Regulation (EU) 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 (Text with EEA relevance)

REGULATION (EU) 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

(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 Central Bank[(1)],

Having regard to the opinion of the European Economic and Social Committee[(2)],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) This Regulation constitutes an essential step towards the completion of the Capital Markets Union as set out in the Communication of the Commission of 30 September 2015, entitled ‘Action Plan on Building a Capital Markets Union’. The aim of the Capital Markets Union is to help businesses tap into more diverse sources of capital from anywhere within the European Union (‘the Union’), make markets work more efficiently and offer investors and savers additional opportunities to put their money to work, in order to enhance growth and create jobs.

(2) Directive 2003/71/EC of the European Parliament and of the Council[(4)] laid down harmonised principles and rules on the prospectus to be drawn up, approved and published when securities are offered to the public or admitted to trading on a regulated market. Given the legislative and market developments since its entry into force, that Directive should be repealed and replaced by this Regulation.

(3) Disclosure of information in cases of offers of securities to the public or admission of securities to trading on a regulated market is vital to protect investors by removing asymmetries of information between them and issuers. Harmonising such disclosure

Changes to legislation: *There are outstanding changes not yet made to Regulation (EU) 2017/1129 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

allows for the establishment of a cross-border passport mechanism which facilitates the effective functioning of the internal market in a wide variety of securities.

(4) Divergent approaches would result in fragmentation of the internal market since issuers, offerors and persons asking for admission to trading on a regulated market would be subject to different rules in different Member States and prospectuses approved in one Member State could be prevented from being used in other Member States. In the absence of a harmonised framework to ensure uniformity of disclosure and the functioning of the passport in the Union it is therefore likely that differences in Member States' laws would create obstacles to the smooth functioning of the internal market for securities. Therefore, to ensure the proper functioning of the internal market and improve the conditions of its functioning, in particular with regard to capital markets, and to guarantee a high level of consumer and investor protection, it is appropriate to lay down a regulatory framework for prospectuses at Union level.

(5) It is appropriate and necessary for the rules on disclosure when securities are offered to the public or admitted to trading on a regulated market to take the legislative form of a regulation in order to ensure that provisions directly imposing obligations on persons involved in offers of securities to the public and in admissions of securities to trading on a regulated market are applied in a uniform manner throughout the Union. Since a legal framework for the provisions on prospectuses necessarily involves measures specifying precise requirements for all different aspects inherent to prospectuses, even small divergences on the approach taken regarding one of those aspects could result in significant impediments to cross-border offers of securities, to multiple listings on regulated markets and to Union consumer protection rules. Therefore, the use of a regulation, which is directly applicable without requiring national law, should reduce the possibility of divergent measures being taken at national level, and should ensure a consistent approach, greater legal certainty and prevent such significant impediments. The use of a regulation will also strengthen confidence in the transparency of markets across the Union, and reduce regulatory complexity as well as search and compliance costs for companies.

(6) The assessment of Directive 2010/73/EU of the European Parliament and of the Council[(5)] has revealed that certain changes introduced by that Directive have not met their original objectives and that further amendments to the prospectus regime in the Union are necessary to simplify and improve its application, increase its efficiency and enhance the international competitiveness of the Union, thereby contributing to the reduction of administrative burdens.

(7) The aim of this Regulation is to ensure investor protection and market efficiency, while enhancing the internal market for capital. The provision of information which, according to the nature of the issuer and of the securities, is necessary to enable investors to make an informed investment decision ensures, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make that information available is to publish a prospectus.

***Changes to legislation:** There are outstanding changes not yet made to Regulation (EU) 2017/1129 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

(8) The disclosure requirements of this Regulation do not prevent a Member State or a competent authority or an exchange, through its rulebook, from imposing other particular requirements in the context of the admission to trading of securities on a regulated market, notably regarding corporate governance. Such requirements should not directly or indirectly restrict the drawing up, the content and the dissemination of a prospectus approved by a competent authority.

(9) Non-equity securities issued by a Member State or by one of a Member State's regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States should not be covered by this Regulation and thus should remain unaffected by this Regulation.

(10) The obligation to publish a prospectus should apply to both equity and non-equity securities offered to the public or admitted to trading on regulated markets in order to ensure investor protection. Some of the securities covered by this Regulation entitle the holder to acquire transferable securities or to receive a cash amount through a cash settlement determined by reference to other instruments, notably transferable securities, currencies, interest rates or yields, commodities or other indices or measures. This Regulation covers in particular warrants, covered warrants, certificates, depositary receipts and convertible notes, such as securities convertible at the option of the investor.

(11) To ensure the approval and passporting of the prospectus as well as the supervision of compliance with this Regulation, a competent authority needs to be identified for each prospectus. Thus, this Regulation should clearly determine the home Member State best placed to approve the prospectus.

(12) For offers of securities to the public with a total consideration in the Union of less than EUR 1 000 000, the cost of producing a prospectus in accordance with this Regulation is likely to be disproportionate to the envisaged proceeds of the offer. It is therefore appropriate that the obligation to draw up a prospectus under this Regulation should not apply to offers of such small scale. Member States should not extend the obligation to draw up a prospectus in accordance with this Regulation to offers of securities to the public with a total consideration below that threshold. However, Member States should be able to require other disclosure requirements at national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden in relation to such offers of securities.

(13) Furthermore, in view of the varying sizes of financial markets across the Union, it is appropriate to give Member States the option of exempting offers of securities to the public not exceeding EUR 8 000 000 from the obligation to publish a prospectus as provided for in this Regulation. In particular, Member States should be free to set out in their national law a threshold between EUR 1 000 000 and EUR 8 000 000, expressed as the total consideration of the offer in the Union over a period of 12 months, below which the exemption should apply taking into account the level of domestic investor protection they deem to be appropriate. However, such exempted offers of securities to the public should not benefit from the passporting regime under this Regulation. Below that threshold, Member States should be able to require other disclosure requirements at

Changes to legislation: *There are outstanding changes not yet made to Regulation (EU) 2017/1129 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

national level to the extent that such requirements do not constitute a disproportionate or unnecessary burden in relation to such exempted offers of securities. Nothing in this Regulation should prevent those Member States from introducing rules at national level which allow the operators of multilateral trading facilities (MTFs) to determine the content of the admission document which an issuer is required to produce upon initial admission to trading of its securities or the modalities of its review.

(14) The mere admission of securities to trading on a MTF or the publication of bid and offer prices is not to be regarded in itself as an offer of securities to the public and is therefore not subject to the obligation to draw up a prospectus under this Regulation. A prospectus should only be required where those situations are accompanied by a communication constituting an 'offer of securities to the public' as defined in this Regulation.

(15) Where an offer of securities is addressed exclusively to a restricted circle of investors who are not qualified investors, drawing up a prospectus represents a disproportionate burden in view of the small number of persons targeted by the offer, thus no prospectus should be required. That would apply for example in the case of an offer addressed to a limited number of relatives or personal acquaintances of the managers of a company.

(16) This Regulation should be interpreted in a manner consistent with Directive 2004/25/EC of the European Parliament and of the Council[(6)], where applicable, in the context of takeover bids, merger transactions and other transactions affecting the ownership or control of companies.

(17) Incentivising directors and employees to hold securities of their own company can have a positive impact on companies' governance and help create long-term value by fostering employees' dedication and sense of ownership, aligning the respective interests of shareholders and employees, and providing the latter with investment opportunities. Participation of employees in the ownership of their company is particularly important for small and medium-sized enterprises (SMEs), in which individual employees are likely to play a significant role in the success of the company. Therefore, there should be no obligation to publish a prospectus for offers made in the context of an employee-share scheme within the Union, provided a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer or allotment, to safeguard investor protection. To ensure equal access to employee-share schemes for all directors and employees, independently of whether their employer is established in or outside the Union, no equivalence decision of third country markets should be required any longer, as long as such information document is made available. Thus, all participants in employee-share schemes will benefit from equal treatment and information.

(18) Dilutive issuances of shares or securities giving access to shares often indicate transactions with a significant impact on the issuer's capital structure, prospects and financial situation, for which the information contained in a prospectus is needed. In contrast, where an issuer has shares already admitted to trading on a regulated market, a prospectus should not be required for any subsequent admission of the shares of the same class on the same regulated market, including where such shares result from the conversion or exchange of other securities or from the exercise of the rights conferred by

***Changes to legislation:** There are outstanding changes not yet made to Regulation (EU) 2017/1129 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

other securities, provided that the newly admitted shares represent a limited proportion in relation to shares of the same class already admitted to the same regulated market, unless such admission is combined with an offer of securities to the public falling within the scope of this Regulation. The same principle should apply more generally to securities fungible with securities already admitted to trading on a regulated market.

(19) This Regulation is without prejudice to the laws, regulations and administrative provisions adopted pursuant to Directive 2014/59/EU of the European Parliament and of the Council[7] in relation to the resolution of credit institutions, in particular Articles 53(2), 59(2) and 63(1) and (2) thereof, in cases where there is no obligation to publish a prospectus.

(20) Exemptions from the obligation to publish a prospectus under this Regulation should be able to be combined for an offer of securities to the public and/or an admission to trading on a regulated market, where the conditions for those exemptions are fulfilled at the same time. For example, where an offer is addressed simultaneously to qualified investors, to non-qualified investors that commit to invest at least EUR 100 000 each, to the employees of the issuer and, in addition, to a limited number of non-qualified investors not exceeding the number set out in this Regulation, that offer should be exempt from the obligation to publish a prospectus.

(21) In order to ensure the proper functioning of the wholesale market for non-equity securities and increase market liquidity, it is important to set out a distinct alleviated treatment for non-equity securities admitted to trading on a regulated market and designed for qualified investors. Such alleviated treatment should comprise minimum information requirements that are less onerous than those applying to non-equity securities offered to retail investors, no requirement to include a summary in the prospectus, and more flexible language requirements. The alleviated treatment should be applicable to, firstly, non-equity securities, regardless of their denomination, which are traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in such securities and, secondly, to non-equity securities with a denomination per unit of at least EUR 100 000, which reflects the higher investment capacity of the investors concerned by the prospectus. No resale to non-qualified investors should be allowed for non-equity securities that are traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access for the purposes of trading in such securities, unless a prospectus is drawn up in accordance with this Regulation that is appropriate for non-qualified investors. To that end, it is essential that market operators, when establishing such regulated markets, or a specific segment thereof, do not allow direct or indirect access by non-qualified investors to that regulated market or specific segment.

(22) Where securities are allocated without an element of individual choice on the part of the recipient, including allocations of securities where there is no right to repudiate the allocation or where allocation is automatic following a decision by a court, such as an allocation of securities to existing creditors in the course of a judicial insolvency proceeding, such allocation should not qualify as an offer of securities to the public.