EU Listing Act Proposal

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Listing Act Package – overview

Proposals of the European Commission of 7 December 2022

Prospectus Regulation

- Full sub-40% exemption
- Full exemption for “seasoned issuers”
- Numerous other tweaks
  - Standardised format and sequence
  - Page limit for prospectus
  - Information on sustainability reporting
  - Mandatory incorporation by reference
  - …

Market Abuse Regulation

- No immediate disclosure of preparatory steps of a protracted process
- More clarity to what information needs to be disclosed and when
- Less stringent insider list requirements
- Increase of notification threshold to EUR 20,000
- Clarification of safe-harbour nature of market sounding regime

Listing Directive

- Continuous 10% minimum free float requirement
- Minimum 1mEUR foreseeable market capitalization upon initial listing
- Abolished for the remainder

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New directive on multi-vote share structures for SME listings

- Retention of control for owners while raising funds on public markets

Limited amendments to MiFID and MiFIR

- Increase investment research on SMEs
- Reinforce supervisory cooperation between authorities

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Proposals regarding the

Prospectus Regulation

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Partial sub-20% exemption → full sub-40% exemption

- Existing exemption from **listing prospectus** requirement for (fungible) securities if they represent, over a 12 months' period, less than **20%** of the number of securities already admitted to trading
  - Increased to **40%** of the number of securities already admitted to trading, allowing e.g. for larger private placements
  - Expanded to **public offers** of (listed) (fungible) securities, allowing e.g. for rights issues without prospectus

→ Quid (non-)prospectus liability?

→ Quid disclosure expectations (and protection) of investors (and underwriters)?
  - → Impact on due diligence exercise?
  - → Impact on auditor comfort package?
  - → Voluntary disclosures in launch press release or even voluntary prospectuses?

→ Quid prospectus requirement for admission to trading of "rights" in rights issue?

→ Think about other limitations (authorised capital, GVV/SIR)

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Full exemption for “seasoned issuers”

- New exemption for “seasoned issuers” from **listing and public offer prospectus** requirement
  - Securities fungible with securities admitted to trading since at least 18 months
  - A summary document of up to 10 pages is **filed** with the competent authority and made available to the public
  - Not possible for
    - Transaction in connection with takeover by means of an exchange offer, a merger or a division
    - Issuer under insolvency or restructuring procedure

→ On the back of continuous compliance with disclosure obligations

→ Content of “summary document” seems to be more limited than that of a “securities note”

- → Quid (non-)prospectus liability?
- → Quid disclosure expectations (and protection) of investors (and underwriters)?
- → Quid prospectus requirement for admission to trading of “rights” in rights issue?

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Numerous other tweaks (selection)

- 300-page limit for prospectuses relating to shares (or equivalent securities)
- Mandatory incorporation by reference
- Standardised format and sequence for prospectuses and summaries

- Information on sustainability reporting to be included
- No requirement to provide hard copies to investors
- Less stringent language requirements for prospectuses (but continued impact of Belgian language legislation to be examined)

- General *de minimis* for public offers of <EUR 12 million over a 12 months' period
  - Member states may require notional disclosure document if it does not constitute a disproportionate burden

- Min. 3 working days-period (instead of 2) to withdraw acceptance after publication of supplement
  - No clarification on withdrawal rights in relation to listing prospectuses (without public offer)
- No supplements to base prospectuses to reflect new financial information incorporated by reference

- Universal Registration Documents require approval by competent authority for only 1 financial year (instead of 2)

- Min. 3 days-period (instead of 6) between publication of IPO prospectus and end of the offer

- New EU Follow-on prospectus (replaces "simplified prospectus")
- New EU Growth issuance document (replaces the "EU Growth Prospectus")

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Proposals regarding the

Market Abuse Regulation

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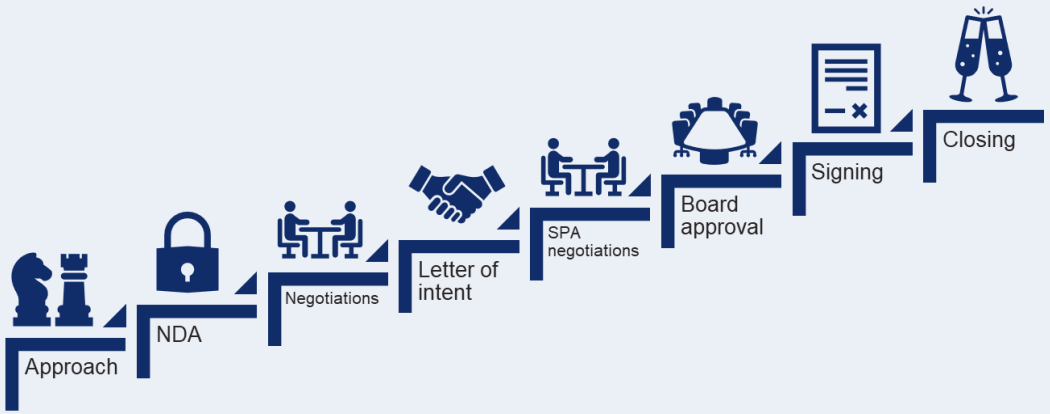
Immediate disclosure – exception for preparatory steps

Current rules

- An issuer must **immediately disclose** all inside information to the public (art. 17.1 MAR)
- A **preparatory step** in a protracted process (*i.e.*, multi-staged events) also constitutes inside information if, by itself, it satisfies the criteria of inside information (art. 7.3 MAR)



Proposed rules

- Disclosure obligation **does not apply to preparatory steps** of such process
- Issuers only need to disclose the information relating to "*the event that is intended to **complete** a protracted process*"
- However, the **notion of inside information** is not amended:
  - Preparatory steps can still constitute inside information
  - No insider dealing or tipping
  - Obligation to ensure confidentiality until disclosure
  - Immediate disclosure in the case of leakage
  - …

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Immediate disclosure – exception for preparatory steps

Some considerations

- Not clear what is understood under "*the event that is intended to **complete** a protracted process*"
  - Closing? Signing? Signing of a binding LOI?

- European Commission will provide **further guidance** via a delegated act of what information needs to be disclosed and when
  - Non-exhaustive list of relevant information categories of inside information
  - Indication for each category of the moment when disclosure is expected to occur

- The **conditions for delay** of inside information do not apply with respect to preparatory steps, as the obligation for immediate disclosure does not apply

- A **thorough assessment** of whether certain information qualifies as "inside information" during all stages of the process remains crucial (cf. no insider dealing/tipping, confidentiality obligations, …)

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Delaying disclosure – ESMA guidelines validated

Current rules

- Disclosure of inside information may be delayed by the issuer, at its own initiative and under its own responsibility, under following conditions (art. 17.4 MAR):
  - Disclosure is likely to **prejudice** the legitimate interests of the issuer
  - ~~Postponement would not be likely to **mislead** the market~~
  - The issuer is able to ensure the **confidentiality** of the information

Proposed rules

- Second condition is too broad, and therefore replaced by the specific conditions that the inside information:
  - is **not materially different** from previous public announcements on the matter
  - does not regard the fact that **previously announced financial objectives** are not likely to be met
  - is **not in contrast** with the market's expectations based on signals the issuer has previously sent (e.g. during interviews or roadshows)

→ In line with ESMA's guidelines on this matter

- Mandatory disclosure in the event of a rumour that is sufficiently accurate and reliable to indicate that the confidentiality is no long ensured.

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Delaying disclosure – prior notification

Current rules

- Supervisory authority to be notified of the delay **after the information is disclosed to the public**

Proposed rules

- Brought forward: supervisory authority to be notified **immediately after the issuer decides to delay**
- **No obligation (or right)** for the supervisory authority to “authorise” the delay

→ Practical considerations

  - The supervisory authority will gather knowledge about transactions that ultimately **do not take place**
  - Issuers to be even more attentive for the **exact moment** when inside information arises (adequate documentation in board minutes, substantiating the decision to delay)
  - **Increased risk** for issuers to be fined for not immediately disclosing inside information
  - Does not apply with respect to preparatory steps, which no longer must be made public (see above)

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Insider lists – permanent vs. deal-specific lists

Current rules	Proposed rules
• Issuers to draw up "**deal-specific insider lists**", with all persons who have access to inside information each time a new insider situation is identified (art. 18 MAR)	• Issuer to draw up one "**permanent insider list**", with all persons who have regular access to inside information due to their function or position within the issuer • Alleviation does **not** apply to persons acting on behalf of issuers, such as external advisors (accountants, consultants, lawyers) and rating agencies, who (still) have to draw up their own "deal-specific insider lists" → What if a non-permanent insider within an issuer obtains inside information? • Further minor technical amendments

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Managers' transactions – increased threshold

Current rules	Proposed rules
• PDMRs and PCAs to **notify** the issuer and the supervisory authority of every transaction conducted on their own account relating to the securities of that issuer within 3 business days (art. 19 MAR) • *De minimis* exception if the transactions remain below a total amount of **EUR 5,000** within a calendar year	• Threshold is raised to **EUR 20,000** • Supervisory authority may increase to EUR 50,000

• PDMRs may not deal in securities in the issuer during a **closed period** of 30 calendar days before the announcement of an interim financial report or a year-end report	• Additional types of transactions can be authorised during **closed periods**
	  • Certain transactions concerning employees schemes concerning financial instruments other than shares
	  • Transactions that do not imply active investment decisions
	  • Transactions that result from external factors or third parties
	  • The exercise of derivatives based on predetermined terms

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Market sounding

Clarification of safe-harbour nature

Reminder of general framework

- Definition of market sounding (art. 11.1 MAR)
  - **any communication** of information to one or more potential investors
  - by the **issuer** or an "important" secondary offeror (and third parties, for example a broker, acting "on behalf" or "on the account" of the issuer or secondary offeror)
  - **prior to the announcement** of a transaction
  - in order to **gauge the interest** of potential investors in a possible transaction and the conditions relating to it (for example its potential size, pricing and other terms)
- Specific definition of market soundings in the context of takeovers bid or mergers (art. 11.2 MAR)
- Principle: disclosure of inside information during a market sounding will be deemed to have been made in the normal course of the exercise of a person's employment, profession or duty, and therefore **not constitute market abuse (safe harbour)**, provided that both the disclosing and receiving party comply with the **(stringent) conditions** set out in MAR
- Stringent conditions include:
  - Script-based approach
  - Same level of information to all receiving parties
  - Duty to inform receiving parties when information ceases to be inside information
  - Written record – audit trail of each step in the process (to be provided to the supervisory authority upon request)

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Market sounding

Clarification of safe-harbour nature

- Clarification that (only) disclosing market participants (DMPs) carrying out market sounding in accordance with the MAR-procedure are granted **full "safe harbour" protection**

- **No obligation** for DMPs to comply with the MAR-procedure, only an **option** to benefit from the safe harbour

- In the case of non-compliance with the MAR-procedure, **no presumption** that DMPs have unlawfully disclosed inside information

- However, obligation for **all DMPs** to keep an **audit trail** (irrespective of whether they intend to benefit from the safe-harbour or not) of their assessment whether such process involves inside information
  - Before conducting market soundings, and throughout the process
  - Written record of the conclusions and reasons, to be provided to the supervisory authority upon its request

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Other proposed amendments

- Simplification of the **reporting mechanism** for buy-back programmes and stabilisation (art. 5 MAR)
  - Issuers only report information to the supervisory authority of the most relevant market in terms of liquidity
  - Issuers only must disclose aggregated information to the market
- Expanded definition of "**front running**" to all persons that may be aware of a future relevant order (not only the person executing the order) (art. 7 MAR)
- Definition of market sounding also includes transactions that are eventually **not announced** (art. 11 MAR)
- Setting up of a **cross-market order book surveillance mechanism** (art. 25 MAR)
- Introduction of sanctions that are **proportionate** to the size of the issuer (art. 30 MAR)
  - Fines for infringement of disclosure requirements are by default calculated as a percentage of the total annual turnover (limited exceptions apply)
  - Lower absolute amounts for non-disclosure by SMEs

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Proposals regarding the

Listing Directive

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Abolishment and limited transfer to MiFID II

- Continuous 10% minimum free float requirement
  - Fixed 10% threshold – no exceptions
  - In the hands of "public investors" (as opposed to company directors/officers and controlling shareholders)
  - Continuous requirement, the compliance of which is to be ensured by the regulated market

    "*Where the percentage of shares held by the public is below 10% of the subscribed capital, Member States shall ensure that regulated markets require that a sufficient number of shares is distributed to the public to fulfil the* [10% minimum free float requirement]." (art. 51a.5 MiFID II)

    → Quid 95% squeeze-out threshold?

- Minimum 1mEUR foreseeable market capitalization upon initial listing
  - No exceptions anymore

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Next steps

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Next steps

March 2023

Feedback period

Feedback open until 28 March 2023

Feedback will be summarised and presented to the European Parliament and Council

April 2023

Ordinary legislative procedure

Reading in Parliament and Council

Modifications and amendments

Approval of a final text

2024 (?)

Publication and entry into force

Entry into force on the 20th day following that publication in the Official Journal

Certain obligations (prospectus standardisation; no disclosure of preparatory steps in a protracted process) would only apply from 12 months after entry into force

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