THE EU LISTING ACT – A NEW CHAPTER FOR EUROPEAN CAPITAL MARKETS

On 1 February 2024, the European Parliament and the European Council reached a provisional agreement for a new EU Listing Act, a legislative package that aims to enhance the EU Capital Markets Union.

In the following, the amendments proposed to the Market Abuse Regulation and the Prospectus Regulation are covered.

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On 1 February 2024, the European Parliament and the Council reached a provisional agreement on the European EU Commission's (the "EU Commission") proposal for a new EU Listing Act, a legislative package initially published 7 December 2022. This legislative package aims to enhance the EU Capital Markets Union. The package consists of a regulation amending the (i) Market Abuse Regulation[1], (ii) Prospectus Regulation[2] and (iii) MiFIR[3], and a directive amending MiFID II[4]. The EU Listing Act seeks to make it easier for new issuers to access the European capital markets by minimising administrative burdens and lowering costs.

The proposed change with the EU Listing Act is still to be finalised and submitted to Member State representatives and the European Parliament for approval. The EU Listing Act is to enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. The proposed amendments to MAR are expected to apply as of 18 months after the date of entry into force[5]. The proposed amendments to the Prospectus Regulation are expected to apply as of 15 months after the date of entry into force. [6]

The timeline for implementation and subsequent publication remains uncertain. We will closely follow the development of the finalisation of the EU Listing Act.

In the following, we cover the amendments proposed to MAR and the Prospectus Regulation.

Amendments to MAR

The new EU Listing Act proposes two main changes to MAR: (1) New rules on disclosure of inside information in a protracted process and (2) amended thresholds for persons discharging managerial responsibilities ("**PDMR**").

Disclosure of Inside Information in a protracted Process

Pursuant to the current MAR, Article 7(3), an intermediate step in a protracted process is deemed to be inside information if the step, in and of itself, satisfies the criteria for inside information. A key factor is if there is a realistic prospect that the final event or circumstance will come into existence or occur based on an overall assessment of factors existing at the relevant time.[7] M&A transactions, including public takeovers, are typical examples of protracted processes in which certain intermediate steps, e.g. execution of a letter of intent, may constitute inside information, the disclosure of which may usually be delayed as disclosure could prejudice the financial and commercial interests involved in the transaction.

The requirement to disclose inside information primarily aims to enable investors to make well-informed investment decisions. However, the requirement to disclose steps in a protracted process as inside information may lead to uncertain information being disclosed or unnecessarily delayed, with administrative burdens and costs to follow, seeing as many issuers have developed a cautionary approach to assessing steps in a protracted process as information to avoid non-compliance with MAR. Consequently, disclosing steps in a protracted process as inside information may not contribute to an efficient price formation and is thus contradictory to the aim that MAR seeks to achieve.[8] If such information – which is preliminary and may be subject to changes – is disclosed, it could lead investors to make investment decisions based on uncertain information.[9]

With the EU Listing Act, issuers will only be required to disclose information related to the particular circumstance or the particular event which the protracted process intends to bring about or result in, as soon as possible after such circumstance or event has occurred. [10]

The EU Listing Act advocates that issuers should not be required to disclose information that constitute mere intentions, ongoing negotiations or, depending on the circumstances, progresses of negotiations (such as meetings between the companies' representatives.[11]

The EU Listing Act proposes to amend MAR, Article 17(1) to specifically state that the requirement to disclose inside information to the public does not apply to inside information related to intermediate steps in a protracted process, where those steps relate to bringing about particular circumstances or an event. In protracted processes, only the final circumstances or event must be disclosed as soon as possible after they have occurred.[12] For contractual agreements, the final circumstance or event will be deemed to have occurred when the core conditions of that agreement have been agreed upon.[13]

The identification of the moment when an event becomes final is not always straightforward. To make it easier for issuers to identify the moment of disclosure, the EU Commission is empowered to adopt a delegated act with a non-exhaustive list of events in protracted processes, which would trigger the requirement to disclose the information.[14] The list would include scenarios of specific events that are to be considered final in protracted processes, and for each event, the moment when it is deemed to have occurred.[15]

To summarise, the EU Listing Act does not modify the definition of inside information. Prohibitions on insider trading, unlawful disclosure of inside information, and market abuse still apply. Rather, it amends the point in time where issuers are obligated to disclose inside information in protracted processes to the market.

PDMR Treshold

Any PDMR, as well as persons closely associated with them, are obligated to notify the issuer and the national competent authority regarding such transactions.[16] In Denmark, the current threshold is EUR 20,000. With the EU Listing Act, Denmark will be provided with the opportunity to keep the current threshold as is, to increase or to decrease the threshold to EUR 50,000 or EUR 10,000, respectively.[17]

Amendments to the Prospectus Regulation

The EU Listing Act proposes several significant changes to the Prospectus Regulation with the aim to lighten the burden for listed issuers.

Currently, the requirement to publish a prospectus is triggered by two distinct events: (i) a public offering of securities and (ii) the admittance of securities to trading on a regulated market. An exemption from "public offering" is the offering of securities to institutional investors which is only accomplished by, e.g., offering units of EUR 100,000 or more.[18] For admittance of securities that are fungible with securities already admitted to trading on the same market, issuers are afforded up to 20% new securities during a consecutive period of 12 months.[19]

Exemption Threshold for offering of Securities to the Public

The EU Listing Act proposes to amend the Prospectus Regulation article (3)(2)(b) concerning the exemption threshold to publish a prospectus. Currently, Member States are allowed to set various thresholds within an interval.[20] In Denmark, if the total value of each such offer exceeds EUR 8 million over a period of 12 months, the issuer is required to publish a prospectus.[21]

With the EU Listing Act, the EU Commission proposes to implement a dual threshold system, replacing the current regime pursuant to which Member States can choose to adopt either a EUR 5 million threshold or an EUR 12 million threshold, i.e. no threshold in between may be adopted.[22] Member States will be required to notify the EU Commission and ESMA[23] of their decision.

Member States are allowed, but not obliged, to implement a publication requirement for a public offering of securities below EUR 5 million or EUR 12 million (depending on the decision by the Member State). The publication requirement would either be a prospectus summary (in accordance with the current Article 7 of the Prospectus Regulation) or a "national document". The information in the national document must be equivalent to or lower than the information required in the prospectus summary article.[24]

Secondary Issuances for offering Securities for Admission to trading on a Regulated Market

In 2017, the implementation of the Prospectus Regulation marked a key shift in the financial landscape, as the exemption threshold for publishing a prospectus for admission to trading on a regulated market was raised from 10% to 20%. This amendment had a profound impact, significantly reducing the number of prospectuses published by issuers. By enabling issuers to release a larger volume of new shares or securities without the need for a prospectus, it not only facilitated a more streamlined process but also offered substantial cost and time savings.

Now, the EU Listing Act proposes to amend Article 1(4) of the Prospectus Regulation by introducing a new exemption that allows public offers of securities to be admitted to trading on a regulated or an SME growth market to be exempt from the obligation to publish a prospectus, provided that the secondary issuance is fungible with securities already admitted to trading on the same market and that they represent no more than 30% of the securities already admitted to trading on the same regulated market or a SME growth market over a 12-month period. However, to use this exemption, issuers must file a document containing information as outlined in a short-form document, a new Annex IX[25] in electronic format with the competent authority of the home Member State.[26] This document must also be made available to the public in accordance with the arrangements set out in Article 21(2) simultaneously with its filing with the competent authority.[27] Moreover, the issuer must not be undergoing insolvency proceedings or a restructuring.[28]

This new exemption allows issuers to offer securities to the public without publishing a prospectus, irrespective of whether the offer exceeds the exemption threshold (currently EUR 8 million in Denmark) if the secondary issuance represents less than 30% of the fungible securities already admitted to trading. Notably, the exemption also applies to SMEs, allowing such companies to raise capital easier.

Concurrently, the EU Listing Act proposes to amend Article 1(5) concerning the exemption for publishing a prospectus when admitting securities to trading on a regulated market. In line with the new addition to Article 1(4), the threshold in Article1(5) is proposed increased to 30%.

Introduction of a new follow-on Prospectus

Currently, the Prospectus Regulation includes a simplified prospectus, which is designed to ease the disclosure requirements for secondary issuances. With the EU Listing Act, the current simplified prospectus and the EU Recovery prospectus are proposed to be replaced by a new follow-on prospectus, amending the current Article 14 of the Prospectus Regulation.[29] The utilisation of the follow-on prospectus is designed to cover both offering of securities to the public as well as applying for admittance to trading on a regulated market.[30]

The follow-on prospectus will make prospectuses easier to prepare and understand and will thus likely increase investor protection while reducing the burden and costs for issuers.[31]

The proposed new rules regarding the follow-on prospectus will apply to issuers whose securities have been traded on a regulated market for at least 18 months before the offer or admission to trading.[32] The follow-on prospectus must be no more than 50 pages.[33] 15 months after the entry into force of the EU Listing Acts, the EU Commission shall adopt delegated acts specifying the format for the follow-on prospectus.[34]

Formality Amendments to the Prospectus

The EU Listing Act proposes certain changes to the current Prospectus Regulation, Article 6 regarding the content and layout of a prospectus, e.g. a maximum of 300 A4-sized pages when printed and an authorisation to ESMA to prepare technical standards specifying a homogenous layout for all prospectuses. ESMA must submit these standards and guidelines to the EU Commission 12 months following the date of entry into force of the new EU Listing Act.[35]

References

1. Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC, and 2004/72/EC. Abbreviation "the ***MAR***".
2. Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC. Abbreviation "the ***Prospectus Regulation***".
3. Regulation (EU) 600/2014 of The European Parliament and of the Council of 15 May 2014 on of 15 May 2014 on markets in financial instruments and amending Regulation (EU) no 648/2012. Abbreviation "***MiFIR***".
4. Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. Abbreviation" ***MiFID II***".
5. EU Listing Act – article 4, page 151.
6. EU Listing Act – article 1(12)(5), page 84.
7. MAR – preamble 16.
8. EU Listing Act – preamble 58, page 43.
9. Explanatory memorandum to the EU Listing Act.
10. EU Listing Act – preamble 58, page 43.
11. EU Listing Act – preamble 58, page 43.
12. EU Listing Act – article 2(5)(a), page 122.
13. EU Listing Act – preamble 58, page 43.
14. EU Listing Act – preamble 59, page 44.
15. EU Listing Act – article 2(5)(g), page 126.
16. MAR article 19.
17. Under the current MAR regime, the base threshold is EUR 5,000 but Member States are allowed to increase the threshold to EUR 20,000. However, with the EU Listing Act, the base threshold will be increased to EUR 20,000. Member States would then be allowed to either decrease the threshold to EUR 10,000 or increase the threshold to EUR 50,000. The Member State's national competent authority must justify its choice of a decrease or increase of the threshold and shall inform ESMA of its decision.

References

18. MAR – article 1(4)(d)

19. MAR – article 1(5)(a)

20. The current wording in MAR article 3(2)(b) is stating “which shall not exceed” which gives Member States the allowance to set various threshold which is not exceeding EUR 8 million.

21. MAR - (3)(2)(b)

22. EU Listing Act – preamble 8, page 8 and article (1)(3)(a-b), page 65.

23. The European Securities and Markets Authority – “ESMA”.

24. EU Listing Act – preamble 8, page 8.

25. Information about, inter alia, the issuer, risk factors, use of proceeds, and terms and conditions of the offer. The document may be no more than 11 A4 pages when printed (pursuant to EU Listing Act article 1(1)(c)(i)(4)(iii), page 62.

26. In Denmark, the DFSA.

27. EU Listing Act – article 1(1)(b)(i)(da), page 56.

28. EU Listing Act – article 1(1)(b)(i)(da)(ii), page 56.

29. EU Listing Act – preamble 25, page 21.

30. EU Listing Act – article 1(11) and (12), page 80.

31. EU Listing Act – preamble 24, page 19.

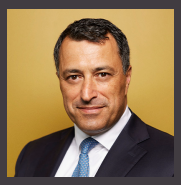
32. EU Listing Act – article 1(12)(1), page 81.

33. EU Listing Act – article 1(12)(5), page 83.

34. EU Listing Act – article 1(12)(8), page 84.

35. EU Listing Act – article 1(6)(c)(8), page 70.

Contacts



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