Regulation (EU) 2019/2115 of the European Parliament and of the Council of 27 November 2019 amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets (Text with EEA relevance)

REGULATION (EU) 2019/2115 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 27 November 2019

amending Directive 2014/65/EU and Regulations (EU) No 596/2014 and (EU) 2017/1129 as regards the promotion of the use of SME growth markets

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Acting in accordance with the ordinary legislative procedure[(2)],

Whereas:

(1) The Capital Markets Union initiative seeks to reduce dependence on bank lending, diversify market-based sources of financing for all small and medium-sized enterprises (‘SMEs’) and promote the issuance of bonds and shares by SMEs on public markets. Companies established in the Union that seek to raise capital on trading venues face high one-off and ongoing disclosure and compliance costs which can deter them from ever seeking admission to trading on Union trading venues. In addition, shares issued by SMEs on Union trading venues tend to suffer from lower levels of liquidity and higher volatility, thereby increasing the cost of capital and making that source of funding too onerous. A horizontal Union policy for SMEs in that regard is therefore essential. Such policy needs to be inclusive, coherent and effective, and take into account the variety of SMEs and their different needs.

(2) Directive 2014/65/EU of the European Parliament and of the Council[(3)] created a new type of trading venue, the SME growth market, a subcategory of multilateral trading facilities (‘MTFs’), in order to facilitate access to capital for SMEs and enable them to grow, and also to facilitate the further development of specialist markets catering for the needs of SME issuers that have growth potential. Directive 2014/65/EU also anticipated that ‘[a]ttention should be focused on how future regulation should further foster and promote the use of that market so as to make it attractive for investors, and provide a lessening of administrative burdens and further incentives for SMEs to access capital

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2019/2115 of the European Parliament and of the Council. (See end of Document for details)*

markets through SME growth markets'. In its opinion on the Commission proposal for this amending Regulation, the European Economic and Social Committee reiterated that the low level of communication and bureaucratic approaches are significant barriers and that much more effort must be put into overcoming those obstacles. In addition, it stated that the bottom of the chain, SMEs themselves, should be targeted by involving, among others, SME associations, social partners, and chambers of commerce.

(3) It has, however, been noted that issuers of financial instruments admitted to trading on an SME growth market benefit from relatively few regulatory alleviations compared to issuers of financial instruments admitted to trading on other MTFs or regulated markets. Most of the obligations set out in Regulation (EU) No 596/2014 of the European Parliament and of the Council[(4)] apply in the same manner to all issuers, irrespective of their size or the trading venue where their financial instruments are admitted to trading. That low level of differentiation between issuers of financial instruments admitted to trading on SME growth markets and those on other MTFs acts as a disincentive for MTFs to seek registration as an SME growth market, which is illustrated by the low uptake of the SME growth market status to date. It is therefore necessary to introduce additional proportionate alleviations to adequately foster the use of SME growth markets. The use of SME growth markets should be actively promoted. Many SMEs are still not aware of the existence of SME growth markets as a new type of trading venue.

(4) The attractiveness of SME growth markets should be reinforced by further reducing the compliance costs and administrative burdens faced by issuers of financial instruments admitted to trading on SME growth markets. To maintain the highest standards of compliance on regulated markets, the measures provided for in this Regulation should be limited to companies listed on SME growth markets, irrespective of the fact that not all SMEs are listed on SME growth markets and not all companies listed on SME growth markets are SMEs. Pursuant to Directive 2014/65/EU, up to 50 % of the issuers of financial instruments admitted to trading on SME growth markets can be non-SMEs, in order to maintain the profitability of the SME growth markets' business model through, inter alia, liquidity in non-SMEs securities. In view of the risks involved in applying different sets of rules to issuers listed on the same category of venue, namely SME growth markets, the measures provided for in this Regulation should not be limited only to SME issuers. For the sake of consistency for issuers and clarity for investors, the reduction in compliance costs and administrative burdens should apply to all issuers of financial instruments admitted to trading on SME growth markets, irrespective of their market capitalisation.

(5) The success of an SME growth market should not be measured simply by the number of companies listed thereon, but rather by the rate of growth achieved by those companies. There is a need for a sharper focus on SMEs — the ultimate beneficiaries of this Regulation — and their needs. Cutting red tape is a vital part of that process, but other steps also need to be taken. Efforts need to be made to improve the information that is directly available to SMEs about the financing options open to them, in order to foster their development. Regulatory alleviation should be for the benefit of smaller companies that have growth potential.

(6) According to Article 10(1) of Regulation (EU) No 596/2014, unlawful disclosure of inside information arises where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties. Pursuant to Article 11(4) of that Regulation, disclosure of inside information in the course of a market sounding is deemed to be made in the normal exercise of a person's employment, profession or duties, provided there is compliance with certain procedures established by the market sounding regime. A market sounding comprises the communication of information, 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 such as its potential size or pricing, to one or more potential investors. During the negotiation phase of an offer of securities to qualified investors (private placement), issuers enter into discussions with a limited number of potential qualified investors, as defined in Regulation (EU) 2017/1129 of the European Parliament and of the Council[(5)], and negotiate all the contractual terms and conditions of the transaction with those qualified investors.

The aim of the communication of information in that negotiation phase is to structure and complete the transaction as a whole, and not to gauge the interest of potential investors as regards a pre-defined transaction. The market sounding regime in respect of private placements of bonds can sometimes be burdensome and act as a disincentive to entering into discussions for such transactions for both issuers and investors. In order to increase the attraction of private placements of bonds, the disclosure of inside information to qualified investors for the purpose of such transactions should be deemed to be made in the normal exercise of a person's employment, profession or duties and should be excluded from the scope of the market sounding regime, provided that an adequate non-disclosure agreement is in place.

(7) Some liquidity in an issuer's shares can be achieved through liquidity mechanisms such as market-making arrangements or liquidity contracts. A market-making arrangement comprises a contract between the market operator and a third party who commits to maintaining the liquidity in certain shares and, in return, benefits from rebates on trading fees. A liquidity contract comprises a contract between an issuer and a third party who commits to providing liquidity in the shares of the issuer, and on its behalf. To ensure that market integrity is fully preserved, liquidity contracts should be available to all issuers of financial instruments admitted to trading on SME growth markets across the Union, subject to a number of conditions.

Not all competent authorities have established accepted market practices in accordance with Regulation (EU) No 596/2014 in relation to liquidity contracts, which means that not all issuers of financial instruments admitted to trading on SME growth markets currently have access to liquidity schemes across the Union. That absence of liquidity schemes can be an impediment to the effective development of SME growth markets. It is therefore necessary to create a Union framework that will enable issuers of financial instruments admitted to trading on SME growth markets to enter into a liquidity contract with a liquidity provider in the absence of an accepted market practice established at national level. Under such a Union framework, a person entering into a liquidity contract

with a liquidity provider would not be deemed to be engaging in market manipulation. It is, however, essential that the proposed Union framework on liquidity contracts for SME growth markets does not replace, but rather complements, existing or future accepted national market practices. It is also essential that competent authorities retain the possibility of establishing accepted market practices in respect of liquidity contracts in order to tailor their conditions to local specificities or to extend such agreements to illiquid securities other than shares admitted to trading on trading venues.

(8) In order to ensure consistent harmonisation of the proposed Union framework for liquidity contracts, the Commission should adopt regulatory technical standards, setting out a template to be used for the purposes of such contracts, developed by the European Supervisory Authority (European Securities and Markets Authority) (ESMA), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[(6)], by means of delegated acts pursuant to Article 290 of the Treaty on the Functioning of the European Union and in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

(9) According to Article 17(4) of Regulation (EU) No 596/2014, issuers can decide to delay disclosure of inside information to the public if issuers' legitimate interests are likely to be prejudiced, if the delay is not likely to mislead the public, and if issuers are able to ensure the confidentiality of the information. Issuers are, however, required to notify the competent authority thereof and to provide a written explanation of the rationale supporting the decision. That notification obligation, when imposed on issuers whose financial instruments are admitted to trading only on an SME growth market, can be burdensome. A lighter requirement for such issuers, whereby they are required to provide an explanation of the reasons for the delay only upon request by the competent authority, would reduce the administrative burden for issuers without having any significant impact on the ability of the competent authority to monitor the disclosure of inside information, provided that the competent authority is still notified of the decision to delay and is able to open an investigation if it has doubts as regards that decision.

(10) The current less stringent requirement for issuers whose financial instruments are admitted to trading on an SME growth market to produce, in accordance with Article 18(6) of Regulation (EU) No 596/2014, an insider list only upon the request of the competent authority is of limited practical effect because those issuers remain subject to requirements concerning ongoing monitoring of the persons who qualify as insiders in the context of ongoing projects. The existing requirement should therefore be replaced by the possibility for issuers whose financial instruments are admitted to trading on an SME growth market to maintain only a list of persons who, in the normal exercise of their duties, have regular access to inside information, such as directors, members of management bodies or in-house counsel. It would also be burdensome for issuers whose financial instruments are admitted to trading on an SME growth market to promptly update full insider lists in the manner provided for in Commission Implementing Regulation (EU) 2016/347[(7)]. However, since some Member States consider insider lists to be important for ensuring a higher level of market integrity, Member States should be given the option of introducing a requirement for issuers whose financial instruments

are admitted to trading on an SME growth market to provide more extensive insider lists that include all persons who have access to inside information. Taking into account the need to ensure a proportionate administrative burden for SMEs, those more extensive lists should nevertheless represent a lighter administrative burden as compared to full insider lists.

(11) It is essential to clarify that the obligation of drawing up insider lists rests both with issuers and any person acting on their behalf or on their account. The responsibilities of any person acting on behalf or on account of an issuer with regard to the drawing up of insider lists should be clarified in order to avoid divergent interpretations and practices across the Union. The relevant provisions of Regulation (EU) No 596/2014 should be amended accordingly.

(12) Pursuant to Article 19(3) of Regulation (EU) No 596/2014, issuers and emission allowance market participants are required to make public information on transactions carried out by persons discharging managerial responsibilities ('PDMRs') and persons closely associated with them ('PCAs') within three business days after the transaction. The same deadline applies to PDMRs and PCAs as regards their duty to report their transactions to the issuer or to the emission allowance market participant. Where issuers or emission allowance market participants are notified late by PDMRs and PCAs of their transactions, it is technically challenging for those issuers or emission allowance market participants to comply with the three-day deadline, which may give rise to liability issues. Issuers and emission allowance market participants should therefore be allowed to disclose transactions within two business days of receipt of notification of those transactions by the PDMRs or the PCAs.

(13) Under Regulation (EU) 2017/1129, an issuer is, under certain conditions, not required to publish a prospectus in the case of securities offered in connection with a takeover by means of an exchange offer and in the case of securities offered, allotted or to be allotted in connection with a merger or division. Instead, a document containing minimum information describing the transaction and its impact on the issuer is to be made available to the public. There is no requirement under Union law for a national competent authority to review or approve such a document before its publication, and its content is lighter compared to a prospectus. An unintended consequence of such an exemption is that, in some circumstances, an unlisted company can carry out an initial admission of its shares to trading on a regulated market without producing a prospectus. That deprives investors of the useful information contained in a prospectus, while avoiding any review by a national competent authority of the information provided to the market. It is therefore appropriate to introduce a requirement to publish a prospectus for an unlisted company which seeks admission to trading on a regulated market following an exchange offer, a merger or a division.

(14) Article 14 of Regulation (EU) 2017/1129 does not currently allow the use of a simplified prospectus for issuers whose equity securities have been admitted to trading on either a regulated market or an SME growth market continuously for at least the last 18 months and that would seek to issue securities giving access to equity securities fungible with