the European Commission to undertake further analysis to make this regime more appropriate for fixed income.

We support the proposal to include a cumulative issuance criterion not exceeding EUR 50 million over a period of 12 months. However, it is difficult for a market operator to verify if an issuer of bonds is or is not an SME because they do not have (full) access to the nominal value of the debt issuances of an issuer on all trading venues across the EU so we suggest this should be undertaken by ESMA.

As a more general point on SMEs, if there were more Arranging Banks for SMEs, there would be more competition between them and better pricing for the placement.

In addition, potentially there could be some tax incentives created to stimulate SME activity.

To increase the demand over this type of medium and small companies' issuances, we would suggest the promotion of specialized investment funds addressed to qualified investors that could benefit from a more flexible regime on their mark to market and daily liquidity regulatory obligations. Because to their low issue size, many investors in this type of securities would prefer to follow a buy and hold strategy up to maturity, they find difficult to fix these SME's bonds in their traditional funds that make mandatory to give daily liquidity to investors and, therefore, having a mark to market price every day.

One final technical point to note regarding SME GMs for fixed income is that article 90(2) B) of Regulation 2017/565 should not refer to "OTF registered as a SME Growth Market" (given that the label is reserved for MTFs).

Q2: In your view, how could the visibility of SME GMs be further developed, e.g. to attract the issuers from other members states than the country of the trading venue?

As mentioned in the introductory remarks, we appreciate the amendments to the Market Abuse and Prospectus Regulation and the MiFID II Delegated Regulation that were recently adopted to facilitate access to capital for SMEs by introducing more proportionate rules for SME GMs. In particular, regarding prospectus rules, we especially welcome the amendment that allows issuers listed on SME GMs for at least two years who intend to transfer quotations to the Regulated Market, to only have to produce a simplified prospectus. This will be very beneficial for smaller companies in earlier stages of growth that are more dependent on local investors for financing.

However, we therefore consider that there should be further benefits for the SME GM label since numbers indicate that there is no real increased interest from issuers to list on an SME GM compared to MTFs. The difference in requirements is limited, making it hard to make the distinction and promote SME GMs. It is necessary to further enhance the attractiveness of capital market financing in certified growth markets for small and medium-sized enterprises. Therefore, it is appropriate to further simplify access to the capital market for SMEs and, as a result, to make technical adjustments to the European regulatory framework. We consider appropriate to reduce administrative and legal burdens as well as to reduce costs for the issuers and to increase the liquidity of equity instruments in SME GMs without endangering market integrity or investor protection.

However, the alleviations introduced in the recent legislation remain behind what we believe is necessary to strengthen the attractiveness of the SME GMs and more significant alleviations are required to achieve the intended effects.

For example, regarding Market Abuse Regulation (MAR), it obliges all issuers of financial instruments to notify the market of inside information. A more proportionate approach may be needed going forward as SMEs may be disincentivized by the comparatively high regulatory burden. Therefore, MAR should be further adjusted to allow for greater differentiation for SME GMs, including:

- the disclosure requirements, notably around information dissemination;
- the duty to react on rumors related to inside information;
- the level of detail of insider lists;
- requirements in relation to managers' transaction reporting;
- the interpretation of the necessary speed around an ad hoc announcement, depending on the actual announcement; and
- the very high level of sanctions.

It is also essential to differentiate between trading prohibitions and disclosure requirements.

In addition, the requirement under Article 33.3 of MIFID is not very clear where it states that member states shall ensure that MTFs are subject to effective rules, systems and procedures which ensure that the following is complied with, in particular in relation to point (e):

> *"e) issuers on the market as defined in point (21) of Article 3(1) of Regulation (EU) No 596/2014, persons discharging managerial responsibilities as defined in point (25) of Article 3(1) of Regulation (EU) No 596/2014 and persons closely associated with them as defined in point (26) of Article 3(1) of Regulation (EU) No 596/2014 comply with relevant requirements applicable to them under Regulation (EU) No 596/2014"*.

We consider that this can be misunderstood, as the surveillance of market abuse is a direct competence of the national regulators and not the operator of the MTF; for an MTF it is impossible to have systems and procedures which literally "ensure" the compliance of MAR by issuers.

On the Prospectus area, as previously referred, we welcome the provision to allow an issuer whose securities are admitted to trading on an SME GM continuously for at least the last 18 months to benefit from a simplified prospectus when raising further issuances, but we suggest to clarify that this is calculated as of when the issuer was admitted to trading on the MTF (even without SME GM label at that time) rather than from the moment that the MTF obtains the SME GM label. This will ensure issuers that meet this criterion can benefit from this provision as soon as possible.

3. Criteria for the percentage of issuers that should qualify as SMEs at the time of MTF registration as SME GM (Article 33(3)(a) of MiFID II)

Q3: In your view does the 50% threshold set in Article 33(3)(a) of MIFID II remain appropriate for the time being as a criterion for an MTF to qualify as an SME GM? Do you think that a medium-term increase of the threshold and the creation of a more specialized SME GMs regime would be appropriate?

Yes, we believe the 50% threshold as set out in Article 33(3)(a) of MiFID II remains appropriate. We do not see the need for this threshold to increase in the medium-term

as we do not believe the threshold is an issue. In addition, we do not support the idea of creating a more specialized SME GM regime. Instead, we think further work is required to be undertaken with respect to the current SME GM regime and the specific alleviations that apply so that it becomes a more attractive proposition for SME issuers.

For example, we would support further alleviations for SME GMs by raising the threshold for companies qualifying from an average market capitalization of EUR 200 million to EUR 500 million. The current qualifying threshold for SMEs of EUR 200 million is too low as it only takes into consideration small enterprises and not mid-caps. This would strengthen SME GM's ability to attract more companies, with the potential to increase liquidity on these markets.

Q4: Do you consider that a further alignment of the definitions of an SME in different pieces of regulation with the MiFID II definition of SME would be helpful? Can you provide specifics of where alignment would be needed?

A consistent approach to the SME definition within EU legislation would be welcome. There are different definitions of an SME in EU legislation:

- Mifid II, Article 4: *'small and medium-sized enterprises' for the purposes of this Directive, means companies that had an average market capitalisation of less than EUR 200 000 000 on the basis of end-year quotes for the previous three calendar years;*

- Prospectus Regulation, Article 2: *'small and medium-sized enterprises' or 'SMEs' means any of the following:*

    i. *companies, which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000;*
    ii. *small and medium-sized enterprises as defined in point (13) of Article 4(1) of Directive 2014/65/EU.*

- Regulation on European long-term investment funds, Article 11: A qualifying portfolio undertaking shall be a portfolio undertaking other than a collective investment undertaking which:

    i. *is not admitted to trading on a regulated market or on a multilateral trading facility; or*
    ii. *is admitted to trading on a regulated market or on a multilateral trading facility and at the same time has a market capitalisation of no more than EUR 500 000 000;*

We consider Mifid II definition should be common criterion, although we would support further alleviations for SME GMs by raising the threshold for companies qualifying from an average market capitalization of EUR 200 million to EUR 500 million. The current qualifying threshold for SMEs of EUR 200m is too low as it only takes into consideration small enterprises and not mid-caps. This would help contribute to a strengthening of SME GM's ability to attract more companies, with the potential to increase liquidity on these markets.

4. Criteria for initial and ongoing admission to trading of financial instruments of issuers on the market (Article 33(3)(b) of MiFID II)

Q5: Which are your views on the regime applicable to SME GMs regarding the initial and ongoing admission to trading of financial instruments? Are there requirements which should be specified?

We do not consider that the SME GM regime should be amended to introduce further harmonised requirements for initial and ongoing admission to trading. Markets should retain some flexibility to apply rules suited to local market conditions. Harmonisation could result in increased costs for issuers and the intended proportionality SME GMs seek to provide for smaller issuers would suffer.
It is important to consider that the local dimension, especially for smaller markets, is essential to cater for the specific needs of companies which are mostly SMEs.

Q6: Do you think it could be beneficial to harmonise accounting standards used by issuers listed on SME GMs with the aim of increasing cross-border investment?

Should accounting standards for issuers on SME GMs be harmonised, it is important that this is done in a proportionate manner to not disincentivise listing and that it remains voluntary for issuers to opt in to use this standard.

We consider it is important to maintain flexibility in this area, so that should issuers seek cross-border listings, they can choose to adhere to the more harmonised standards; however, many SME issuers will always remain local and should still be allowed to apply the local national accounting standards if they wish to do so.

5. Criteria for the disclosure of appropriate information to the public (Article 33(3)(c), (d) and (f) of MiFID II)

Q7: Should ESMA propose to create homogeneous admission requirements for issuers admitted to trading on SME GMs and to be disclosed to investors? Should such requirements be tailored depending on the size of the issuer (e.g. providing less burdensome requirements for Micro-SMEs)?

We do not consider that the SME GM regime should be amended to create homogenous admission requirements for trading. Markets should retain some flexibility to apply rules suited to local market conditions. Should these requirements be harmonised, the intended proportionality SME GMs seek to provide for smaller issuers would suffer and could increase costs for issuers.

As mentioned in Q6, local dimension, especially for smaller markets, is essential to cater for the specific needs of companies which are mostly SMEs. Moreover, regional markets across Europe host a larger share of IPOs for smaller companies as these companies are likely to be local and seek investors more familiar with their business.

Regarding the proposal to tailor the requirements for micro-SMEs, we consider that this could over-complicate the current regime and that the focus should be on applying the

most appropriate alleviations to make the current regime a more attractive one for SME issuers.

Q8: Should ESMA suggest an amendment requiring an MTF registering as SME GM to make publicly available financial reports concerning the issuers admitted to trading on the SME GM up to one year before registration?

No, we consider ESMA should not suggest an amendment requiring an MTF registering as SME GM to make publicly available financial reports concerning the issuers admitted to trading on the SME GM up to one year before registration.

It should be noted that financial reports covering two years before, when available, is already included in the listing requirements, the prospectus or the registration document requested by most of the SME GM.

A more general point in relation to registering MTFs is the different experiences in terms of registering that existing SME GMs had. While some faced little difficulties, others suffered a quite protracted process and indicated that understanding certain requirements was difficult, for instance regarding the possibility to classify certain segments of an MTF as an SME GM, resulting in different interpretations and difficulties in implementation.

Our suggestion to facilitate registration would be to have a simplified process in place in cases where the entity applying for authorisation to register an SME GM is already operating a Regulated Market and/or and MTF. In those cases, a notification process to the competent authority should be sufficient.

Q9: Is there any other aspect of the SME GMs regime as envisaged under MiFID II that you think should be revisited? Would you consider it useful to make the periodic financial information under Article 33(3)(d) available in a more standardised format?

We do not consider that proposals for making periodic financial information available in a more standardised format would favour listing of SMEs. We share ESMA's assessment that this could represent a burden for smaller SMEs.

We support measures facilitating sharing of company information, provision of information to investors, and that give companies visibility on a European basis. By facilitating access to information about companies in other Member States or regions, more cross-border investments could potentially be encouraged.

In the context of recent policy proposals on the potential creation of a European harmonised data repository for company reporting, a so-called EU Single Access Point, we consider that such an Access Point should include information disclosed by companies listed on Regulated Markets and SME GMs. The Single Access Point would facilitate access and availability of data about companies and as such serve as a basis for investors' assessments, potentially informing their decisions. SMEs would benefit from pooling the information they disclose at a one-stop-shop. The SMEs' visibility would be increased and barriers to access capital reduced, overall ensuring and increasing their competitiveness. A Single Access Point could also serve as a starting point for the establishment of a European database for SME-research.

To increase integration but keep the project efficient and manageable in terms of the administrative burden of data processing, the scope should be limited to disclosures stemming from the Transparency Directive for issuers listed on Regulated Markets or, in the case of issuers on SME GMs, the relevant disclosure documentation required. Should it extend to other requirements, it is important to consider that, depending on how it is implemented, this may introduce considerable extra costs for listed companies compared to non-listed ones as many reporting obligations do not apply to private companies and this would be a concern.

It will be important to ensure that any reporting requirement targets information that is useful. This is key to ensure there is an added value and that new reporting requirements do not simply come on top of currently existing ones but rather replace requirements currently in place.

In parallel to establishing a Single Access Point, the Commission should take this opportunity to clarify certain disclosure requirements. The costs linked to a lack of clarity in the regulation should not be underestimated as risk-averse issuers (in particular SMEs) will consider the regulatory risks in choosing their financing options.

While some harmonisation of information may be required, this should be done in a proportional manner that does not negatively impact issuers, which may lack resources to report according to certain standards. A differentiation between SME GM and Regulated Market issuers will be necessary, where, while they are both required to disclose similar information, they are still subject to different requirements. We would not support issuers on SME GMs being subject to the same requirements as issuers on Regulated Markets under the Transparency Directive. The approach therefore needs to be tailored to the different markets.

In terms of approach, we suggest that a federal model would be best whereby ESMA maintains the central database, but the information is still filed locally and flows through to the ESMA database. This way ESMA can set the requirements for reporting to become more standardised so that the data can easily flow through to the central database, while ensuring the local NCAs continue to be involved which is important for the local ecosystem. The responsibility for ensuring the new requirements are complied with should be made clear.

In view of fostering supervisory convergence and genuinely integrated capital markets, we consider that ESMA should be entrusted with the supervision and maintenance of such a database. However, supervision of reporting requirements should be performed by the respective NCAs. Different or even conflicting supervisory practices overall constitute barriers to cross-border operations and do not accelerate market integration.

6. Other measures to promote the growth of the SME GMs regime in the EU

Q10: Do you think that in the medium term a two-tier SME regime with additional alleviations for micro-SMEs could incentivise such issuers to seek funding from capital markets? If so, which type of alleviations could be envisaged for micro-SMEs?

Instead of trying to create a two-tier SME regime, we suggest the focus should be on creating one regime with the most appropriate alleviations for all SMEs so that the current regime can be developed into a more attractive proposition for SME issuers.

7. Other possible amendments to the SME GMs regime

Q11: Do you think that requiring SME GMs to have in place mandatory liquidity provision schemes, designed in the spirit of what is envisaged in Article 48(2) and (3) of MiFID II, could alleviate costs for SMEs issuers and provide them an incentive to go public? Do you think that on balance such provision would increase costs for MTFs in a way which exceeds potential benefits, resulting in reducing the incentive to register as an SME GM?

While we fully support the objective of increasing liquidity in trading in SME securities, we do not believe there should be a mandatory liquidity provision scheme that is required to be implemented by the market operator. We believe it should be for the operator of the SME GM to determine the most appropriate scheme for its market.

Mandatory liquidity provision would mean an extra and significant cost for the MTF. This may also represent a serious difficulty for countries with no tradition of market making nor firms specialised in it. Alternatively, the issuer liquidity contract is an adequate tool to improve liquidity.

In addition, we welcome the new regime for issuer liquidity contracts on SME Growth Markets introduced in the Market Abuse Regulation as this is another element which should contribute to supporting and increasing liquidity for SME trading.

Q12: Do you think the requirement in Article 33(7) of MiFID II regarding the issuer non objection in case of instruments already admitted to trading on SME Growth Markets to be admitted to trading on another SME growth market should be extended to any trading venue? Should a specific time frame for non-objection be specified? If so which one?

We support the proposal to extend the 'issuer non-objection requirement for admission to trading' of SMEs to Regulated Markets and MTFs.

MiFID created unintended consequences for SMEs in terms of market fragmentation and fragmented liquidity. To address this, an SME issuer asking for the admission of its shares to the licensed public market should have the right to choose where to be traded to avoid fragmentation of already low liquidity, i.e. to limit the trading of its stock outside its primary market.

Q13: Do you think that it should be specified that obligations relating to corporate governance or initial, ongoing or ad hoc disclosure should still hold in case of admission to trading in multiple jurisdiction?

Yes, we agree that this should be specified.

Q14: How do you think the availability of research on SMEs could be increased?

We consider that measures should be taken to improve access to equity research on SMEs.

Pre-MiFID II, research was supplied as part of a bundled service, paid by execution fees. Research post-MiFID II is required to be unbundled and priced separately from execution

of trading of financial instruments. Authorising the bundling of SME research would be the fastest way to increase production and distribution of independent reports and may have the biggest effect on the liquidity of SMEs.

Furthermore, we propose three ideas to improve access to equity research on SMEs:

- Launching a Pan-European program to cover the costs of research coverage.
- Establish user-friendly platforms for analysts to share their reports on.
- Amend unbundling rules to allow brokers to send SME-research reports to fund managers.

A growing number of SMEs are paying independent research providers to write research and take the initiative in approaching investors directly. However, this is challenging due to potential conflict of interests and a lack of recognition and coverage limitations due to budget constraints. Some markets have launched programs to cover the costs of SME research coverage and the first results suggest that it can create additional liquidity for listed SMEs. A Pan-European program should be launched to cover the costs of research coverage based on the lessons learnt from these pilot programs.

A possible additional way to improve the liquidity of SME shares would be to establish user-friendly platforms for analysts to share their reports on. Retail investors should also have access to such platforms.

As a result of unbundling rules, fund managers are prevented from accepting research on small companies provided by brokers for free. The rules should be amended to allow brokers to send SME-research reports to fund managers without having to establish a research contract with them. In doing so, a threshold could be established for what should be considered an SME.

8. RTS on liquidity contracts

Q15: Do you agree with the proposed limits on resources - which are mainly based on the Points for Convergence - or would you propose different ones? If so, please provide a justification.

The limits on the resources that issuers may make available to a liquidity provider are stated in Article 5 of the draft RTS on liquidity contracts and are based on the Points of Convergence document that ESMA published in 2017. The Points of Convergence establish that the maximum limit for illiquid securities can be 500% of the average volume traded in a certain period, or 1% of the capitalisation the day before the signing of the contract, both with the limit of EUR 1 million. However, the document under consultation (in the draft contract proposal) does not consider the second possibility (1% of capitalisation) but only the first (500% of the average daily volume). In our opinion, the draft contract proposal should also incorporate the possibility of 1% of capitalisation. We agree with the rest of the limits set out in Article 5 of the draft RTS.

Q16: Do you agree with the proposed limits on volumes – which are based on the Points for Convergence – or would you propose different ones? If so, please provide a justification of the alternative proposed parameters.

Yes, we consider that the proposed limits are adequate.

Q17: Do you think that specific conditions should be added as regards trading during periodic auctions? For SME GMs following different trading protocols, are there criteria or safeguards which should be considered in order to make sure that the liquidity contract does not result in a manipulative impact on the shares' price?

Regarding the behavior of liquidity providers during auction periods, we believe that a distinction should be made between liquid and illiquid securities. Same volume limits cannot apply for both. For very illiquid securities it may be that the amount that the liquidity provider puts up for in the auction represents most of the volume, even 100% on one of the sides. We, therefore, suggest setting a volume limit (of 20%, for example) for liquid shares and a higher limit, 50% or even no limit for illiquid shares.

Q18: Do you agree with ESMA's view that the liquidity contract may cover large orders only in limited circumstances as described in paragraph 118?

We fully agree that block trades can benefit from the safe port provided by the liquidity contract, given that they are made through the market and comply with the limits established by the trading rules for this type of transactions.

9. ITS on insider lists

Q19: Do you agree with the proposal described above regarding the template for the insider list to be submitted by issuers on SME GMs? If not, please elaborate.

We support the proposed approach by ESMA for reducing the information required on insider lists.

MAR obliges all issuers of financial instruments to notify the market of inside information. A more proportionate approach in terms of the level of detail of insider lists may be needed going forward as SMEs may be disincentivised by the comparatively high regulatory burden.