RegCORE Client Alert

European Commission proposes EU-wide "Listing Act" to simplify company listings and capital raises

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Capital Markets Union

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QuickTake

On 7 December 2022, the European Commission (**EC**) published a package of proposals[1] to further develop traditional i.e., non-cryptoasset-based capital markets in the EU and to make these more attractive for both prospective issuers and investors. These measures form part of the EU's overarching efforts to finalise the Capital Markets Union (**CMU**). The CMU aims, by way of legislative and institutional reforms, to create a single market for capital across the EU by strengthening EU capital markets for "traditional" equity and non-equity securities. One of the CMU's central objectives[2] is to facilitate better access to public capital markets-based as opposed to reliance on banking sector financing options for EU companies, including small-to-medium sized enterprises (**SMEs**).

The EC has acknowledged that the public listing process for equity securities is burdensome and expensive for EU companies, particularly SMEs. Following a targeted consultation[3], the EC has suggested a package of measures (collectively referred to by the EC as the **Listing Act**) to streamline listing and post-listing criteria to attract more EU enterprises to EU public markets and to enhance SMEs' access to financing. The Listing Act aims to make pre- and post-IPO procedures for different sized companies more proportional. The suggested changes aim to improve transparency, investor protection, and market integrity. Moreover, the Listing Act reforms aim to reduce legal fragmentation inhibiting companies' ability to issue dual-class shares. As discussed in further detail in this Client Alert, the Listing Act package published by the EC includes three distinct legislative instruments, each of which contain a number of targeted amendments to facilitate wide-reaching reforms. These new instruments include:

1. A legislative proposal for an EU Regulation containing amendments to the **Prospectus Regulation** ((EU) 2017/1129), the Markets in Financial Instruments Regulation (600/2014) (**MiFIR**), and the Market

[1] See here and here as well as a Press Release (available here), a Factsheet (available here) and Q&A (available here). An Impact Assessment Report (available here) and Executive Summary (available here) are also relevant reading.
[2] In particular, Action Point 2 of the EC's revised CMU Action Plan released in 2022 which calls for greater access to public markets.
[3] Which ran from 19 November 2021 to 25 February 2022. A further feedback period on the Listing Act's proposals will end on 7 February 2023. Feedback collected by the European Commission during this period will be summarised and submitted to European Parliament and Council.

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Abuse Regulation (596/2014) (**MAR**) aimed at making public capital markets in the EU more appealing to companies and facilitating SMEs' access to capital (COM(2022) 762);[4]

2. A legislative proposal for an EU Directive on multiple-vote share structures in firms seeking to list their shares on a SME growth market (COM(2022)761). This Directive establishes common regulations for multiple-vote share structures in companies that intend to list their shares on a SME growth market in one or more member countries and do not already have shares listed on any trading venue;[5] and

3. A legislative proposal for an EU Directive (COM(2022)760) incorporating adjustments to the MiFID II Directive (2014/65/EU) (**MiFID II**) and repeal directive 2001/34/EC (**Listing Directive**) aimed at making public capital markets in the EU more attractive for companies and facilitating access to capital for SMEs.[6]

The European Parliament and Council will adopt the Listing Act's proposals using the standard legislative procedure (previously called "co-decision"), which may take several months to several years. A first reading and Council deliberations took place on 8 and 12 December 2022. This Client Alert should be read with further updates on this development as may be published from time to time on PwC Legal's EU RegCORE website.

New Regulation to amend the Prospectus Regulation, MAR and MiFIR

This proposed Regulation's overarching goal is to lower compliance and regulatory expenses for both listed companies and those looking to list. This is to be achieved through specific amendments to the above-mentioned existing instruments that form the cornerstone of the EU's capital markets legislative and regulatory regime.

Article 1 – Amendments to the Prospectus Regulation

The goal of the proposed changes to the EU's Prospectus Regulation is to make the existing regime simpler and less expensive for issuers to produce a prospectus. In this section, references to articles refer to the articles of the EU's Prospectus Regulation. The proposed amendments therefore:

- **Extend the exemptions for secondary issuances of fungible securities that can trade alongside securities that are admitted to trading on a Regulated Market[7] or a SME Growth Market[8] (importantly a Regulated Market is not permitted to apply for registration as a SME Growth Market – unlike an MTF which may do so).** The provisions of Articles 1(4) and (5) are changed to:
    - ensure that the prospectus exemption for secondary issuances in Article 1(5)(a) (for the admission to trading on a Regulated Market of securities fungible with securities already admitted to trading on the same Regulated Market, provided that the newly admitted securities represent, over a period of 12 months, less than 20% of the number of securities already admitted to trading on the same Regulated Market) applies to both the offer of securities to the public and the admission to trading of the securities;
    - extend the Article 1(5)(a) exemption to companies that have had securities traded on an SME Growth Market continuously for at least the last 18 months before the offer or the admission to trading of the concerned securities;

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[4] The legislative proposal's interinstitutional reference number is 2022/0411(COD) and is available here along with annexes here.
[5] The legislative proposal's interinstitutional reference number is 2022/0406(COD) and is available here.
[6] The legislative proposal's interinstitutional reference number is 2022/0405(COD) and is available here.

[7] In the EU, Regulated Markets are the main markets on which investment exchanges, performing the function of a traditional stock exchange, admit new issues of shares to trading and trade shares. Regulated Markets must be operated by a market operator. In a formal sense, a Regulated Market is defined under MiFID II/MiFIR as a multilateral system that is run or controlled by a market operator and that brings together or enables the bringing together of various third-party purchasing and selling interests in financial instruments. Regulated Markets can be distinguished from multilateral trading facilities (**MTF**s) and Organised Trading Facilities (**OTF**s). Similar to Multilateral Trading Facilities (**MTF**s), Regulated Markets offer a type of organised trading functionality. Operating a Regulated Market, unlike operating a MTF is neither an investment activity nor an investment service under MiFID II/MiFIR. However, the criteria for management eligibility and operational setup are the same as those that are imposed on or prompted by investment activity. Much like a Regulated Market, MTF transactions cannot be carried out at the operator's discretion. Unlike OTFs, neither Regulated Markets nor MTFs may trade on own account and against own capital.

[8] A SME Growth Market, as defined in Article 4(1)(12) MiFID II refers to EU multilateral trading facilities that are registered as an SME growth market in accordance with Article 33 of the MiFID II Directive. The aim of the designation is to facilitate access to capital for SMEs, in part by reducing some aspects of the regulatory burden that otherwise applies to issuers with shares admitted to trading on EU MTFs without the designation or on EU Regulated Markets. The focus of EU SME Growth Market regulation is on primary market services and facilitating SME issuers' access to capital rather than secondary market services, although the attractiveness of these markets to investors is considered important as well. EU MTFs can register as an SME Growth Market if it meets certain conditions (Art 33 MiFID II as supplemented by Commission Delegated Regulation (EU) 2017/565 (consolidated version), as further amended by Delegated Regulation (EU) 2019/1011. The conditions for registration as an EU SME Growth Market include the requirement that at least 50% of the issuers whose financial instruments are admitted to trading on the EU MTF are SMEs at the time when the EU MTF is registered as an EU SME Growth Market and in subsequent calendar years.

- increase the Article 1(5)(a) threshold from 20% to 40%;[9] and
- introduce a new prospectus exemption for companies issuing securities that are fungible with securities already admitted to trading on a Regulated Market or an SME Growth Market. This includes those companies transferring from an SME Growth Market to a Regulated Market. These companies may instead, provided certain conditions[10] are met, publish a short summary document (as an alternative to a prospectus) that includes a statement of compliance with ongoing and periodic reporting and transparency obligations and details the use of proceeds and any other relevant information not yet disclosed publicly. A new Annex IX clarifies what information is required to be included in the summary document. Importantly, the current draft foresees that the short summary document would only need notification to rather than approval by an NCA.

- **Harmonise the cut-off points for the prospectus exemption for small public offerings of securities. The alterations are:**
  - deletion of Article 1(3) (which sets out a threshold of EUR 1 million, below which the EU Prospectus Regulation does not apply). Member States will no longer be permitted to provide for a lower exemption threshold; and
  - amendment of Article 3(2) (which sets out an optional exemption whereby Member States can choose to exempt offers of securities to the public from the obligation to produce a prospectus if the total consideration of each such offer in the EU is less than a specified monetary amount) to set a uniform monetary amount of EUR 12 million (as opposed to the current EUR 8 million) over 12 months. For sake of clarity, issuers can still, on a voluntary basis, prepare prospectuses irrespective of the revised threshold. Equally, Member States may set disclosure requirements at a national level for offers below this threshold, provided they do not create a disproportionate burden. Cross-border offers that seek to rely on prospectus exemptions will continue to be subject to the disclosure requirements applicable in the respective Member States.

- **Standardise and simplify the prospectus for initial offerings of securities that are made available to the public or that are allowed to trade on a Regulated Market.** These consist of:
  - changes to Articles 6(2) (The Prospectus) and 7 (The Prospectus summary), which standardise the format and order of the prospectus and summary and place a 300-page limit on share IPO prospectuses (with the exception of the summary and certain information, such as that provided when the issuer has a complex financial history); and
  - amendments to:
    - Article 16 (to simplify risk factors), specifying that a prospectus must not contain “risk factors that are generic, or those that only serve as disclaimers, or do not give a sufficiently clear picture of the specific risk factors of which investors ought to be made aware of”. Moreover, each risk factor must be adequately described and equally how that risk factor affects the issuer or the securities being offered or admitted to trading. Equally, the assessment of the materiality of the risk factors may be disclosed using a qualitative scale of low, medium or high, at the discretion of the issuer, offeror or person requesting admission to trading on a Regulated Market. Lastly, the ranking requirement that the most material risk factors must be mentioned first has been removed – although it may remain as good practice to continue to do so.
    - Article 19 (to make incorporation by reference mandatory and the removal of the requirement to supplement for annual or interim financial statements), detailing specific information that is to be included in a prospectus where it has been previously or simultaneously published electronically;[11]

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[9] It should be noted that the use of this exemption in practice will still require an issuer to consider its obligations with respect to its shareholder meetings and approvals (in particular for share issuance whereby per-emption rights are limited or excluded) as well as national consumer protection legislation

[10] Such issuers are permitted to publish a summary document instead of a prospectus where the following conditions are met:
1. the securities offered to the public are not issued in connection with a takeover, whether by means of an exchange offer, merger or division;
2. the issuer is not subject to an insolvency or restructuring procedure; and
3. the issuer files a short summary document, with the NCA of the home Member State and makes such document available to the public.

[11] As a minimum, this information includes: (i) documents approved by a competent authority; (ii) alternative disclosure documents prepared in line with exemptions included in Article 1 (4) and (5) Prospectus Regulation; (iii) regulated information; (iv) annual and interim financial information; (v) audit reports and financial statements; (vi) management reports, including, where applicable, sustainability reporting; (vii) corporate governance statements; (viii) reports on the determination of the value of an asset or a company; (ix) remuneration reports; (x) annual reports; and (xi) memorandum and articles of association.

Additional information meeting the requirements of the Prospectus Regulation may be incorporated by reference on a voluntary basis. Moreover, an issuer, offeror or person asking for admission to trading on a Regulated Market is no longer required to publish a Prospectus Supplement regarding updating annual or interim financial information incorporated by reference in a Base Prospectus that is still valid under Article 12(1) Prospectus Regulation.

    - Article 21 (to remove the option for investors to request paper copies of the prospectus); and

    - Article 27 (to ensure issuers can draw-up the prospectus in English only, except for the summary).

- **CSRD and ESG disclosure requirements to be adopted.** In particular the reforms should, by way of delegated acts setting out specific requirements, also consider:

  - for equity securities issuers, whether the issuer is subject to sustainability reporting under the EU's forthcoming Corporate Sustainability Reporting Directive (CSRD); and

  - for issues of non-equity securities, whether those securities are marketed as taking into account ESG factors or otherwise pursuing ESG objectives.

- **Provide for a new "EU Follow-On Prospectus" to replace the simplified disclosure regime for secondary issuances and the EU Recovery Prospectus.** Article 14 (Simplified disclosure system for secondary issuances) is deleted. A new concept of and measures applicable to a EU Follow-On Prospectus is instead introduced in its place for equity and non-equity securities, the rules of which are outlined in new Article 14b. The information listed in Annex IV or V, depending on the kind of securities, must be included in such a prospectus. Among other technical changes, the new EU Follow-On Prospectus would only require financial information for one year only and would not require the inclusion of an operating and financial review in relation to such financial information. For public offers or admissions to a Regulated Market, the following people are eligible to draw up an EU Follow-On Prospectus:

  - issuers whose securities have been admitted to trading on a Regulated Market or an SME Growth Market continuously for at least the 18 months preceding the offer or admission of the new securities; and

  - offerors of securities admitted to trading on a Regulated Market or an SME Growth Market continuously for at least the 18 months preceding the offer,

  other than for an issuer who has only non-equity securities admitted to trading on a Regulated Market or an SME Growth Market which shall not be allowed to draw up an EU Follow-on prospectus for the admission to trading of equity securities on a Regulated Market.

- **Substitute a new EU Growth Issuance Document for the EU Growth Prospectus. The EU Growth Prospectus is removed from Article 15**. Instead:

  - there is a new EU Growth Issuance Document in its place, the rules of which are outlined in new Article 15a;

  - depending on the kind of securities, the EU Growth Issuance Document must include the information listed in either Annex VII or Annex VIII;

  - for offers of securities to the public by certain designated categories of offerors, including SMEs and issuers whose securities are admitted or to be admitted to trading on a SME Growth Market, provided that they do not already have securities admitted to trading on a Regulated Market, the preparation and publication of an EU Growth Issuance Document is required, unless an exemption from the requirement to publish a prospectus applies; and

  - SMEs and issuers on SME Growth Markets may still decide to create an EU Follow-On Prospectus for secondary issuances if they have securities that have been continuously admitted to trading on a SME Growth Market for at least the previous 18 months and if they do not have securities admitted to trading on a regulated market.

- **Consolidate and streamline national competent authorities' (NCAs) review and approval of prospectuses. With the amendment to Article 20(11) (Scrutiny and approval of the Prospectus), the EC is given the authority to state in delegated acts:**

  - when a NCA is allowed to use additional criteria for the scrutiny of a Prospectus and the type of what additional information may required in those circumstances;

  - the maximum timeframe for a NCA to finalise the review and scrutiny of a Prospectus and reach a decision on its approval or not; and

  - the consequences for a NCA that fails to take a decision on the Prospectus within the specified time limits.

- **Make permanent the amendments introduced by the Capital Markets Recovery Package (CMRP) and further clarify rules on supplements**. Article 23 (Supplements to the Prospectus) is amended to:

- make permanent the changes introduced by the CMRP (being the extension of the withdrawal period from two to three working days and clarification of which investors financial intermediaries have to contact when a supplement is published and extension of the deadline to contact those investors); and

- make it clear that in the event of the publication of a supplement, the financial intermediary must only notify investors who are clients of the financial intermediary (at least to receive the information on the publication of a supplement).

- **Change the equivalence rules outlined in Articles 29 and 30 for prospectuses from third countries.** In Article 29, additional conditions are introduced (Offer of securities to the public or admission to trading on a regulated market made under a prospectus drawn up in accordance with the laws of a third-country). Much of this cements existing practice and supervisory expectations further into legislation but also introduces a condition of reciprocal treatment of equivalence (see below). A prospectus prepared in accordance with the legislation of a third country no longer needs to be approved by the relevant authority of the home Member State; instead, it only needs to be filed with that competent authority. The additional conditions that third-country prospectuses must meet to be able to benefit from equivalence include:

  - the third-country's legally binding requirements must ensure that such third-country prospectus include the necessary information that is material to allow investors to make an informed investment decision in an equivalent way as those requirements in the EU's Prospectus Regulation;

  - the third country's laws, regulations and administrative provisions on civil liability apply to the persons responsible for the information given in the prospectus, including at least to the issuer or its respective administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market and, where applicable, the guarantor;

  - the third country's legally binding requirements stipulate the validity of the third-country prospectus and contain an obligation to supplement the third-country prospectus where a significant new factor, material mistake or material inaccuracy of the information included in that prospectus could affect the assessment of the securities, as well as the conditions for investors to exercise their withdrawal rights in such a case;

  - if EU-based retail investors are able to invest in securities for which a third-country prospectus has been prepared, that third-country prospectus must contain a summary providing the key information that such retail investors must understand to be able to assess the nature and risks of the issuer, the securities and if applicable any guarantor; and

  - the third country's supervisory framework for the scrutiny and approval of third-country prospectuses and the arrangements for the publication of third-country prospectuses have an equivalent effect as the provisions referred to in Articles 20 and 21 of the EU's Prospectus Regulation.

- **Other further changes proposed include**:

  - making permanent the threshold of EUR 150 million for exempting offers of non-equity securities issued in a continuous and repeated manner by credit institutions introduced by the CMRP in Articles 1(4)(j) and 1(5), first subparagraph, point (i) is made permanent;

  - simplifying the universal registration document (URD) regime in Article 9 by making it possible to draw up the document in English only and granting the status of frequent issuer after one year of approval instead of two; and

  - reducing the minimum period between the publication of a prospectus and the end of an initial public offer of a class of shares admitted to trading on a Regulated Market for the first time (**IPO**) in Article 21(1) (Publication of the prospectus) from six to three days. This shortening of the minimum IPO period may facilitate a shorter bookbuilding or subscription period and may serve to de-risk a transaction by reducing market-risk.

<u>Article 2 – Amendments to MAR</u>

The proposed amendments to MAR aim to reduce legal uncertainty on what constitutes "inside information" for the purpose of disclosure as well as on the timing of disclosure. References to Articles in the following section are to those in MAR. The proposed amendments include:

- **Simplifying the Article 5 (Exemption for buy-back programmes and stabilisation) reporting mechanism.** Simplifications allow an issuer to benefit from the exemptions from the Article 14 and 15 prohibitions. Issuers shall report information only to the NCA of the most relevant market in terms of liquidity for their shares and disclose only aggregated information to the public.

- **Amending the definition of “front running”**. The definition of inside information with respect to front running (as in Article 7(1)(d) is to be amended to ensure it not only captures persons charged with an execution of an order concerning financial instruments but also other categories of persons that may be aware of a future relevant order. The changes also ensure that information on orders sent by parties other than clients, such as orders known as a result of managing a proprietary account or a fund, is included in the revised definition.

- **Clarify the market sounding procedure's safe-harbour characteristics.** The revisions proposed to amend Article 11 (Market soundings) amended to clarify that the market sounding regime and requirements are only an option for disclosing market participants (DMPs) to benefit from the protection against the allegation of unlawful disclosure of inside information (safe-harbour). The definition of market sounding in Article 11(1) is expanded to also include cases where a transaction is not eventually announced.

- **Improve legal clarity regarding what information must be reported when and reduce the extent of the need to disclose inside information.** The proposed revisions to MAR mean that the disclosure duty in Article 17(1) (Public disclosure of inside information) is modified to clarify that it excludes the intermediate steps of a “protracted process” from its scope. Such processes comprise multi-staged events, most notably a merger, acquisition or litigation. That being said, subject to safeguarding confidentiality, issuers remain under an on-going obligation to disclose, only such information relating to the event that is intended to complete a protracted process at the moment when such information is sufficiently precise (such as a management or board decisions bringing about an event). In accordance with the proposed revised Article 17(1b) (see below), issuers are obligated to maintain the secrecy of inside information up to the time of disclosure and, in the event of a leak, to immediately reveal such inside information to the public. According to a proposed new Article 17(1a), the EC may adopt a delegated act to create a non-exhaustive list of pertinent information along with an indication of the anticipated timing of disclosure (for each item of information).

- **More details on permitted delays to disclosure of inside information**. The proposed revisions would amend Article 17(4) replacing the general condition that delays do not mislead the public (given the vagueness of this test in practice) with the following detailed conditions that must be met on an on-going basis:

  - the inside information is not materially different from the previous public announcement of the issuer on the matter to which the inside information refers to;

  - the inside information does not regard the fact that the issuer’s financial objectives are not likely to be met, where such objectives were previously publicly announced; and

  - the inside information is not in contrast with the market’s expectations, where such expectations are based on signals that the issuer has previously sent to the market, including interviews, roadshows or any other type of communication organised by the issuer or with its approval.

- **Change in timing of notifications to permitted delays of disclosure of inside information.** As is already the case in a number of Member States, the revisions to MAR will move forward the deadline whereby a notification of a permitted delay to disclosure of inside information is submitted to the NCA. This deadline is then the moment immediately following the issuer’s decision to delay disclosure, rather than the moment after the information is released to the public. The current proposed revisions to MAR do not impose a right nor an obligation of the NCA to authorise a delay implemented and notified by the issuer.

- **Simplify the insider lists regime.** The proposed revisions to Article 18 (Insider lists) would amend and extend the relief introduced to the regime by Regulation (EU) 2019/2115 for issuers on SME Growth Markets to all issuers (including those on Regulated Markets). The list of permanent insiders that issuers must create and maintain is less onerous; it comprises all individuals who regularly have access to inside knowledge about that issuer as a result of their role or position inside the issuer. When warranted by concerns about market integrity, Member States may require issuers whose securities have been admitted to trading on a regulated market for at least the last five years to compile and maintain a complete insider list (Article 18(1b)).

- **Increase the amount above which managers must inform their transactions, and broaden the range of close-period transactions that are excluded from notification.** Amendments to Article 19 (Managers' Transactions) include:

  - increasing the threshold above which transactions carried out by Persons Discharging Managerial Responsibility (**PDMR**s) and Persons Closely Associated on their own account and relating to the shares or debt instrument of that issuer or to derivatives or other financial instruments linked thereto shall be to notified to the issuer and to the NCA from EUR 5,000 to EUR 20,000;

  - increasing the threshold at which NCAs may decide to increase the threshold governing at the national level from EUR 20,000 to EUR 50,000; and

- including additional transactions to the list of exemptions from the rule prohibiting PDMRs from engaging in transactions during the closed period, such as employee benefit plans involving financial instruments other than shares, financial instruments other than shares that qualify for or are entitled to, and transactions where no investment decision is made (such as the automatic conversion of financial instruments).

- **Setting up a cross-market order book surveillance (CMOBS) mechanism.** A new Article 25a is inserted to introduce the CMOBS mechanism that allows NCAs to exchange order book data collected form exchanges to detect market abuse in a cross-border context.

- **Making administrative financial penalties for violations of disclosure rules more proportionate – especially for SMEs.** In order to ensure that administrative sanctions for violations of disclosure requirements are more in line with the issuer's size, Article 30(2)(j) and (4) (Administrative sanctions and other administrative measures) have been changed. In exceptional circumstances and only when it would be impossible to take into account all the circumstances surrounding an infraction, competent authorities may calculate sanctions based on absolute amounts, as stated in Article 31, where the calculation of pecuniary sanctions is based on the issuer's total annual turnover. Lower absolute amounts of the minimum and maximum monetary punishments are introduced for SMEs in certain situations. As a result, Member States would have more leeway to reduce the maximum amount of money that SMEs, who violate their national laws regarding disclosure, can be fined.

Amendments to MiFIR

As part of the implementation of the CMOBS mechanism, Article 25 (Obligation to maintain records) of MiFIR is proposed to be amended to empower a NCA to request order book data on an ongoing basis from a trading venue (being Regulated Markets, MTFs and OTFs) under its supervision and equally grant powers to the European Securities and Markets Authority (**ESMA**) to harmonise the format of the template used to store such data.

New EU Directive on multiple-vote share structures

Currently multiple-vote structures across the EU are exclusively subject to national regulation. As a result, the EC has concluded that businesses operating in various Member States face varied regulatory burdens. I order to create a more level playing field, the EC's proposed Directive aims to establish a "minimum harmonisation" of national laws on multiple-vote share structures for those companies seeking admission to trading of their shares on a SME Growth Market.

A "multiple-vote share structure" is defined in Article 2 of the proposed Directive as the share structure of a company that contains at least one class of multiple-vote shares. In turn, "multiple-vote shares" is defined as "shares belonging to a distinct and separate class and that carry higher voting rights than another class of shares with voting rights on matters to be decided at the general meeting of shareholders".

In accordance with Article 4 of the proposed Directive, Member States are required to ensure that companies may adopt multiple-vote share structures when they apply for first admission to trading of their shares on a SME Growth Market. Article 4 also specifies that Member States may not bar shares of a firm from being admitted to trading on a SME Growth Market because the company has chosen to adopt a multiple-vote share structure. In such circumstances, Member States may stipulate that the additional voting rights connected to multiple vote shares may only be exercised following the admission to trading.

Article 5 of the proposed Directive sets out minimum safeguards for shareholders and therefore requires that Member States must:

- require a qualified majority (as defined in national law) of the shareholders present and voting at a general shareholders' meeting to accept the adoption of a multiple-vote share structure and any amendment of such a structure that affects voting rights; and

- limit the voting weight of shares with multiple votes when other shareholders' rights are exercised. This can be done by setting a maximum weighted voting ratio, limiting the total amount of multiple-vote shares to a maximum percentage of the outstanding share capital, or prohibiting the use of the enhanced voting rights associated with multiple-vote shares for voting on issues that must be decided by a qualified majority at the annual general meeting of shareholders.

Member States are permitted under the proposed Directive to implement further safeguards to ensure a suitable protection of shareholders and of the interests of the company. Examples of such further safeguards are set out in Article 5(2) of the proposed Directive.

New Directive to amend MiFID II and repeal the Listing Directive

This new proposed Directive makes changes relating to rules on investment research, the SME Growth Market and the repeal of the Listing Directive. Each of these elements are further explored in the sections below.

Investment research

The proposed Directive aims to make it easier for firms to develop and provide investment research on companies, particularly those with small and medium capitalisations, in order to increase their visibility and their chances of attracting potential investors.

A few of the modifications concern the unbundling rules. According to those rules, when third parties provide investment research to investment firms in connection with execution or brokerage services, it is not regarded as an inducement if it is in exchange for a direct payment from the investment firm's own funds or a payment from a separate research payment account controlled by the firm and subject to a number of conditions having been satisfied. The EC, having reviewed available evidence has concluded that the unbundling rules may have reduced access to research generally, especially for coverage of SMEs. This is the case as brokers who previously included SME research in their "bundled" investment services have reduced their SME capacities as a result of their decision not to pass the costs of research on to their customers.

The new Directive therefore aims to amend Article 24 (General principles and information to clients) MiFID II to:

- increase the market capitalisation threshold below which the re-bundling of trade execution fees and research fees would be allowed from EUR 1 billion to EUR 10 billion; and
- establish a framework for a sort of research that is funded by the issuer and which developed following the introduction of MiFID II to make up for the lack of research coverage of SMEs. Such research will be labelled as “issuer sponsored research” provided that it is provided in line with a code of conduct that establishes basic requirements for independence and objectivity and that was created or authorised by a market operator or by a competent body. Issuers will be able to submit their issuer-sponsored research to the respective relevant collection point(s) as described in Article 2(2) of the proposed for a rule on a European Single Access Point, making it easier for the general public to access and increasing visibility among potential investors. Any additional research materials that are generated without adhering to the code of conduct and are paid for entirely or in part by the issuer must be identified as marketing communications and thus comply with the rules on marketing communications.

Amendments to accommodate changes to SME Growth Markets

The new Directive proposes to amend Article 33 (SME Growth Markets) MiFID II to clarify that an operator of a MTF can apply for a segment of such MTF to be registered as a SME Growth Market provided certain requirements are complied with in respect of that segment.

Repeal of the Listing Directive

ESMA’s Securities Markets Standing Committee (**SMSC**) conducted analysis on the implementation of the Listing Directive and found that many EU Member States were no longer applying (in full or in part) the concepts used in the Listing Directive in their respective national laws and those that do not have a broad discretion to take into account “local market conditions”. The SMSC found that a number of Member States interchangeably (and incorrectly) use the concepts of “admission to official listing” and “admission to trading on a regulated market”.

The SMSC was of the view that such a dual regime could lead to legal uncertainty at the EU level, especially as requirements on transparency and market abuse are not currently applied to financial instruments admitted to an official listing but are applied to financial instruments admitted to trading on a Regulated Market. The proposed Directive seeks to harmonise and consolidate the EU’s “Listing Rules” by repealing the Listing Directive and transferring the relevant provisions into MiFID II – thereby reducing legal uncertainty and risk of regulatory arbitrage in the EU – or so the intention of the EC at least.

Article 2 of the new proposed Directive provides that the Listing Directive will be repealed two years from the entry into force of the new Directive. Article 1(4) of the new Directive introduces a new Article 51a into MiIFD II. This sets out specific conditions for the admission of shares to trading on a Regulated Market, with the effect to:

- reducing the minimum free float requirement from 25% to 10%. The free float requirement will no longer be limited to the public in the EU/EEA; and
- maintaining the minimum market capitalisation requirement of a minimum of EUR 1 million.

Key considerations for market participants and outlook ahead

While much work needs to be done to move the Listing Act along the legislative process, there are a number of key takeaways both in the forms of opportunities and challenges that issuers, investors and other market participants (as well as ESMA and the NCAs) will need to already start considering and preparing for. This will also include assessing how these EU-27 focused changes and benefits compare to legislative and regulatory regimes as well as market practices, each in their own state of evolution, in other respective non-EU jurisdictions.

It is anticipated that from an EU perspective, the proposed revisions to the Prospectus Regulation will increase securities issuance activity in the EU and the European Economic Area as a whole by facilitating and enhancing issuers' ability to access public capital markets. Specifically, the removal of the requirement to issue a supplement for updating annual or interim financial information incorporated by reference in a base prospectus will be welcome for non-equity transactions although much of the detail remains to be published by ESMA.

According to the EC, the expected cost savings associated with revisions to Prospectus Regulation compliance for issuers could amount to around EUR 67 million annually. Investors would equally benefit from a more concise and simplified document that is easier to read and browse. Such a more standardised structure would improve the readability and comparability of prospectuses across the EU and therefore also aim to drive investor interest and in turn issuances.

That being said, these EU-specific alternatives will however still likely need to be counterbalanced with obligations that continue to apply to offerings and listing documentation that apply in other non-EU jurisdictions – notably the U.S.[12] In contrast, the (welcome) comprehensive revision of the equivalence regime for prospectuses issued in third countries and merely notified to rather than approved by a NCA may increase issuance activity by third-country issuers in the EEA.

Moreover, in respect of MAR, it is anticipated that the proposed revisions may mean issuers might find the list of relevant information and indication of when disclosure is expected to be made helpful in navigating their inside information disclosure requirements. It is anticipated that the elimination of intermediary disclosures during "protracted processes" may lower the volume of notices and create a more practical system for handling public disclosures relating to such transactions. Given the perhaps somewhat a cumbersome nature of the current regulations, the streamlining of insider lists will be a welcome move for issuers. Moreover, the EC anticipates that the simplified lists will be easier for issuers to prepare while still being useful for investigations of insider trading cases by competent authorities both at the EU and national level. The extra exclusions associated with managerial transaction reporting will likely also contribute to market efficiency by reducing notifications and duties.

The revisions to MAR, therefore, aim to reduce the burden on listed firms by reducing the amount of time and money, including fees for external advisers, now spent to ensure disclosure obligation compliance. According to the EC, the expected decrease in annual compliance costs for MAR inside information amounts to around EUR 89 million. The targeted modifications to the delayed disclosure regulations is anticipated to cut companies' costs by EUR 11 million. That being said, relevant companies will need to revise their MAR compliance systems as well as documented policies and undocumented procedures to ensure they can comply with the new prescriptive measures.

While the proposed Listing Act's reforms are comprehensive and may provide welcome relief, relevant market participants will want to closely track this development in particular as how it impacts their capital market operations, documentation, reporting and disclosure requirements as well as their respective compliance programs. It is also very conceivable that as the Listing Act moves from proposal to legislative reality that ESMA will publish further new and revise existing supervisory guidance in addition to respective existing and new technical standards on a number of key issues. This may in particular also be relevant in the context of specific types of issuances, such as but not limited to, special purpose acquisition companies (SPACs) where ESMA has published its own guidelines on SPAC prospectuses.[13]

In summary, while the Listing Act is just one additional pillar to a range of CMU proposals, it remains a powerful means of driving reform and thus greater harmonisation for the EU's Single Market for financial services at a time, certainly post-Brexit, when the EU needs a safe, robust and attractive capital market more so than ever before.

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[12] This may be particularly true given that previous EU efforts for "light disclosure" regimes (which with the reforms would include, if the proposed revisions become reality (i) the "short summary document" as an alternative to prospectuses for secondary issuances provided they meet the specified conditions; and (ii) the EU Growth Issuance Document) have failed to gain momentum given that these EU-focused revisions do not alleviate the compliance requirements that apply in jurisdictions outside of the EU-27.
[13] Available here.

About us

PwC Legal is assisting a number of financial services firms and market participants in forward planning for changes stemming from these developments. If you would like to discuss any of the developments mentioned above, or how they may affect your business more generally, please contact any of our key contacts or PwC Legal's EU RegCORE Team via de_regcore@pwc.com or our website.

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