

Newsalert

The new “exemption document” in public exchange offers, mergers and divisions

Introduction

Regulation (EU) No. 2017/1129 (the “**Prospectus Regulation**”), applicable from 21 July 2019, exempts issuers from the obligation to publish a prospectus in case of securities offered in connection with a takeover by means of an exchange offer or in case of securities offered, allotted or to be allotted in connection with a merger or division, provided that a document “*containing information describing the transaction and its impact on the issuer*” (so called exemption document) is made available to the public.

The same Regulation empowers the European Commission for the definition of the minimum content of the exemption document through the adoption of delegated acts.

On 16 December 2020, the European Commission adopted the new delegated Regulation (EU) of the European Commission “*supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the minimum information content of the document to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division*” (the “**Delegated Regulation**”).

The Delegated Regulation is subject to objection by the European Parliament and the Council for a period of three months from 16 December 2020 (unless extended by the European Parliament or the Council for a further three months). In the absence of any objection by the European Parliament or the Council, the Delegated Regulation shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.

1. The exemption document vs. the equivalent document

The new rules on the exemption document contained in the Prospectus Regulation and in the Delegated Regulation replace, after a period of legislative gap ⁽¹⁾, the rules on the so-called "equivalent document" laid down in Directive 2003/71/EC and its implementing rules, under which the issuer of shares in the context of a public exchange offer, merger or division was exempted from drawing up a prospectus if it published a document "*containing information deemed equivalent to that of the prospectus by the competent authority*". Such document was therefore subject to the prior issue by the competent authority of a "judgement of equivalence" to the prospectus.

The EU legislator in 2003 had not provided any indications as to the notion of equivalence of information nor to the type of documents to be subjected to the judgement of equivalence. In this context, the Italian practice had been established of supplementing the documentation required by the rules on public exchange offers (i.e. the offer document to be submitted to Consob pursuant to Article 102, paragraph 3, of the Consolidated Financial Act), mergers and divisions (i.e. the information document prepared pursuant to Article 70 of the Issuers' Regulations adopted by Consob with Resolution No. 11971/1999) with the information required to obtain the "equivalence opinion" from Consob ⁽²⁾.

With respect to the previous regime, the Prospectus Regulation has therefore introduced two significant aspects: on one hand, the minimum content of the exemption document must comply with the scheme identified by the European Commission and, on the other hand, the document is no longer subject to prior examination by the competent authority (except as discussed below with reference to certain cases of public exchange offers).

2. Scope of the rules on the exemption document

The Prospectus Regulation provides that an exemption document may be drawn up, as an alternative to a prospectus, in connection with an offer and/or admission to trading on a regulated market of:

- (i) equity securities offered in connection with a takeover by way of a public exchange offer ⁽³⁾, provided that:
 - a) those securities are fungible with existing securities already admitted to trading on a regulated market prior to the takeover and its related transaction and the takeover is not considered a "reverse acquisition"

⁽¹⁾ In the absence of a regulation relating the minimum content of the exemption document, the exemption regime could not be applied, with the result that public exchange offer, merger and divisions carried out after 21 July 2019 required the preparation of a prospectus.

⁽²⁾ With Communication No. DIE/13037777 of 3 May 2013, Consob had provided some guidelines for the drafting of the document to be submitted to the opinion of equivalence, with particular reference to mergers and divisions.

⁽³⁾ See art. 1, par. 4, let. (f), par. 5, let. (e) and par. 6-bis, of Prospectus Regulation.

- within the meaning of International Financial Reporting Standards ⁽⁴⁾;
or
- b) the competent authority to review the offer document under the Takeover Rules (Directive 2004/25/EC of the European Parliament and of the Council) has approved the exemption document in advance;
- (ii) equity securities offered, allotted or to be allotted in connection with a merger or division ⁽⁵⁾, provided that:
 - a) the transaction is not considered a "reverse acquisition" within the meaning of International Financial Reporting Standards; and
 - b) the equity securities of the acquired or divided company were already admitted to trading on a regulated market before the transaction.

3. The content of the exemption document

Article 2 of the Delegated Regulation provides, as a general rule, that the exemption document shall contain the information necessary to enable investors to understand

- the prospects of the issuer and, depending on the type of transaction, information on the offeree company, of the company being acquired or the company being divided, as well as any significant changes in the business and financial situation of each of those companies that have occurred since the end of the previous financial year;
- the rights attached to the equity securities;
- the description of the transaction and its impact on the issuer.

The content of the exemption document is set out in detail in the annex attached to the Delegated Regulation (see Annex I). With respect to a prospectus "for secondary issuances of equity securities" (i.e. for the issuance of shares fungible with those already admitted to trading on a regulated market), the exemption document presents, on one hand, some significant simplifications (including, for example, the absence of a specific section on profit forecasts and estimates published by the issuer) and, on the other hand, it provides - in addition to the sections relating to the issuer and to the securities subject to the offer or admission to trading - some detailed information tailored to the type of transaction for which the document is prepared, namely information relating to:

- the target company of the public exchange offer, the company being acquired or the company being divided (Section 2), including a description of the activities and principal markets as well as the annual and half-yearly financial information published in the 12 months preceding the publication of the exemption document or - if the company being acquired does not have securities admitted to trading

⁽⁴⁾ See IFRS (International Financial Reporting Standard) 3, par. B19, adopted with Regulation (EC) No. 1126/2008 of the European Commission.

⁽⁵⁾ See art. 1, par. 4, let. (g), par. 5, let. (f) and par. 6-ter, of Prospectus Regulation.

on a regulated market - the audited financial information in the 12 months preceding the publication of the exemption document ⁽⁶⁾;

- the transaction (Section 3), including a description of the purpose of the transaction, the procedure and terms of the transaction and the relevant risk factors;
- the impact of the transaction on the issuer (Section 5), including a description of the issuer's intentions with regard to the future business following the transaction, including an indication of any significant changes impacting the operations, principal activities, products and services; the pro forma financial information required if the transaction would result in a variation of more than 25% relative to one or more indicators of the size of the issuer's business.

In order to limit costs for issuers, the Delegated Regulation allows the preparation of a simplified version of the exemption document, containing only the sections relating to the transaction, its impact on the issuer as well as the overview of business activities and working capital, applicable to cases where the securities offered to the public or to be admitted to trading on a regulated market are fungible with equity securities already admitted to trading on a regulated market and represent no more than 10% of them.

Finally, in the case of a takeover by means of a public exchange offer (i) where securities are offered that are not fungible with existing securities already admitted to trading on a regulated market or (ii) that qualifies as a "reverse acquisition" under International Financial Reporting Standards, it is required that:

- the supervisory authority competent to review the offer document pursuant to the Takeover Rules (in Italy, Consob) also approves the exemption document (see Article 1, par. 6-bis, let. b) of the Prospectus Regulation);
- the exemption document contains, in addition to the information set forth in Annex I of the Delegated Regulation referred to above, also the information required by Annexes 1 and 11 of the Delegated Regulation (EU) 2019/980, containing the schedules for the draft of the registration document and the securities note used, for example, in initial public offering transactions on a regulated market (see Annex II of the Delegated Regulation).

4. Incorporation by reference

With a view to reducing and simplifying costs for issuers and in line with the provisions of the Prospectus Regulation, the Delegated Regulation provides the

⁽⁶⁾The financial information shall be prepared in accordance with the International Financial Reporting Standards as endorsed in the Union in accordance with Regulation (EC) No 1606/2002. Where Regulation (EC) No 1606/2002 is not applicable, the financial information shall be prepared in accordance with: (a) a Member State's national accounting standards for issuers from the EEA, as required by Directive 2013/34/EU of the European Parliament and of the Council; b) a third country's national accounting standards equivalent to Regulation (EC) No 1606/2002 for third country issuers. If such third country's national accounting standards are not equivalent to Regulation (EC) No 1606/2002 the financial statements shall be restated in compliance with that Regulation.

possibility for issuers to make use of the so-called incorporation by reference, i.e. the right to refer to documents published "previously or simultaneously" by the issuer without reproducing their content in the prospectus.

In particular, pursuant to Article 3 of the Delegated Regulation, it will be possible to incorporate by reference the following documents:

- the annual and half-yearly financial reports
- management reports
- the reports of experts and valuers;
- the offer document prepared in public exchange offer transactions;
- the merger or division plans, the explanatory report of the board of directors on the merger or division;
- other documents published in accordance with national law, where they are relevant to the transaction (i.e. any disclosure documents published pursuant to Article 70 of the Issuers' Regulation).

5. Terms for the publication of the exemption document

The Issuers' Regulation provides the terms within which issuers must publish the exemption document in order to benefit from the exemption from the obligation to publish a prospectus.

In particular, with reference to mergers and divisions, the exemption document shall be published by the issuer at least fifteen days before the start of trading or the allotment of the new shares (Article 34-ter, paragraph 03 and Article 57, paragraph 2 of the Issuers' Regulation).

With reference to the public exchange offers, the exemption document shall be published and sent to Consob no later than the date of submission to Consob of the draft offer document pursuant to Article 102, paragraph 3, of the Consolidated Financial Act for approval by the Authority.

6. Powers of Consob

As mentioned above, unlike the equivalent document provided by the previous legislation, the exemption document is not subject to prior examination by the competent authority.

Pursuant to Article 2 of the Prospectus Regulation, Consob may:

- require issuers, offerors or persons asking for admission to trading on a regulated market, and the persons that control them or are controlled by them, to provide information and documents;

- require auditors and managers of the issuer, offeror or person asking for admission to trading on a regulated market, as well as financial intermediaries commissioned to carry out the offer of securities to the public or ask for admission to trading on a regulated market, to provide information;
- suspend an offer of securities to the public or admission to trading on a regulated market for a maximum of 10 consecutive working days on any single occasion where there are reasonable grounds for suspecting that Prospectus Regulation has been infringed;
- prohibit or suspend advertisements or require issuers, offerors or persons asking for admission to trading on a regulated market, or relevant financial intermediaries to cease or suspend advertisements for a maximum of 10 consecutive working days on any single occasion where there are reasonable grounds for believing that Prospectus Regulation has been infringed;
- prohibit an offer of securities to the public or admission to trading on a regulated market where they find that Prospectus Regulation has been infringed or where there are reasonable grounds for suspecting that it would be infringed;
- suspend or require the relevant regulated markets, MTFs or OTFs to suspend trading on a regulated market, an MTF or an OTF for a maximum of 10 consecutive working days on any single occasion where there are reasonable grounds for believing that Prospectus Regulation has been infringed;
- prohibit trading on a regulated market, an MTF or an OTF where they find that Prospectus Regulation has been infringed;
- make public the fact that an issuer, an offeror or a person asking for admission to trading on a regulated market is failing to comply with its obligations;
- disclose, or require the issuer to disclose, all material information which may have an effect on the assessment of the securities offered to the public or admitted to trading on a regulated market in order to ensure investor protection or the smooth operation of the market;
- suspend or require the relevant regulated market, MTF or OTF to suspend the securities from trading where it considers that the issuer's situation is such that trading would be detrimental to investors' interests;
- carry out on-site inspections or investigations at sites other than the private residences of natural persons, and for that purpose to enter premises in order to access documents and other data in any form, where a reasonable suspicion exists that documents and other data related to the subject-matter of the inspection or investigation may be relevant to prove an infringement of the Prospectus Regulation.

For further information, please reach out to your usual Chiomenti contacts.