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The Listing Act – Easier access to EU capital markets

Part 2 – Simplifications to the Market Abuse Regulation and MiFID II

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Background

On 24 April 2024, the EU Parliament adopted the EU Listing Act. The Listing Act is part of a package of measures aiming to further develop the Capital Markets Union. The purpose of the Capital Markets Union is to enable companies to diversify their funding and access funding sources other than bank lending, to help them grow and to adapt their financing structure when maturing.

The Listing Act package introduces reforms to make EU public capital markets more attractive for companies to seek listing and stay listed by alleviating and making more proportionate the requirements that apply both at the moment of listing and when a company is already listed.

The reform consists in targeted amendments to:

- EU Regulation 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the **Prospectus Regulation**);
- EU Regulation 596/2014 on market abuse (the **Market Abuse Regulation**); and
- EU Directive 2014/65 on markets in financial instruments (**MiFID II**) and EU Regulation 600/2014 on markets in financial instruments (**MiFIR**).

A new Directive on multiple vote share structures has also been adopted. Additionally, Directive 2001/34 on the admission of securities to official stock exchange listing and on information to be published on those securities is repealed (the **Listing Directive**).

While one of the expressed purposes of the Listing Act is to facilitate access to capital for small and medium-sized enterprises, the scope is more general, and all listed companies and companies seeking a listing are concerned by the reform.

This briefing is part of a series of briefing in three parts covering the Listing Act. Part 1 of the series provided an overview of the most important changes to the Prospectus Regulation. This Part 2 analyses the changes made to the Market Abuse Regulation and MiFID II, which are materialised in (i) a Regulation amending Regulation (EU) 2017/1129, (EU) No 596/2014 and (EU) No 600/2014 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 (ii) a Directive 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. Part 3 will discuss the new directive on multiple-vote share structures.

Key insights

- Feedback from stakeholders has revealed that the **Market Abuse Regulation** places significant burden on companies once listed. The Listing Act aims to address disproportionate disclosure requirements for issuers while ensuring an appropriate level of investor protection and market integrity.

- Key changes include a change in the **disclosure obligations of inside information in protracted processes** and an increase of the threshold applicable to **managers' transactions** notifications. Additional changes are made to the **market sounding regime** and the **share buyback safe harbour**. A new **cross market order book surveillance mechanism** is also put into place.
- Changes made to MiFID II address the shortage of investment research regarding small and mid-capitalisation companies by a **change in the unbundling rule** and the introduction of an **EU code of conduct** for issuer-sponsored research. **Free float requirements** for listings on regulated markets are also decreased.

1. Market Abuse Regulation

A. Delaying disclosure of inside information

When an issuer holds inside information which directly concerns that issuer, it must disclose such information to the public as soon as possible, unless the issuer would decide to make use of the possibility to delay disclosure under its responsibility and would to be entitled to do so under the conditions of the Market Abuse Regulation.

Under the amended Market Abuse Regulation, delaying disclosure is possible under the three following conditions:
- Immediate disclosure is likely to prejudice the legitimate interest of the issuer.
- **The information that is intended to be delayed is not in contrast with the latest public announcement or other type of communication by the issuer on the same matter**.
- The issuer is able to ensure confidentiality.

This first and third conditions already apply today. The second condition replaces the more generic condition that "the delay is not likely to mislead the public".

The new condition is inspired by the current guidelines of ESMA on delayed disclosure, according to which the delay is likely to mislead the public in at least the following circumstances if the information (i) is materially different from a previous announcement of the issuer on the same matter, (ii) relates to the fact that financial objectives will likely not be met where they have been previously announced and (ii) is in contrast with market expectations when such expectations are based on signals sent by the issuer.

The EU Commission has been empowered to adopt a Delegated Act setting out where necessary a non-exhaustive list of situations in which inside information is in contrast with the latest public announcement or other type of communication.

Contrary to the initial proposal of the EU Commission, the competent authority will only need to be informed that the delaying procedure has been applied **immediately after the information has been disclosed** to the public (ex-post notification – no changes compared to current regime).

B. Disclosure of inside information in a protracted process

Currently, steps in a protracted process may satisfy, by themselves, the conditions for being considered inside information. This is the case if they constitute non-public information of a precise nature, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the price. This is expressly foreseen under the Market Abuse Regulation, which has been aligned to the European Court of Justice case law (*Markus Geltl v Daimler* case).

Steps in a protracted process that constitute inside information hence need to be disclosed to the market as soon as possible unless the issuer decides to delay disclosure. This could be the case in multi-steps transactions, auction processes, etc.

In Belgium for example, such principle has been applied by the Financial Markets and Services Authority (FSMA) to impose a EUR 250,000 fine on a company for failure to disclose inside information (decision of 27 December 2021).

In this respect, the EU Commission had noted that issuers sometimes have difficulties delineating between what is and what is not inside information. In addition, they are sometimes bound to disclose information at a very early stage when information on circumstances or events have not yet reached a high degree of certainty. Issuers incur high compliance costs to understand which steps of a protracted process may constitute inside information and when a certain piece of information is mature enough to be disclosed. This can mislead investors rather than contributing to efficient price formation and well-informed decisions by investors.

The new rules **remove the disclosure obligations regarding steps in a protracted process** where those steps are connected with bringing about or resulting in particular circumstances or in a particular event. In such case, the delay procedure does not need to be applied either. Issuers must only disclose the information related to the particular circumstances or the particular event that the protracted process intends to bring about or results in (i.e., the final event).

According to the recitals of the Regulation amending the Prospectus Regulation, the disclosure obligation will not cover the announcement of mere intentions, ongoing negotiations or, depending on the circumstances, progress of negotiations (such as meetings between the companies' representatives). For example, in a merger, disclosure should be made as soon as possible after the management has taken the decision to sign off on the merger agreement, once the core elements of the merger have been agreed upon. For contractual agreements, this would be when the key terms of that agreement have been agreed upon.

The removal of the obligation to disclose intermediary steps in a protracted process is accompanied by an obligation for the issuer to maintain the confidentiality of the information which meets the criteria of inside information. The prohibition of insider dealing also continues to apply as long as the inside information has not been announced. On this basis, the analysis as to whether a particular step in a protracted process constitutes inside information remains relevant for issuers.

The EU Commission has been empowered to adopt a Delegated Act setting out where necessary a non-exhaustive list of final events in protracted processes which would trigger the obligation to disclose and for each event, the moment when the event is deemed to have occurred.

C. Managers' transactions

The Market Abuse Regulation includes a notification regime for transactions by persons discharging managerial responsibilities (**PDMRs**) and the persons closely associated with them (**PCAs**).

The notification threshold for the PDMRs and PCAs transactions is now raised from EUR 5,000 to **EUR 20,000** per calendar year (without netting). NCAs may increase the threshold to EUR 50,000 (instead of EUR 20,000) or decrease it to EUR 10,000, where justified considering national market conditions. This is to avoid that unnecessary noise on the market with respect to notifications that do not bring useful information.

Under the Market Abuse Regulation, PDMRs may not conduct any transactions on financial instruments of the issuer during a closed period of 30 calendar days before the announcement of a mandatory interim financial report or a year-end report which the issuer is obliged to make public. There are exceptions to this prohibition which are expanded by the Listing Act:

- the current exceptions of severe financial difficulties, employee's schemes and share qualification or entitlements will also cover financial instruments other than shares; and
- an additional catch-all exception to the prohibition to trade is added in cases where no active investment decision is made, activities result from external factors or third parties or are transactions or trade activities, including the exercise of derivatives based on predetermined terms.

This last exception is very useful and will cover discretionary asset management mandate, acceptance of inheritance or exercise of options agreed outside the closed period.

D. Market soundings

The Market Abuse Regulation provides for a detailed and burdensome record-keeping and disclosure regime that is applicable to market soundings, i.e., the communication of information, prior to the announcement of a transaction (if any) in order to gauge the interest of potential investors in such transaction and its conditions.

This regime now expressly becomes an optional safe harbour. This means that there is no unlawful disclosure if the regime is complied with (i.e., disclosure of inside information in the course of a market sounding is deemed to be made in the normal exercise of a person's employment, profession or duties and therefore does not constitute unlawful disclosure of inside information). However, failure to comply does not automatically amount to market abuse either (although this was the better view, this point was previously debated).

The Market Abuse Regulation provides that any disclosing market participant must consider whether it will disclose inside information, make a written record of it, and disclose it to the NCA on request, regardless of whether the optional market sounding procedure is followed. This is already the case and has been maintained to ensure the possibility for competent authorities to obtain an audit trail of a process that may imply disclosure of inside information.

The definition of market sounding is expanded to cover scenarios where there is no public announcement of a transaction and the cleansing obligation (informing recipients that the information disclosed is no longer inside information) is also amended so that it does not apply where the information has already been announced publicly otherwise.

E. Safe harbour for share buyback programmes

The Market Abuse Regulation includes a safe harbour for buy-back programmes, which are presumed not to be insider dealing or market manipulation if the conditions of the safe harbour are complied with (notably conditions on price and volume and limited specified purposes). To benefit from this safe harbour, reporting obligations must be complied with. Those have been simplified by the Listing Act.

- The trades now only need to be reported to the competent authority of the most relevant market in terms of liquidity (previously, trades need to be reported to each trading venue where the shares are admitted/traded).
- The trades are now to be disclosed to the public in an aggregated form only and the disclosure should indicate the aggregated volume and the weighted average price per day and per trading venue.

F. Insiders list

Contrary to the EU Commission's initial proposal, it has been decided not to lighten the insider lists regime by only requiring issuers (beyond those whose financial instruments are admitted to trading on an SME growth market as is the case currently) to draw up permanent insider lists (list of persons who, due to the nature of their function or position within the issuer have regular access to inside information). As a result, issuers continue to be required to prepare a list of all all persons who have access to inside information and who are working for them under a contract of employment, or otherwise performing tasks through which they have access to inside information.

ESMA is, however, required to review the implementing technical standards to extend the use of the alleviated format applicable to issuers whose financial instruments are admitted to trading on an SME growth market to all issuers. The EU Commission is empowered to adopt such standards.

G. Other changes to the Market Abuse Regulation

- *Liquidity contracts on SME growth markets* - The market operator or the investment firm operating an SME growth market is no longer required to agree to the terms and conditions of liquidity contracts (since it is not a party to such contracts) and must now only acknowledges in writing to the issuer that it has received a copy of the liquidity contract.
- *Front-running* - The definition of inside information as it relates to front-running conducts has been expanded. The revised definition is no longer limited to persons charged with the execution of orders and covers other persons who might be aware of forthcoming orders or transactions. It also covers information conveyed by persons others than clients on their behalf and information known by virtue of management of a proprietary account or a fund.

H. Surveillance and sanctions for legal persons

The general turnover-based sanction mechanism continues to apply to sanctions imposed on legal persons. This is now also extended notably to infringements of disclosure requirements for breach of obligations regarding insiders lists and disclosure of managers transaction, for which the sanctions are now also calculated proportionately of the total turnover of the issuer (0.8%). The NCAs have discretion to calculate sanctions based on an absolute amount on an exceptional basis if the amount resulting from the turnover method is disproportionately low. In such case, administrative sanctions of at least EUR 2,500,000 may be imposed (EUR 1,000,000 for SMEs).

In addition, a cross market order book surveillance mechanism has been introduced for the exchange of order book data between the NCAs.

I. Entry into force

Generally, amendments to the Market Abuse Regulation will enter into force on the 20th day following publication (which has not yet taken place). They will be directly applicable in Member States and do not require implementation. By exception, provisions regarding disclosure of inside information in a protracted process and delaying disclosure will apply 18 months after the Regulation enters into force (i.e., not before the second half of 2025).

2. MiFID II

A. Regulated Market admission conditions

The contents of the Listing Directive have been reduced over the year and most of the rules contained therein have already been transferred to other EU legal instruments. Therefore, it is now repealed and the conditions for the admission of shares to a regulated market are transferred to MiFID II.

- The EUR 1 million foreseeable market capitalisation condition for admission to shares to a regulated market is maintained. Member States may provide for alternative requirements to measure whether a sufficient number of shares has been distributed to the public.
- However, the minimum free float requirement is decreased to 10% (instead of 25%) to be assessed at the time of admission, with no geographical restrictions to EU / EEA.

B. Investment research

MiFID II rules on investment research are amended to increase the level of investment research on SMEs. The main changes include:

i. A new general requirement that investment research be fair, clear, and not misleading.

ii. The obligation for issuer-sponsored research to be produced in connection with an EU code of conduct which shall set out standards of independency and objectivity and specify procedures and measures for the effective identification, prevention, and disclosure of conflicts of interest (if not, they would be qualified as marketing communication).

iii. ESMA will develop technical standards for such code to be adopted by the EU Commission.
The removal of the threshold of market capitalisation below which unbundling rules do not apply so that firms providing research can bundle the price of the research with that of brokerage services.
In this respect, the research unbundling rule of MiFID II required investment firms to separate payments they receive as brokerage commissions from the compensation perceived for providing investment research or to pay research from their own resources. In 2021, this rule had been amended to allow for bundled payments for execution services and research for small and middle capitalisation companies below a market capitalisation of EUR 1 billion for the period of 36 months preceding the provision of research.
This has not been deemed sufficient to slow down the decline of investment research and the regime has been further lightened. The suppression of the threshold and further amendments allow for more flexibility on the organisation of payments and re-bundling of payments for trading execution and research, while guaranteeing transparency towards clients. It is further specified that trading commentaries and other bespoke trade advisory services intrinsically linked to execution shall not be considered as research.

C. Entry into force

Amendments to MiFID II and the repealing of the Listing Directive will enter into force on the 20th day following publication (which has not yet taken place). The changes will need to be implemented by Member States within 18 months from the date of entry into force (i.e., not before the second half of 2025).

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