Baker McKenzie.

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In The Know

Leveraged Finance Newsletter

By James Tanner, Ben Bierwirth, Andrey Ivanov and Lisa Nielsen Board of Baker McKenzie's London office.

EU Listing Act: Changing EU capital markets for the better

On 8 October 2024, the Council of the European Union ("**Council**") adopted the EU Listing Act ("**Act**"), a legislative package aimed at making EU public capital markets more attractive and more accessible to EU companies of all sizes by enacting targeted refinements to the current capital markets ecosystem as opposed to wholesale reform. In this edition of In The Know, we will take a closer look at the specific amendments and assess the Act's likely impact.

Background

The goal of the Act

The Act is intended to resolve three key problems that the European Commission identified with the EU capital markets system, namely

- Companies, particularly small and medium-sized companies (SMEs), do not consider listing in the EU to be an easy and affordable means of financing and may find it difficult to stay listed due to ongoing listing requirements and costs.
- EU public markets are not flexible enough to accommodate companies' financing needs.
- The lack of available company research and insufficient liquidity discourage investors from investing in some listed securities.

The Act will amend the key EU capital markets regulations with a view to resolving these problems, specifically through the following:

- A new **regulation** that will amend the Prospectus Regulation (Regulation (EU) 2017/1129) ("**Prospectus Regulation**"), the MAR and the Markets in Financial Instruments Regulation (Regulation (EU) No 600/2014) ("**MiFIR**").
- A new **directive** that will amend the Markets in Financial Instruments Directive (Directive 2014/65/EU) ("**MiFID II**") (and repeal what remains of Directive 2001/34/EC, more commonly known as the Consolidated Admissions and Reporting Directive or "**CARD**").

It will also introduce a new **directive** allowing companies to adopt or modify multiple-voting share structures, including when seeking admission to trading on an EU multilateral trading facility (MTF).

Expected timeline

Following the Council's adoption of the Act on 8 October 2024, the next step is for it to be published in the Official Journal of the European Union (the "**OJ**"). It will become law 20 days later.

Thereafter, the changes will take effect as follows:

- **15 months after OJ publication**
  - provisions relating to the EU Follow-On Prospectus and the EU Growth issuance document

Nb. The Commission is to adopt delegated acts setting out further details within 15 months of the Act coming into force.

- **18 months after OJ publication**
  - remaining amendments to the Prospectus Regulation and the MAR

Nb. ESMA is required to produce guidelines (on plain language etc.) and draft implementing technical standards (on template/layout of prospectuses) within 12 months of the Act coming into force, and the Commission is to adopt delegated acts setting our further details on format and ESG disclosure within 18 months of the Act coming into force.

- **2 years after OJ publication**
  - repeal of CARD
  - deadline for implementation of the new directive on multiple-voting share structures in each member state

Key changes to the Prospectus Regulation

"Admission to trading" exemption for secondary issuances increased

The Act will raise the "admission to trading" exemption threshold from 20% to 30% (aggregated over 12 months). This will allow companies to issue shares up to 30% of their outstanding share capital without needing a prospectus, making it theoretically easier for EU companies to issue secondary issuances and obtain funding in the equity capital markets.

Our view

The impact of this change may prove to be rather limited. Companies' shareholders will still typically need to approve large issuances or delegate authority to do so to the companies' boards. Likewise, while practice varies per member states, pre-emption rights are likely to be triggered when companies offer more than 10-20% of their outstanding shares in a secondary issuance, so it remains to be seen how willing shareholders and company boards will be to adapting their companies' constitutions to accommodate the increased thresholds.

All that aside, we continue to believe that for larger offerings (such as rights issues, jumbo blocks, etc.), a full-blown prospectus will likely still be used to market the deal, with all the bells and whistles in terms of comfort and disclosure opinions.

New exemptions for secondary issuances based on a "key information" document

The first of these new exemptions for secondary issuances allows issuers with securities listed continuously for at least 18 months on a regulated or SME growth market to issue unlimited additional fungible securities without needing an approved prospectus, provided that the following conditions are met:

a. The new securities to be admitted to trading are not being issued in connection with a takeover by means of an exchange offer, a merger or a division.

b. The issuer is solvent and not subject to any restructuring at the time of the offering.

c. A short-form "key information" document (maximum x11 A4 sides) for investors is filed in electronic format with the competent authority of the home member state and made available to the public.

The second of these new exemptions for secondary issuances extends both the "admission to trading" exemption and the unlimited additional fungible securities exemption discussed above to "offers to the public", provided that points (b) and (c) above are satisfied.

As regards the short-form document, the minimal content requirements for this are set out in a new Annex IX to the Prospectus Regulation. They dictate that the 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.

Our view

In our experience, previous "light disclosure" regimes did not gain much momentum.

Whether this new, similar regime will succeed will depend on whether advisers and investors can, in practice, work with the revised scope of information, while also considering disclosure requirements and practice outside the EU, in particular US practice and requirements.

EU Follow-On Prospectus

The Act will introduce a new EU Follow-On Prospectus that will replace the simplified disclosure regime for secondary issuances (for equity and non-equity securities) currently existing under the EU Recovery Prospectus regime.

The regime for the EU Follow-On Prospectus will require the following, among other items:

- Inclusion of financial information for **one** year only and will not require the inclusion of an operating and financial review in relation to such financial information
- A summary section that is seven A4 pages long (or eight if guarantor information is included)
- A 50-page limit (excluding summary and information incorporated by reference) to ensure concise disclosure that is most relevant to investors

The new EU Follow-On Prospectus can be used by companies, entirely on a voluntary basis, to draw up and publish a simplified investor disclosure document. It will be available to the following:

- Issuers that have had securities admitted to trading on a regulated market on an SME growth market continuously for at least the 18 months preceding the secondary issuance
- Issuers seeking admission to trading on a regulated market of securities fungible with securities that have been admitted to trading on an SME growth market continuously for at least the last 18 months preceding the admission to trading of the securities
- Offerors of securities admitted to trading on a regulated market or an SME growth market continuously for at least the 18 months preceding the offer of securities to the public

Our view

This simplified disclosure regime is going to be a useful, cost-effective alternative where a company can't rely on the other exemptions, such as if the fungibility condition is not met or if the company issues securities in connection with a takeover or restructuring procedure and therefore cannot meet the requisite conditions discussed above.

It is also conceivable that issuers who **can** rely on new or amended secondary issuance exemptions will elect to produce an EU Follow-On Prospectus (rather than nothing at all), for example in instances where a significant amount of time has elapsed since their last issuance.

Revised EU Growth issuance document

The Prospectus Regulation amendments will see the EU Growth issuance document replace the current EU Growth Prospectus regime. This will mainly affect SMEs and issuers (other than SMEs) with securities admitted or to be admitted to trading on an SME growth market.

Standardising prospectus format and content

The Act will introduce various amendments to further standardise and streamline the format and sequence of the prospectus and summary, most notably in relation to the order of disclosure of information.

The key changes include the following:

- A 300-page limit (A4-sized paper) for share IPO prospectuses (This excludes the summary, any information incorporated by reference or additional information provided if and when the issuer has a complex financial history or has made a significant financial commitment.)
- A standardised format for prospectuses
- Specific requirements for sustainability disclosures
- The possibility to incorporate new annual or interim financial information into the base prospectus by reference instead of having to supplement it

Going forward, investors will also only be entitled to receive copies of prospectuses in electronic form, while issuers will be permitted to draw up their prospectus in "a language customary in the sphere of international finance" (which we interpret as "in English"), where an offer of securities to the public is made or admission to trading on a regulated market.

ESMA will be tasked with developing guidelines on comprehensibility and the use of plain language in summaries, as well as with drafting implementing technical standards to specify the template and layout of the summaries.

Our view

The 300-page limit may make it challenging to prepare a single disclosure document for all relevant jurisdictions. Furthermore, page limits upend the whole purpose of having a prospectus, i.e., to provide all material information to investors while also protecting the issuer from potential liability for misleading

information or non-disclosure. However, this situation might be partially remedied by the new page-limit exemption that applies where an issuer is also privately placing with investors in a third country in accordance with that third country's laws and regulations, in which case the page limit does not apply.

Risk factors

A couple of the more welcomed changes in the Act relate to the risk factors section of prospectuses. Specifically, in response to years of industry complaints over the (mis)use of generic and/or irrelevant risk factors, the new wording provides that a prospectus should not contain risk factors that: (a) are generic; (b) only serve as disclaimers; or (c) do not give a sufficiently clear picture to investors of the specific risk factors that they should be aware of.

Additionally, the much-bemoaned requirement that the most material risk factors (in the company's assessment) be ranked, that is to say, mentioned first in each respective category, is being watered down in the new wording.

Our view

Risk factors will still have to be presented in a limited number of risk categories, depending on their nature. However, once the changes come into effect, the most material risk factors will only need to be listed in a manner that "is consistent with" the issuer's assessment of their materiality, which, at least from a liability perspective, should provide some relief.

Shorter minimum IPO period

Under the new rules, the minimum IPO offer period between the publication of a prospectus and the end of an offer of shares will be reduced from six to three days to facilitate swift book-building processes.

Our view

With a six-working-day offer period, companies going public often find themselves exposed to market risk over a relatively long period of time. This is particularly evident in cases where the order book is oversubscribed within a few hours, but the offer must remain open, which poses an unnecessary risk for a deal that has already been successfully marketed. As such, the shortening of the offer period should provide increased flexibility and may serve as a tool to de-risk a transaction.

Key changes to the MAR

Disclosure of inside information during protected processes

Under the current MAR rules, issuers must announce inside information **as soon as possible** unless specific conditions are satisfied.

The Act will carve out intermediate steps in a protracted process (such as a large merger or litigation) from this immediate disclosure obligation. In such circumstances, an issuer will be required — subject to safeguarding confidentiality — to make an announcement only when the final step in the process is taken, such as when definitive transaction documents are signed, or board approval is obtained. Before this final step is taken, the issuer will **not** be considered to be "delaying" making an announcement, so it will not need to satisfy conditions in the ESMA Guidelines on delaying disclosure.

Importantly, the changes only affect announcements disclosing inside information to the public. If the issuer comes into possession of inside information during an intermediate step, **it must still** do the following:

- create an insider list
- prohibit dealings by insiders
- take the other usual precautions around inside information

Our view

Though obviously helpful to issuers engaged in protracted processes, issuers may in certain circumstances still be subject to the retained version of the MAR, which has applied in the UK since the end of the UK-EU transition period, as supplemented by the Market Abuse (Amendment) (EU Exit) Regulations (SI 2019/310) ("**UK MAR**"). As such, if they wish to avoid announcing information about an intermediate step in a process, they will need to be comfortable that the information is not yet sufficiently precise or, if it is, that it can satisfy the conditions for delaying disclosure, to keep the timing of its announcements in line with these amended EU requirements.

Delaying disclosure

The current rules setting out when issuers can legitimately delay disclosure of inside information include the condition that delay of disclosure should not be "likely to mislead the public".

The Act will replace this condition with the condition that the inside information that the company intends to delay is **not contrary** to the most recent previous public announcement by the company on the matter to which the inside information relates.

Our view

The new language is more specific and easier to assess than the current language and therefore should assist issuers in knowing when to make their disclosures.

To assist further in interpreting the amended MAR rules, the European Commission will adopt a new Regulatory Technical Standard, setting out a non-exhaustive list of the following:

- Final events in a protracted process and, for each event, the moment when it is deemed to have completed and an announcement must be made
- Circumstances when inside information contradicts the latest public statement by the issuer on that matter

The existing ESMA Guidelines will remain the go-to reference with regard to the circumstances when an issuer may have a legitimate interest in delaying disclosure.

PMDR/PCA dealings

The Act will:

- Raise the threshold above which Persons Discharging Managerial Responsibilities (PDMR) and Persons Closely Associated (PCA) dealings must be notified from EUR 5,000 to EUR 20,000
- Expand the current exemptions to the prohibition relating to shares, employee shares or saving schemes and qualifications or entitlement of shares to include financial instruments and other shares (such as debt and derivative instruments)
- Expand the list of exceptional circumstances when a PMDR can deal during a closed period to include any of the following circumstances:
  - The dealing does not involve any active investment decision or active involvement by the PDMR.
  - The dealing results exclusively from external factors or third parties.
  - It is a dealing based on pre-determined terms.

Our view

UK-listed companies usually try to ensure that PDMRs don't deal **at all** during closed periods. Moreover, it would have been helpful for EU MAR expressly to recognise that some "passive" dealings can be carried out during a closed period (a position that is commonly accepted in the UK).

In relation to the de minimis threshold, in the UK this is generally ignored and instead **all** dealings by PDMRs and their PCAs are notified — partly due to difficulties with calculating when the threshold has been reached. As such, it remains to be seen whether these changes will have any real impact for UK-listed companies.

MiFID II amendments and CARD repeal

MIFID II

To increase research coverage, the Act will allow all investment firms (no longer imposing a maximum market capitalisation threshold) to proceed in the way they find most appropriate in terms of payments for execution services and research. The provisos for this are as follows:

- Investment firms must agree the methodology of their remuneration with the third-party provider of research and execution services, including how the total cost of research will be taken into account when establishing the total charges for investment services.
- Investment firms must inform clients of their choice to pay either jointly or separately for execution services and research, their policy regarding this, and how they prevent or manage conflicts of interest.

CARD repeal — amended "free float requirement"

The Act will repeal CARD, and most of its provisions will not be replaced. However, the CARD requirement for a minimum percentage of shares to be in public hands from admission (the more commonly known "free float requirement") will be retained, but with the percentage reduced from 25% to 10% (in line with the change the UK made back in December 2021). It will also become easier to satisfy this requirement because eligible investors will count as "the public" wherever they are in the world, whereas at present they count only if they are located in the EU or the EEA.

Directive on multi-voting share structures

Dual-class share structures ("**DCSS**") are currently exclusively regulated at national level, leaving member states free to decide what types of structures to permit. The Act's new Directive on Multiple Voting Share Structures will require all member states to ensure that a company seeking to list its shares on an EU MTF for the first time is permitted to adopt a DCSS, thereby achieving greater harmonisation among member states — and thus deterring companies from "forum shopping" for an IPO venue that permits their desired form of DCSS.

At the same time, the directive will protect the rights of shareholders who hold shares with a lower number of votes per share by introducing certain safeguards. For example, the impact of DCSS on the decision-making process of the general meeting must be limited by the introduction of either of the following:

- A **maximum ratio** of the number of votes attaching to shares with multiple-voting rights to the number of votes attaching to shares with the fewest voting rights
- For decisions subject to a **qualified majority** of the votes at the general meeting: (a) a qualified majority of the votes cast AND a qualified majority of the share or number of shares represented at the meeting; or (b) a qualified majority and a separate vote for each class of shares whose rights are affected (However, this does not apply with regard to the appointment and removal of members of the administrative, management and supervisory bodies and "operational decisions" of such bodies submitted to the general meeting for approval.)

Member states will also be permitted to introduce further safeguards, such as transfer-based, time-based and/or event-based sunset clauses. Any DCSS must be appropriately disclosed in the issuer's IPO prospectus and its annual financial reports.

Our view

The changes are designed to help attract companies — particularly those led by founders keen to retain control over certain key matters post-IPO — to list on more junior markets in the EU. They will give issuers a wider range of markets to choose from, which the Commission hopes will increase competition for listings both within the EU and between the EU, the UK and the US.

Final thoughts

The Act represents a targeted refinement of the existing capital markets rules in the EU rather than any kind of substantial overhaul. Some proposals, such as extended exemptions for secondary issuances and further efforts to standardise disclosure requirements, may well achieve the Act's aim of making it easier, quicker and cheaper for companies to come to market. Conversely, some other proposals may have much more limited effect.

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TRANSACTIONAL POWERHOUSE

CONTACTS

James Tanner
Partner | London
James.Tanner@bakermckenzie.com

Benjamin Bierwirth
Partner | London
Ben.Bierwirth@bakermckenzie.com

Andrey Ivanov
Trainee Solicitor | London
Andrey.Ivanov@bakermckenzie.com

Lisa Nielsen Board
Senior Knowledge Lawyer | London
Lisa.Nielsenboard@bakermckenzie.com

bakermckenzie.com

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