

Newsletter

Listed companies, corporate governance and Capital Markets

Offer to the public and admission to trading of securities.

New Rules of the European Regulation 2017/1129 (the "Prospectus Regulation")

Introduction

The provisions of Regulation (EU) 2017/1129 "on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market" (a "**Prospectus**") will become effective on 21 July 2019, except for the exemptions regime which is already applicable.

Generally, listed companies and small and medium enterprises are the issuers which benefit more from the new rules. Among the most significant features of the Prospectus Regulation are in fact the new so called "Fast Track" procedure for approval of the Prospectus, a wider range of cases where a "simplified prospectus" for secondary offerings can be used and the new EU "growth" prospectus available to companies which intend to access the capital markets. The Prospectus Regulation also provides for a new exemptions regime and widens the range of information that can be incorporated by reference.

The Prospectus Regulation, in particular, aims at:

- simplifying the content of a Prospectus;
- reducing the administrative burdens for issuers; and
- tailoring the content of the Prospectus to the characteristics and features of the different issuers and securities to be offered or listed.

I The “Fast Track” procedure for the approval of a Prospectus

The Prospectus Regulation introduces, for the first time in the EU system, a so called “Fast Track” accelerated procedure which provides for the Prospectus review and approval time to be halved.

The “Fast Track” procedure is available to “Frequent Issuers” only, *i.e.* issuers which already published, for two consecutive financial years, a universal registration document (the “**Universal Document**”), whose content is similar to the one prescribed for a registration document for equity securities.

The Universal Document can be published also on a stand-alone basis - *i.e.* not in connection with a specific public offering or listing – subject to prior Consob approval. After the publication of the Universal Document for two consecutive financial years, issuers acquire a “Frequent Issuers” status and are allowed to publish subsequent Universal Documents without the prior authorization of Consob (Article 9, para. 2).

Once the Universal Document has been published, it can be used one or several times, *in lieu* of the registration document for a public offer or admission to trading. In this case, the terms for approval are halved (*i.e.* 5 working days, instead of 10, pursuant to Article 20, para. 6).

A further significant innovation of the Prospectus Regulation is that issuers which published the Universal Document, are also exempted from the obligation to publish the annual financial report and/or the half-yearly financial report pursuant to Articles 4 and 5 of the Transparency Directive 2004/109/EC and Article 154-*ter* of the Italian Consolidated Financial Act (provided that, among other things, the Universal Document has been published, respectively, within 4 months after the end of the financial year or within 3 months after the end of the financial half-period) (Article 9, paragraph 12).

Similarly to the U.S. regime on “shelf registration”, with the Universal Document the European legislator intended to make available to listed issuers already disclosing to the market a set of full and qualified information on an annual basis a faster and more streamlined procedure for the publication of Prospectuses whenever such publication is required.

II Simplified disclosure regime for secondary issuances

The Prospectus Regulation promotes the preparation of a simplified prospectus, with a reduced content compared to the ordinary prospectus and focused on the most significant information such as:

- prospects of the issuer and the significant changes occurred since the end of the last financial year, if any;
- rights attaching to the securities; and
- reasons for the offering, and its impact on the issuer, on the overall capital structure, and the use of the proceeds.

In particular, a simplified prospectus can be used by the issuers:

- (i) whose (equity or debt) securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue securities fungible with existing securities which have been previously issued (Article 14, paragraph1(a));
- (ii) whose equity securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months and who issue non-equity securities (Article 14, paragraph1(b)).

III The EU Growth Prospectus

The Prospectus Regulation allows issuers whose securities are not yet listed on a regulated market to draw up a so-called "EU Growth Prospectus", a particularly simplified Prospectus with a reduced and standardized content.

The EU Growth Prospectus should be "*significantly lighter than the standard prospectus*", in order to facilitate access to capital markets to SMEs and minimise the relevant costs (Article 15).

The following entities are eligible to draw up a EU Growth Prospectus:

- SMEs that:
 - o meet at least two of the following three criteria: (a) an average number of employees during the financial year of less than 250; (b) a total balance sheet not exceeding Euro 43 million; and (c) annual net turnover not exceeding Euro 50 million; or
 - o have an average capitalisation of less than Euro 200 million in the last three years;
- issuers, other than SMEs, having an average market capitalisation of less than Euro 500 million on the basis of end-year quotes for the previous three calendar years, whose securities are traded or are to be traded on an SME growth market; and
- other issuers having an average number of employees less than 500, for an offering to the public with a total consideration not exceeding Euro 20 million.

IV The exemptions regime

The Prospectus Regulation amended some of the exemptions from the obligation to publish both a listing prospectus (applicable from 20 July 2017) and a prospectus for public offerings (applicable from 21 July 2018).

Listing prospectus

The listing of new (equity or debt) securities fungible with securities already admitted to trading on the same market is exempted from the obligation to publish a prospectus if the

amount of the new securities, in the last 12 months, is lower than 20% of the amount of securities already listed (Article 1, paragraph 5(a)). Under the previous regime, the threshold was set at 10% and the exemption was applicable to shares only.

The exemption to draw up a prospectus also applies if the securities to be admitted to trading are: (a) shares resulting from the conversion, exchange or exercise of the rights conferred by other securities; (b) shares fungible with shares already admitted to trading on the same regulated market; and (c) for an amount, in the last 12 months, lower than 20% of the shares already admitted to trading (Article 1, paragraph 5(b)). Under the previous regime, this exemption was automatic and did not contain any thresholds.

Public offering prospectus

Offerings for a total consideration, in the last 12 months, of less than Euro 1 million - or the higher amount provided for in the national legislation, (up to a maximum of Euro 8 million) - are exempted from the obligation to publish a Prospectus (Article 1, paragraph 3, and Article 3, paragraph 2). Under the previous regime, the total maximum amount was Euro 5 million.

Consob, with resolution no. 20686 of 9 November 2018, increased the threshold from Euro 5 million to Euro 8 million.

V Incorporation by reference

In order to simplify the Prospectus structure and avoid the duplication of information available to the public, the Prospectus Regulation widens the range of information that can be incorporated by reference into a Prospectus, *i.e.* the possibility of referring to documents previously published by the issuer without reproducing their content in the Prospectus.

The current rules allow issuers to incorporate by reference: prospectuses and information, documents previously published, financial statements, annual and interim financial information, audit reports, by-laws and other regulated information under the Transparency Directive 2004/109/EC.

The Prospectus Regulation allows issuers to further incorporate by reference corporate governance statements and remuneration reports, evaluators' reports, annual reports and other information made available to investors by investment funds, asset management companies, etc. (Article 19, paragraph 1).

To enable investors to read and retrieve the information incorporated by reference, a cross-reference list must be included in the Prospectus, also containing hyperlinks to the documents and information incorporated by reference (Article 19, paragraph 2).

VI **Entry into force of the Prospectus Regulation and transitional regime**

The provisions of the Prospectus Regulation will be effective from 21 July 2019, except for the exemptions regime which is already applicable. Directive 2003/71/EC will be applicable until such date.

By 21 January 2019, the European Commission will adopt delegated acts specifying the content and the format of the Prospectus as well as the Universal Document. To this aim, the European Commission requested the ESMA (European Securities and Markets Authority) to provide a technical advice. On 28 March 2018, this technical advice was published by ESMA on its website and delivered to the European Commission.

For any question, please do not hesitate to call your contact lawyer at Chiomenti.