EU LISTING ACT: EUROPEAN COMMISSION PROPOSES MEASURES SIMPLIFYING COMPANY LISTINGS AND CAPITAL RAISES.

On 7 December 2022, the European Commission put forward measures to further develop the EU's Capital Markets Union (CMU) and make EU capital markets more attractive.

Introduction

Reference is made to our July 2022 briefing for a detailed overview of the background to and development of the CMU[1]. A key objective of the CMU is ensuring the access of companies, including small and medium-sized enterprises (SMEs), to public market financing.

In particular, Action 2 of the Commission's action plan as published on 24 September 2020 calls for greater access to public markets. The Commission recognised that the current public listing process for equity securities is cumbersome and costly for EU companies, especially SMEs.

Following a targeted consultation, the Commission has now proposed a set of measures to simplify the listing and post-listing requirements to attract more EU companies to the EU public markets and in particular to facilitate SMEs' access to capital. These proposed measures are in this briefing together referred to as the "**Listing Act**".

A key objective of the Listing Act is to alleviate and render more proportionate the pre and post-IPO requirements that apply to companies of varying sizes. The proposed amendments also seek to preserve a sufficient degree of transparency, investor protection and market integrity. Finally, the Listing Act addresses the issue of fragmentation in national laws that restricts the flexibility of companies to issue dual-class shares.[2]

Timing

On 7 December 2022, the proposals with respect to the Listing Act were put forward by the Commission following feedback received during a public consultation period that ran from 19 November 2021 - 25 February 2022. The Listing Act proposals are currently the subject of a feedback period coordinated

Key changes Prospectus Regulation

- Prospectus exemption on secondary issuances raised to 40% and available for offers to the public
- Introduction of Follow-On Prospectus, Summary Note and Growth Prospectus for secondary issuances
- Minimum IPO offer period shortened to three days
- Further harmonisation of prospectus structure (language, sequence, page limitations)

Key changes MAR

- Further specification of conditions for the delay of disclosure of inside information
- Increased flexibility around disclosing inside information relating to the intermediate steps of a protracted process
- Insider trading notification threshold increased to EUR 20,000 per year

Other

- Introduction of multiple-vote share structures for SME listings

[1] See https://financialmarketstoolkit.cliffordchance.com/content/micro-facm/en/financial-markets-resources/resources-by-type/european-capital-markets-briefing-series/eu-capital-markets-union--an-overview-of-key-developments-in-202/_jcr_content/parsys/download/file.res/eu-capital-markets-union-an-overview-of-key-developments-in-2022.pdf

[2] See http://ec.europa.eu/finance/docs/law/221207-impact-assessment-listing_en.pdf

by the European Commission and which is currently expected to expire on 7 February 2023. Feedback collected by the European Commission during this period will be summarised and submitted to European Parliament and Council. Adoption of the proposal at the level of the European Parliament and Council will take place via the ordinary legislative procedure (formerly known as "co-decision") and this process can take anywhere from several months to several years. A first reading and discussions at the level of the Council already occurred on 8 December and 12 December 2022.[3]

The Listing Act

The set of proposals comprising the Listing Act are (i) an amending Regulation amending Regulation (EU) 2017/1129 (the "**Prospectus Regulation**"), Regulation (EU) No 596/2014 (the "**MAR**") and Regulation (EU) 600/2014, (ii) an amending Directive amending Directive 2014/65/EU (the "**MiFID**") and repealing Directive 2001/34/EC and (iii) a proposed Directive on multiple-vote shares for SME listings.

This briefing summarises what we believe are the key amendments proposed for each of (i), (ii) and (iii) above, a short description of the main features of the amendments and, where relevant, their practical context and our own initial assessment.

Changes to the Prospectus Regulation and MAR

Prospectus Regulation

- *Exemption for secondary issuances expanded*

  Under the Listing Act, the threshold for the current "admission to trading" exemption set out in Article 1(5)(a) of the Prospectus Regulation[4] is increased from 20% to 40% on a 12-months basis. In addition, the Listing Act proposes that this exemption also becomes available for the "offer to the public" (the other trigger of the obligation to draw up and publish a prospectus) of such securities, enabling share issuances for up to 40% of a company's outstanding share capital without triggering the obligation to draw up and publish a prospectus.

  A caveat in the practical use of this exemption is that a company's shareholders meeting will typically still have to approve such a large issuance of shares or agree to delegate the authority to do so to the (management) board. Practice varies per Member State, but in practice, our experience is that maximum standing authorisations to issue shares whereby pre-emption rights are limited or excluded are often limited to 10-20% of outstanding share capital.

  Another caveat in the practical use of this exemption is that even if no prospectus needs to be drawn-up and published, the size and nature of the offering may result in national consumer protection legislation becoming

[3] The measures announced on 7 December 2022 also contain legislative proposals on clearing and corporate insolvency, to make EU clearing services more attractive and resilient and to harmonise certain corporate insolvency rules across the EU, respectively. This briefing (solely) focuses on the measures proposed as part of the Listing Act. See https://finance.ec.europa.eu/publications/capital-markets-union-clearing-insolvency-and-listing-package_en for further details on the clearing and corporate insolvency related proposals.

[4] Or, more formally, the exemption from the obligation to publish a prospectus 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.

relevant, which may eventually trigger unharmonized disclosure requirements.

The Listing Act also extends the exemption to companies with securities admitted to trading on an SME growth market.

- *Secondary issuances based on a Summary Note*

  The Listing Act also introduces a new exemption for companies issuing securities that are fungible with securities that have already been admitted to trading (which in practice means shares or other securities of the same class) for at least 18 months, either on a regulated market or an SME growth market. These companies are not required to draw up and publish a prospectus, provided the following conditions are met:

  i. the securities offered to the public are not issued in connection with a takeover, whether by means of an exchange offer, merger or division;

  ii. the company is not subject to an insolvency or restructuring procedure; and

  iii. the company files a short summary document, the Summary Note, with the competent authority of the home Member State and makes such document available to the public.

  As to (iii), this document must include a statement of compliance with the company's ongoing and periodic reporting and transparency obligations, detail the use of proceeds and any other relevant information, not yet disclosed publicly. The Listing Act introduces a new Annex IX to the Prospectus Regulation, setting out the information to be included in the summary document, mostly relating to the specific offering and securities. The exemption is available for both "admission to trading" as well as an "offer to the public".

  In our experience, previous "light disclosure" regimes did not gain much momentum. Whether these new, similar regimes (not only the Summary Note, but also the EU Follow-on Prospectus and EU Growth issuance document as each described in more detail below) will succeed, will in practice depend, amongst other things, on whether advisers and investors can in practice work with the revised scope of information, also taking into account disclosure requirements and practice outside the EU, in particular the U.S. practice and requirements. Having said that, an important change is that the Listing Act only requires a filing of the Summary Note with the competent authority and not for the Summary Note to be approved by such authority, as is currently required under the "light disclosure" regimes.

- *Secondary issuances based on an EU Follow-on Prospectus*

  The Listing Act introduces a new EU Follow-on Prospectus, which replaces on a permanent basis (for equity and non-equity securities) the simplified prospectus for secondary issuances, where a company cannot rely on any of the other exemptions available, e.g. where the fungibility condition is not met or the company issues the securities in connection with a takeover or restructuring procedure.

  The Listing Act introduces the new Annexes IV and V to the Prospectus Regulation, listing the information a company needs to include in the Follow-on Prospectus. Among other items, the new EU Follow-on Prospectus requires inclusion of financial information for one (1) year only and does not

require the inclusion of an Operating and Financial Review in relation to such financial information.

Because of the introduction of the EU Follow-on prospectus, the simplified disclosure regime for secondary issuances (currently in Article 14 of the Prospectus Regulation) will be abolished.[5] Companies may also on a voluntary basis draw-up and publish an EU Follow-on Prospectus if a secondary issuance falls under one of the other exemptions.

- *Minimum IPO offer period shortened to three days*

  The Listing Act reduces the minimum period between the publication of a prospectus and the end of an offer of shares from six to three working days in the event of an IPO of a class of shares admitted to trading on a regulated market for the first time.

  This allows companies and their advisers to run a shorter book building or subscription period in an IPO in order to de-risk the transaction by limiting market exposure. Over recent years and where so allowed, companies more often limited their IPOs to certain –categories of- institutional investors only, in order to be able to use a shorter period than the 6 days required in a public offering including retail investors.

- *Introduction of a revised EU Growth issuance document*

  A new EU Growth issuance document is introduced, which replaces the EU Growth prospectus set out in Article 15 of the Prospectus Regulation. Drawing up and publishing an EU Growth issuance document is mandatory for offers of securities to the public by certain identified categories of offerors, including SMEs and issuers whose securities are admitted or to be admitted to trading on an SME growth market, **provided that** they do not already have securities admitted to trading on a regulated market and except where an exemption from the obligation to publish a prospectus applies.

  The Listing Act introduces the new Annexes VII and VIII to the Prospectus Regulation, listing the information a company needs to include in the revised EU Growth issuance document.

- *Harmonised threshold for exempting small offers of securities to the public from the requirement to publish a prospectus.*

  The current Article 3(2) of the Prospectus Regulation is amended to set a harmonised threshold of EUR 12 million (increased from the current EUR 8 million) as "catch-all" exemption threshold from the prospectus requirement, based on the total consideration of the aggregated offers made by the same company in the EU over a 12-month period. In addition, the current EUR 1 million threshold below which the Prospectus Regulation is not applicable will be removed and member States will no longer be allowed to provide for a lower exemption threshold.

  For the avoidance of doubt, companies are still allowed to draw up and publish a prospectus on a voluntary basis and member States are allowed to require additional national disclosures for offers of securities to the public below EUR 12 million, provided the national disclosures do not create a disproportionate burden for such companies. Cross-border offers subject to

[5] Separately, the EU Recovery prospectus regime introduced in the context of the Covid-!9 pandemic will expire on 31 December 2022

prospectus exemptions will be subject to the disclosure requirements applicable in the relevant Member States.

- *Standardising the prospectus content and format.*

  The Listing Act further standardises the format and sequence of the prospectus and summary, most notably in relation to the order of disclosure of information. The Listing Act introduces a 300-page limit for IPO prospectuses for shares and clarifies what information in the prospectus does not fall under the page limit, such as the summary (with a separate limit), information incorporated by reference and additional information in relation to a company's complex financial history.

  The proposal also aims to make additional improvements to the efficiency and effectiveness of the prospectus requirements. We note a few of these in our briefing, but all will in due course merit further consideration and an assessment of implications. The amendments made to Article 16 to streamline risk factors are likely to be of particular interest and the removal of the requirement that the most material risk factors be mentioned first in each category will likely be welcomed by the market. Also likely to be of interest, and in line with much of the EU regulatory agenda, specific requirements for sustainability disclosures have been introduced (Article 13).

  Other amendments include changes to Article 19 (to make incorporation by reference mandatory and the removal of the requirement to supplement for annual or interim financial statements), Article 21 (to remove the possibility for investors to request paper copies of the prospectus), Article 27 (to ensure issuers can draw-up the prospectus in English only, except for the summary) and Article 29 (to adopt a new approach to equivalence of third country prospectuses).

- *Confirmation of certain prospectus supplement related rules*

  The Listing Act confirms the current three working day period within which investors may withdraw their subscriptions if the company publishes a supplement due to significant new factors, material mistakes or material inaccuracies. This three-day period was introduced in temporary format during the Covid-!9 pandemic

  The Listing Act also clarifies that, in the event of a publication of a supplement to the prospectus, the financial intermediary is required to inform only those investors who are clients of that financial intermediary and agreed to be contacted by electronic means (at least to receive the information on the publication of a supplement).

MAR

- *Disclosing inside information in so-called "protracted processes".*

  The Listing Act narrows down the scope of the disclosure obligation set out in Article 17(1) of the MAR in the case of inside information in relation to so-called "protracted processes". Such processes comprise multi-staged events, most notably a merger, acquisition or litigation. The Listing Act clarifies that the disclosure obligation does not cover the intermediate steps of such a "protracted process", but that –subject to safeguarding confidentiality- issuers are under the obligation to disclose only the information relating to the event that is intended to complete a protracted process at the moment when such information is sufficiently precise, for

example when the (management) board of an issuer has taken the relevant decision to bring about that event.

According to the Commission, "when information is disclosed at a very early stage and is of a preliminary nature, it may mislead investors, rather than contribute to *efficient price formation and address the information asymmetry. In a protracted process, given the different iterations information has still to go through, the information related to intermediate steps is not sufficiently mature and hence should not be disclosed*".

- *More detailed conditions for the delay of disclosure of inside information*

  Article 17(4) of the MAR is amended, replacing the general condition that such delay should not mislead the public (which is a condition difficult to assess in practice) with the following detailed conditions that must (continue) to be met:

  i. 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;

  ii. 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

  iii. 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.

- *Timing of the notification to delay of disclosure of inside information*

  The timing of the notification of the delay to the competent authority is brought forward to the moment immediately after the decision by the issuer to delay disclosure, instead of, ultimately, the moment after the information is disclosed to the public. In certain Member States this timing has already been implemented upon enactment of the MAR, but that approach is now being implemented across all Member States. The Listing Act does not create an obligation or right of the competent authority to approve a delay being invoked by an issuer.

- *Safe-harbour nature of market sounding procedures.*

  The Listing Act confirms that so-called "disclosing market participants" or "DMPs" carrying out market soundings in accordance with certain information and record-keeping requirements as set out in the MAR are granted full protection against the allegation of unlawfully disclosing of inside information, i.e. benefiting from a "safe-harbour" protection. In case of non-compliance, there will not be a presumption that DMPs have unlawfully disclosed inside information.

- *Simplification of insider lists*

  Article 18 of the MAR is amended to introduce a lighter regime of drawing up and maintaining insider lists by issuers, limited to a less burdensome list of (only) "permanent insiders". This list includes all persons having regular access to inside information relating to that issuer due to their function or position within the issuer (such as members of administrative, management and supervisory bodies, executives who make managerial decisions

affecting the future developments and business prospects of the issuers and administrative staff having regular access to inside information).

- *Increased threshold for "PDMR and PCA" notifications.*

  Article 19 of the MAR is amended to raise the annual threshold above which transactions conducted by Persons Discharging Managerial Responsibilities (PDMRs) and Persons Closely Associated (PCAs) must be notified to the issuer and to the competent authorities from EUR 5,000 to EUR 20,000. In addition, the value to which competent authorities may decide to increase the threshold applying at the national level is raised from EUR 20,000 to EUR 50,000.

Changes to MiFID

- *Investment Research*

  The Commission[6] is of the view that listed companies, especially SMEs, need to make themselves known to possible investors: the current low level of investment research on such issuers, driven by many underpinning factors, leads to their low visibility and scarce investors' interest, further limiting the liquidity for the already listed companies. Under MiFID and related legislation so-called "unbundling rules" were introduced, decoupling investment research activities from investment banking activities. In the view of the Commission, these unbundling rules seem to have met some of their objectives, including to better manage conflicts of interest, to limit the over-production of research on very liquid shares and to improve transparency of the costs associated to the provision of research. However, it seems to the Commission that the unbundling rules may also have led to less availability of research, especially for SMEs. To increase research coverage for such SMEs in particular, the Listing Act proposes the introduction in MiFID of an increased threshold of a companies' market capitalisation to EUR 10 billion, below which the unbundling rules as referred to above do not apply.

The proposed Directive on multiple-vote shares in SMEs

According to the Commission[7], one of the main issues that deters founders and families from deciding to go public is the fear of losing control over their company once it is listed, in particular for SMEs. Multiple-vote share structures can serve as an mechanism to allow companies' owners to retain decision-making powers in a company while raising funds on public markets. These structures permit one or more shareholders to hold a controlling stake in a company without having to make the proportionate economical investment required for the size of the stake, should all shares have the same voting power. Multiple-vote share structures typically include at least two distinct and separate classes of shares with a different number of voting rights attached to the shares belonging to each class.

There are vast differences between Member States in the approach towards multiple-vote share structures, which leads to unequal opportunities for EU companies when deciding to list. Some Member States have allowed multiple-

[6] See the explanatory memorandum to the Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/65/EU to make public capital markets in the Union more attractive for companies and to facilitate access to capital for small and medium-sized enterprises and repealing Directive 2001/34/EC

[7] See the explanatory memorandum to the Proposal for a Directive of the European Parliament and of the Council on multiple-vote share structures in companies that seek the admission to trading of their shares on an SME growth market.

vote shares since almost the beginning of their capital markets, where others do not allow multiple-vote shares or have allowed implementation on a limited basis only. These different approaches have resulted an uneven playing field for companies in different Member States. The Listing Act therefore proposes to introduce a Directive providing for a consistent implementation of multiple-vote share structures across all Member States for SMEs.

The proposed Directive comprises the following key features:

- it only applies to companies seeking listing on an SME growth market in one or more Member States for the first time;
- the Directive is a minimum harmonisation Directive, i.e. Member States may adopt (or retain) national provisions that allow companies to adopt multiple-vote share structures in situations not covered by this Directive;
- it contains the obligation for Member States to ensure the fair and equal treatment of shareholders and provide for the adequate protection of the interests of the company and of the shareholders that do not hold multiple-vote shares by introducing appropriate safeguards;
- Safeguards that Member States may consider include (i) time limitations on enhanced voting rights, (ii) restrictions on voting on particular matters, and/or (iii) expiration of enhanced voting rights upon the occurrence of specified (company) events; and
- the Directive sets out disclosure requirements for companies that adopted multiple-vote share structures that apply both at the point of admission to trading of the company's shares and then on an annual basis, including information relating to the structure of the company's share capital, the characteristics of the multiple-vote shares as well as the presence of other control-enhancing mechanisms in the company.

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