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Entry into force on 20 July 2017 of certain provisions of the Prospectus regulation: information from the AMF for companies listed on a regulated market

The new Regulation (EU) n°2017/1129 on prospectuses amends the conditions to be obeyed for an issuer to be exempted from the obligation to produce an admission prospectus. A 20% threshold has now been introduced. The AMF presents these new provisions and their conditions.

A staggered application timetable

Regulation (EU) No. 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, was published in the Official Journal of the European Union on 30 June. It is an important step in the establishing of the Capital Markets Union, which aims to help businesses tap into more diverse sources of capital from anywhere within the European Union.

Most of its provisions will come into force on 21 July 2019. Exceptionally, some provisions relating to exemptions from the obligation to produce a prospectus will apply as from 20 July 2017 (article 1, paragraph 5, first sub-paragraph, points a), b) and c), and the whole of the second sub-paragraph). Provisions relating to national thresholds below which public offerings are not subject to the producing of a prospectus will also come into force on 21 July 2018 (article 1, paragraph 3, and article 3, paragraph 2).

Presentation of the new measures applicable as from 20 July 2017

The provisions applicable as from 20 July 2017 regard the possibility of admitting securities to trading on a regulated market without producing a prospectus. They provide that the obligation to publish a prospectus "shall not apply to the admission to trading on a regulated market of any of the following:

"a) securities fungible with securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 20% of the number of securities already admitted to trading on the same regulated market;

"b) shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, where the resulting shares are of the same class as the shares already admitted to trading on the same regulated market, provided that the resulting shares represent, over a period of 12 months, less than 20% of the number of shares of the same class already admitted to trading on the same regulated market (...);

"c) securities resulting from the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority due to the exercise of a power referred to in Article 53(2), 59(2) or Article 63(1) or (2) of Directive 2014/59/EU; "

The first exemption (point a), which previously only covered the admission of shares, is extended to the admission of all "securities fungible with securities already admitted to trading on the same regulated market". The admission ceiling is also raised from 10% to 20% over twelve rolling months.

The second exemption (point b) relates to the admission of shares resulting from the conversion or exchange of other securities or the exercise of the rights conferred by other securities. This was previously not subject to any threshold, although the ESMA has said that it should not be used abusively. It is now subject to a threshold of "20% of the number of shares of the same class already admitted to trading".

The European regulation states that the following shares are not included in the numerator used to calculate this percentage:

"a) where a prospectus was drawn up in accordance with either this Regulation or Directive 2003/71/EC upon the offer to the public or admission to trading on a regulated market of the securities giving access to the shares;

"b) where the securities giving access to the shares were issued before 20 July 2017;

"c) where the shares qualify as Common Equity Tier 1 items as laid down in Article 26 of Regulation (EU) No 575/2013 of the European Parliament and of the Council (19) of an institution as defined in point (3) of Article 4(1) of that Regulation and result from the conversion of Additional Tier 1 instruments issued by that institution due to the occurrence of a trigger event as laid down in point (a) of Article 54(1) of that Regulation;

"d) where the shares qualify as eligible own funds or eligible basic own funds as defined in Section 3 of Chapter VI of Title I of Directive 2009/138/EC of the European Parliament and of the Council (20), and result from the conversion of other securities which was triggered for the purposes of fulfilling the obligations to comply with the Solvency Capital Requirement or Minimum Capital Requirement as laid down in Sections 4 and 5 of Chapter VI of Title I of Directive 2009/138/EC or the group solvency requirement as laid down in Title III of Directive 2009/138/EC. "

The AMF reminds readers of the prospectus exemption conditions

For the exemptions provided for in points a) and b) of article 1, the AMF reminds readers that:

- they only apply to admission prospectuses and do not apply to public offering prospectuses;
- they only apply to securities fungible with existing securities;
- the methods used to calculate them are set out in the answer to question No. 31 of the ESMA's Q&As on the prospectus regulation, which are regularly updated;
- they only allow the admission to trading on a regulated market of securities exempt from the obligation to produce a prospectus; issuers must therefore still meet their ongoing information obligations if they complete an issue of equity securities or securities giving access to shares for which no prospectus is published (DOC-2013-03);
- they may be combined together, unless this might lead to an abusive exemption (question No. 27 of the ESMA's Q&As). Article 1.6 of the European regulation contains an "anti-abuse" provision according to which issuers cannot list, on a regulated market, more than 20% of the number of shares of the same class already admitted to trading on

the same regulated market, over a period of twelve rolling months, without publishing a prospectus;

Although this article 1.6 does not formally come into force until 21 July 2019, it serves as an example of what might constitute an abusive exemption, as defined by the ESMA in its guidelines referred to above. Issuers are therefore advised to comply with this provision as of now to avoid being in a position of considerable legal insecurity;

- any company that issues shares and/or securities giving access to shares that may directly, or through conversion, exceed the limit of 20% of shares admitted without publishing a prospectus over twelve rolling months should produce a prospectus, even if the shares are admitted are the result of a conversion by an investor. To avoid any interruption to listings due to prospectus production times, the AMF recommends that issuers plan ahead and produce a prospectus when securities giving access to shares are issued if, because of this issuance, the threshold of 20% over twelve rolling months may be crossed.

As a consequence of the entry into force of these provisions of the new European regulation on 20 July 2017, exemption No. 1 contained in article 212-5 of the AMF's general regulations is no longer applicable and will be repealed. The scope of exemption No. 7 contained in this article will be limited to securities giving access to shares issued before 20 July 2017.

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