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The EU Listing Act Package: Key Aspects for Primary and Secondary Capital Markets Transactions

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Introduction

The EU Listing Act Package comprises several legislative proposals for changes to the EU Prospectus Regulation[1], the EU Market Abuse Regulation[2], EU MiFIR[3] and EU MiFID II[4], as well as the introduction of a new EU Directive on multiple-vote share structures.

The legislative proposals aim to simplify and streamline primary and secondary issuances in the capital markets, alleviate certain requirements for listed companies and, thereby, make public markets in the EU more attractive for both issuers and investors.

This briefing note summarizes some of the key amendments to the EU Prospectus Regulation (the ***Prospectus Regulation*** or the ***Proposals***) and comments on its practical implications.

Standardization[5]

One pillar of the amended Prospectus Regulation addresses standardization of prospectuses.

Most notably for equity prospectuses, the amended Prospectus Regulation introduces a page limit, according to which prospectuses relating to shares shall be of a maximum length of 300 pages of A4-sized paper when printed, while being presented and laid out in a way that is easy to read, using characters of readable size.

Such page limit shall not take into account the prospectus summary, information incorporated by reference or information to be provided when the issuer has a complex financial history or has made a significant financial commitment or gross change.

The suggested approach has been intensely criticized during the legislative process mainly for the following reasons:

- firstly, a prospectus is a flipped coin: on the one side it is a safety net for issuers and intermediaries, while on the other side it is an investor protection document. The essence is to give all information material for an investment decision in an easy to understand and comprehensive way, and this should be left to a case-by-case determination – not a "*one size fits all*" approach;
- secondly, the approach to standardization does not align with the liability regime under the Prospectus Regulation, which has not been updated to cater for more limited disclosure. The unfortunate consequence of this is that liability risks attached to disclosure that is inherently constrained by the page limit will increase for issuers and intermediaries alike; and
- last but not least, the suggested page-limit makes it challenging to prepare a single disclosure document that complies with different jurisdictional disclosure requirements. In sizeable cross-border transactions, this is particularly relevant as they typically involve offering documents that cover various disclosure regimes (most frequently, the disclosure requirements under the Prospectus Regulation as well as the US Federal securities laws).

Against this background, a helpful exemption was introduced. The 300-page limit shall not apply in circumstances where the issuer seeks admission to trading on a regulated market in the EU and, simultaneously, offers or privately places securities with investors in a third country, where an offering document is prepared under law, rule, or market practice of such third country. Recital 17(a) of the amended Prospectus Regulation supports the view that this exemption also applies in situations where no disclosure document is formally approved, but where such offer document includes disclosure enabling to rely on a prospectus exemption [...] "*reduce the burden for issuers who seek admission to trading on a regulated market in the Union and simultaneously offer or privately place*

1 Regulation (EU) 2017/1129.

2 Regulation (EU) 596/2014.

3 Regulation (EU) 600/2014.

4 Directive (EU) 2014/65.

5 To be applicable 18 months after entry into force of the amended Prospectus Regulation, which remains subject to finalization of the legislative process.

securities with investors in a third-country, and who would otherwise have to draw up several documents"]. Consequently, in transactions involving a placement of securities with US investors in reliance on Regulation 144A, the 300-page limit shall not apply.

There may potentially be other changes related to a standardised format of, and sequencing of information in, prospectuses. The European Securities and Markets Authority (***ESMA***) is tasked with developing guidelines on comprehensibility and on the use of plain language in prospectuses; and also with the development of draft implementing technical standards specifying the template and layout of prospectuses, including the font size and style requirements (depending on the type of prospectus and the type of investors targeted). The European Commission is empowered to adopt delegated acts, which will set out further details, within 18 months of the entry into force of the EU Listing Act.

ESG disclosure

The Prospectus Regulation introduces a specific disclosure requirement for issuers of equity instruments, which are subject to Article 8 of the EU Taxonomy Regulation[6] and, therefore, have to publish non-financial information under the EU Accounting Directive[7] as amended by the EU Corporate Sustainability Reporting Directive (***CSRD***)[8]: the prospectus summary must include a statement on whether the issuer's activities are associated with economic activities that qualify as environmentally sustainable under Articles 3 and 9 of the EU Taxonomy Regulation[9].

In essence, the issuer shall include in its statement whether its economic activities contribute to any of environmental objectives under the EU Taxonomy Regulation, whether they follow the 'do no significant harm' principle and are carried out in compliance with the minimum safeguards and the technical screening criteria established by the European Commission. In light of the complexity and granularity of business activities classified under the EU Taxonomy Regulation, forthcoming guidance by ESMA is expected to specify how fulsome such disclosure will need to be.

For prospectuses relating to equity securities, the Proposals include an amendment to Annex I, according to which the management reports, including the sustainability reporting as required by CSRD, should be incorporated by reference in the prospectus *or, alternatively, the information set out therein should be* included in the prospectus for the periods covered by the historical financial information. Recital (23) of the Prospectus Regulation underlines that the relevant ESG-aspects justify such disclosure. However, this approach contradicts current market practice in some jurisdictions where management reports are – mainly for liability reasons – not included in prospectuses.

Additionally, the European Commission is empowered to adopt delegated acts specifying various content requirements for prospectuses, which includes prospectus schedules for non-equity securities that are advertised as taking into account ESG factors or pursuing ESG objectives. Prospectuses for EU Green Bonds will need to incorporate by reference the information included in the European Green Bond factsheet (or otherwise include the optional disclosures available under the EU Green Bond Regulation).

Incorporation by reference[10]

A welcome change in the amended Prospectus Regulation for issuers of non-equity securities is the ability to incorporate future annual or interim financial information by reference into a base prospectus, during the period of validity of that base prospectus, without the need to publish a prospectus supplement to incorporate such information by reference. Issuers will still have the option to voluntarily publish a prospectus supplement for these purposes should they wish to do so.

The scope of other information that may be incorporated by reference into a prospectus has also been expanded in the Proposals. Issuers may choose to incorporate by reference a sustainability report contained within management reports; as well as the short form summary document required for some of the fungible exemptions, as set out in Annex IX (the ***Annex IX*** document).

Exemptions from publishing a prospectus[11]

The Proposals introduce an expanded exemption from the requirement to prepare and publish a prospectus in the context of fungible issuance: issuers will not have to publish a prospectus in relation to a public offer of new securities fungible with securities already admitted on a regulated market or an SME growth market provided (i) they represent less than 30% of the number of securities already admitted to trading on the same market over a 12-month period; and (ii) the issuer is not subject to insolvency / restructuring proceedings.

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6 Regulation (EU) 2020/852.

7 Directive (EU) 2013/34.

8 Directive (EU) 2022/2464.

9 To be applicable 18 months after entry into force of the amended Prospectus Regulation, which remains subject to finalization of the legislative process.

10 With immediate application upon entry into force of the amended Prospectus Regulation, which remains subject to finalization of the legislative process.

11 With immediate application upon entry into force of the amended Prospectus Regulation, which remains subject to finalization of the legislative process.

Until now, this exemption was limited to the admission to trading of fungible securities and the threshold was 20%. Going forward, the new 30% threshold will cover both the public offer and the admission to trading.

In the case of the public offer, an 11-page Annex IX document should be filed with (but does not need to be approved by) the home Member State and should also be made available to the public.

The introduction of this exemption was criticized on the following grounds:

- this proposal is not aligned with requirements under applicable corporate regimes, which, in some cases, such as the German Stock Corporation Act, provide for lower thresholds to exclude shareholder subscription/preemption rights (constituting a prerequisite for making effective use of the exemption). In this context, it is also worth noting that some of the leading shareholder representatives suggest low thresholds to exclude shareholder subscription / preemption rights to avoid dilutive effects on shareholders; and
- moreover, the Annex IX document shall contain information regarding the securities and the associated risks. It requires a statement by the issuer of continuous compliance with reporting and disclosure obligations throughout the period of being admitted to trading, including under the EU Transparency Directive[12], the EU Market Abuse Regulation and Commission Delegated Regulation (EU) 2017/565 which supplements the EU MiFID II; as well as a statement that the document is not a prospectus. However, the absence of a specific liability regime attached to such document creates murky waters around its use.

On balance, it remains to be seen if this exemption and the associated Annex IX document will indeed become widely used or, in the alternative, issuers and intermediaries will voluntarily prepare a prospectus for disclosure purposes by "*opting-in*".

Technical Changes

The Proposals also introduce the following technical changes:

- shortening the minimum offer period for initial public offerings from six to three working days;
- no requirement to prioritize risk factors within categories (although practically speaking, we think this change is unlikely to lead to changes in the way risk factors are drafted or ordered within a prospectus);
- no requirement to provide hard copies of prospectuses to investors any longer (only electronic copies will need to be made available);
- investor withdrawal rights that apply when a prospectus supplement is published are extended from two working days to three working days; and
- clarification that no new securities may be added into a base prospectus via a prospectus supplement, except where an issuer does so to comply with capital requirements under EU law. ESMA will develop guidelines to specify what constitutes a new type of security.

Entry into force

The amended Prospectus Regulation remains subject to completion of the legislative process. With European Parliament elections now underway, the proposed text will first need to be confirmed by the new European Parliament by corrigendum and then be adopted by the Council of the EU (anticipated to happen later this year). It will enter into force on the 20th day following its publication in the EU Official Journal.

However, while some provisions will come into immediate effect, certain provisions will not be applicable until 15 or 18 months after entry into force. Please note, this briefing indicates the dates of application of selected aspects of the Proposals. For information about other aspects of the Proposals that are not covered in this briefing note, please reach out to your usual Freshfields contact.

There is also a grandfathering regime according to which prospectuses approved in accordance with the currently in force Prospectus Regulation, and before 18 months minus one day of the amended Prospectus Regulation entry into force, shall continue to be governed by the provisions of the currently in force Prospectus Regulation until the end of their validity.

Divergence with the UK

The Proposals mark divergence between the EU and UK prospectus regimes, which up until now have remained broadly similar at a substantive level. With the advent of the forthcoming UK public offers and admission to trading regime, further EU/UK divergence in this area could be on the horizon.

[12] Directive (EU) 2004/109.

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