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EU capital markets: New ESMA prospectus Q&As and proposed prospectus and market abuse regime reforms

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The European Securities and Markets Authority has recently published updated versions of its Q&As on the EU Prospectus Regulation and, in December 2022, the European Commission published a legislative proposal to amend the EU Prospectus Regulation and EU Market Abuse Regulation with a view to reducing regulatory and compliance costs for issuers with securities listed on EU stock exchanges.

Legislative proposal to amend EU Prospectus Regulation and EU Market Abuse Regulation

Introduction

The European Commission's proposal is part of a set of measures to make public markets more attractive for EU companies and to facilitate access to capital for small and medium-sized companies (SMEs). The overall objective is to introduce technical adjustments to the EU rulebook in order to reduce regulatory and compliance costs for companies seeking to list or already listed, with a view to streamlining the listing process, while ensuring an appropriate level of investor protection and market integrity.

The legislative proposal to amend Regulation (EU) 2017/1129 ("the EU Prospectus Regulation" or PR) and Regulation (EU) 596/2014 ("the EU Market Abuse Regulation" or EU MAR), which is available here, is subject to adoption by the European Parliament and the Council.

EU Prospectus Regulation: key proposed amendments

The proposed key amendments to the EU Prospectus Regulation are as follows.

Exemptions for secondary/follow-on offerings

Under the current regime, provided there is an exempt "offer to the public" (e.g. an offer to qualified investors only, or fewer than 150 persons per Member State), issuers are not required to publish an admission prospectus for any issue of securities that are fungible with those already admitted to trading on the same regulated market, where such securities represent, over a period of 12 months, less than 20% of the number of securities already admitted to trading on such regulated market.

The amendments would widen the scope of this exemption by: (i) increasing the 20% threshold to 40%; and (ii) making it an exemption to the "offer to the public" trigger for a prospectus (in addition to the "admission to trading" trigger), where the securities being offered are fungible with securities already admitted to trading on the same market.

In addition, the amendments would introduce a broader exemption (to both the "offer to the public" and "admission to trading" triggers) which would permit an issuer offering and/or admitting securities fungible with those already admitted to trading on a regulated market or SME growth market for at least 18 months prior to the relevant offer and/or admission not to have to publish a prospectus, provided that the issuer is not in financial distress or going through a significant transformation (e.g. a change of control resulting from a takeover, merger or division). Instead, the issuer would be required to publish a short summary document (of a maximum length of 10 sides of A4) complying with specific content requirements, including a statement of compliance with ongoing and periodic transparency obligations, specific risk factors relating to the issue of securities and the reason for the issuance and use of proceeds.

Higher *de minimis* exemption

Under the proposed amendments, a prospectus would not be required for offers of securities to the public in the EU of less than €12 million (based on the total consideration of the aggregated offers made by the same issuer in the EU over a period of 12 months). This would represent an increase to the current universal *de minimis* threshold of €1 million and the discretion given to individual Member States under the current regime to exempt offers to the public in the EU of up to €8 million from needing a prospectus. However, individual Member States will be permitted to require national disclosure documents for offers of securities to the public below €12 million, provided such documents do not constitute a disproportionate burden.

More standardised and streamlined prospectus for primary issuances of securities offered to the public or admitted to trading on a regulated market

Several amendments have been proposed to standardise and streamline prospectus disclosure. These include:

- the introduction of a standardised format for a prospectus (i.e. a fixed order and presentation of disclosure, including the summary);
- a maximum length of 300 sides of A4-sized paper for an equity prospectus (excluding the summary, any information incorporated by reference or additional information provided where the issuer has a complex financial history or has made a significant financial commitment);
- mandatory incorporation by reference of specified information that has been previously or simultaneously published electronically in an applicable language (including annual and interim financial information); and
- the removal of the ability for investors to request paper copies of a prospectus.

New EU Follow-on prospectus to replace the simplified prospectus for secondary issuances

A new EU Follow-on prospectus is to replace, on a permanent basis (for equity and non-equity securities), the current simplified prospectus for secondary issuances on a regulated market. This regime will apply to secondary issuances by issuers whose securities have been admitted to trading on a regulated market or an SME growth market for at least 18 months and that do not fall under a proposed exemption from the prospectus requirement (e.g. secondary issuances by companies in financial distress or going through a significant transformation). The EU Follow-on prospectus will follow a standardised format and sequence and is subject to a size limit of 50 sides of A4-paper for issues of shares (excluding the summary, any information incorporated by reference or additional information disclosed where the issuer has a complex financial history or has made a significant financial commitment). Among other things, the EU Follow-on prospectus must include the most recent financial statements, trend information, a working capital statement and disclosure about the reason for the offer and use of proceeds.

Replacing the EU Growth prospectus with a new EU Growth issuance document

The proposal also introduces a new mandatory short-form EU Growth issuance document which replaces on a permanent basis the EU Growth prospectus regime.

Under the proposed new regime, except where an exemption from the obligation to publish a prospectus applies, the publication of an EU Growth issuance document will be required for offers of securities to the public by certain specified categories of issuers with no securities already admitted to trading on a regulated market, including SMEs and other issuers with securities trading on an SME growth market (albeit these persons would still be allowed to opt for an EU Follow-on prospectus for an offer or admission on a regulated market if they have securities already admitted to trading on an SME growth market for at least the previous 18 months).

The EU Growth issuance document will follow a standardised format and sequence and be subject to a size limit of 75 sides of A4-paper for issues of shares (excluding the summary, any information incorporated by reference or additional information disclosed where the issuer has a complex financial history or has made a significant financial commitment). Among other things, the
EU Growth issuance document must include the most recent annual financial statements, a working capital statement, disclosure about the reason for the offer and use of proceeds and disclosure about the issuer's growth strategy and objectives.

Shorter minimum subscription period for IPOs

The amendments propose that the length of time the prospectus must be made available to the public be shortened from at least six working days before the end of the offer to three working days in order to facilitate swift book-building processes (especially in fast-moving markets) and increase the attractiveness of including retail investors in the IPO.

Streamline and improve the review and approval of the prospectus by national competent authorities (NCAs)

It is proposed that the European Commission be empowered to specify in delegated acts: (i) when an NCA is allowed to use additional criteria for the review of the prospectus and the type of additional information that may be required; (ii) the maximum time frame for an NCA to finalise the review of the prospectus and reach a decision on whether that prospectus is approved or the approval is refused and the review process terminated; and (iii) the consequences for an NCA failing to take a decision on the prospectus within the time limits provided under the PR.

In addition, it is proposed to require European Securities and Markets Authority (ESMA) to conduct one peer review on review and approval of prospectuses at least every three years.

Make permanent the amendments introduced by the Capital Markets Recovery Package (CMRP) and further clarify rules on prospectus supplements

In 2021, the CMRP introduced certain changes to the PR to make it easier for the capital markets to support EU businesses recovering from the COVID-19 pandemic. The CMRP extended from two to three working days the period within which investors may withdraw from their subscriptions for securities where issuers publish a prospectus supplement. It also clarified which investors financial intermediaries have to contact when a prospectus supplement is published and extended the deadline to contact those investors. It is now proposed to amend the PR to make these changes permanent.

In addition, it is proposed to amend the PR to clarify that, in the event of a publication of a prospectus supplement, 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. Financial intermediaries will also be required to offer investors who have not agreed to be contacted electronically an electronic opt-in solely for the purpose of receiving the notification of the publication of a supplement and advise those investors who refuse an electronic opt-in to monitor the website of the issuer or the financial intermediary to check whether a supplement is published.

Revise the equivalence regime for third country prospectuses to make it workable

The PR currently allows the offering 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 if certain requirements are met. These requirements currently include that such third country prospectuses must be approved by the NCA of the relevant Member State and the third country information requirements must be equivalent to the requirements under the PR. This was considered by ESMA to limit significantly the added value of the equivalence regime because, while third country prospectuses would be drawn up under the disclosure rules of the equivalent third country, they would have to be reviewed and approved under the disclosure rules of the PR.

Therefore, the European Commission is now proposing that additional conditions be introduced in the PR to make the equivalence regime workable. The approval by the NCA of the relevant Member State of a third country prospectus would be replaced with the filing only of the prospectus with that NCA. However, this would only be the case with respect to third countries in relation to which the European Commission adopted an implementing act determining that the legal and supervisory framework of such third country ensures that a prospectus drawn up in accordance with national law complies with legally binding requirements equivalent to the requirements under the PR.

EU Market Abuse Regulation: key proposed amendments

The key amendments proposed to be made under EU MAR are as follows.

Narrow the scope of the obligation to disclose inside information concerning intermediate steps of a protracted process

Under the amendments the scope of the obligation to disclose inside information would be narrowed such that it will no longer apply to intermediate steps of a protracted process where those steps are connected with bringing about a set of circumstances or an event (i.e. multi-staged events, such as a merger or other significant M&A transaction). This is on the basis that in a protracted process, given the different iterations information still has to go through, the information related to intermediate steps is not sufficiently mature and hence does not justify disclosure. In such cases, the issuer should only disclose the information related to the event that the protracted process intends to bring about (i.e. the merger) once sufficiently precise (i.e. when the management board has taken the relevant decision to bring about the event).

Under the current regime, inside information relating to a protracted process must be immediately disclosed, save that an issuer may on its own responsibility delay the public disclosure of the relevant information subject to the relevant conditions for delayed disclosure being satisfied. Under the new regime, although the immediate disclosure obligation will not apply, issuers will still be obliged to ensure the confidentiality of all inside information (including such information relating to the intermediate steps of a protracted process) until that information is publicly disclosed.

As the proposal does not amend the definition of "inside information" under EU MAR, the prohibition of insider dealing will continue to be triggered by an intermediate step of a protracted process that qualifies as inside information.

To facilitate the assessment of the appropriate time of disclosure of certain relevant information by issuers and to ensure a consistent interpretation of the requirement, the European Commission is empowered to adopt a delegated act to set out a non-exhaustive list of relevant information and, for each example, the moment when the issuer could be reasonably expected to disclose it.

Clarify conditions under which issuers may delay disclosure of inside information

The proposal amends the conditions which issuers must comply with to delay the disclosure of inside information. Under the current regime, delaying the disclosure of inside information is permitted if: (i) immediate disclosure is likely to prejudice the issuer's legitimate interests; (ii) delay of disclosure is not likely to mislead the public; and (iii) the issuer is able to ensure the confidentiality of the information. It is proposed that condition (ii) be replaced with three new, more specific conditions which require that the relevant inside information:

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

In addition, it is proposed that issuers must inform the relevant NCA of any intention to delay the disclosure of inside information (and provide a written explanation of how the conditions for delay have been met) immediately after the decision to delay is taken. This is a change to the position under the current regime, under which the obligation to inform the relevant NCA applies immediately after the disclosure of the information to the public and Member States may stipulate that the explanation of the decision to delay is provided only on request of the relevant NCA.

Clarify the market sounding safe harbour

The proposal makes minor amendments to clarify that the market sounding regime and the relevant disclosure and record-keeping requirements under Article 11 of EU MAR are only one option for disclosing market participants (DMPs) to benefit from the protection against the allegation of unlawful disclosure of inside information. As a result, the proposal clarifies that while DMPs opting to carry out market soundings in accordance with the specified information and record-keeping requirements are granted full protection against the allegation of unlawfully disclosing inside information, there is no presumption that DMPs who have not complied with such requirements have unlawfully disclosed inside information.

However, all DMPs will need to make a written record of whether they have disclosed inside information when carrying out market soundings, which record must be provided to the applicable NCA on request. This applies even if the DMP elects not to take advantage of the safe harbour.

Simplify the insider lists regime

The proposal extends the relaxation of the insider list requirements previously granted to SME growth market issuers to all issuers, including those listed on regulated markets. The proposal requires issuers to draw up and maintain a less burdensome list of “permanent insiders”. This list includes all persons who have regular access to inside information relating to the issuer due to their function or position within the issuer (e.g. members of administrative, management and supervisory bodies, executives making managerial decisions and administrative staff who have regular access to inside information). Unlike under the current regime, there will be no requirement for individuals outside the issuer to be included on the list of “permanent insiders”. However, any person acting on behalf of or on the account of an issuer (such as advisers, accountants or credit rating agencies) will still be required to maintain and update its own insider lists and provide it to an NCA whenever required.

The proposal also allows Member States to disapply this relaxation and require “a full insider list” (i.e. a list of all persons having access to inside information whether within or outside the issuer, as required under the current regime) from issuers who have been admitted to trading on a regulated market for at least the last 5 years, where such a request is justified by concerns for market integrity.

Raise the threshold for transaction notification by Persons Discharging Managerial Responsibilities (PMDRs) and expand the scope of exempted transactions

It is proposed that transactions conducted by PMDRs and persons closely associated with them on their own account relating to shares, debt instruments, derivatives or other financial instruments of the relevant issuer will not require notification to an NCA where the transaction falls below €20,000, representing an increase to the current threshold of €5,000. In addition, the proposal grants NCAs the possibility of choosing to raise the threshold applying at the national level to €50,000.

Furthermore, the proposal expands the exemptions to the prohibition of PMDRs carrying out transactions in a closed period (i.e. in the 30 calendar days before the announcement of an interim financial report or a year-end report which the issuer is obliged to make public). The current exemptions to the prohibition relating to employee shares or saving schemes and qualifications or entitlement of shares are to be expanded to include also financial instruments other than shares.

ESMA Prospectus Q&A updates

ESMA regularly provides responses to questions asked by the public, financial market participants, and competent authorities regarding the EU Prospectus Regulation (the “Prospectus Q&As”).

- In its most recent update of the Prospectus Q&As published on 3 February 2023, ESMA addressed a question on Article 1(4)(d) of the EU Prospectus Regulation, i.e. whether the purchase of securities via a joint account may be considered as a purchase by one investor.

  Article 1(4)(d) states that the obligation to publish a prospectus does not apply to certain types of offers of securities to the public, including an offer of securities addressed to investors who acquire such securities for a total consideration of at least €100,000 per investor.

  ESMA confirmed that a joint account, e.g. one held by a husband and wife, may still be considered to comply with the above minimum amount of €100,000 per investor as, according to ESMA, Article 1(4)(d) contains "no condition regarding the mode of payment".

- In its previous Prospectus Q&As update on 12 October 2022, ESMA addressed a question regarding the meaning of "approval" referred to in Article 1(6a)(b) of the EU Prospectus Regulation relating to the application of the prospectus exemption in connection with a takeover by means of an exchange offer.

  ESMA clarified that the term "approval" refers to the approval process applied by the relevant supervisory authorities designated in accordance with Directive 2004/25/EC (the "EU Takeover Directive") and that have the competence, where applicable, to review the offer document under that directive.

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