

EU: Prospectus Regulation

As of 21 July 2019, the Prospectus Regulation (Regulation 2017/1129) will be applicable in the member states of the European Union. Repealing the Prospectus Directive (Directive 2003/71/EC), the new text is an important component of the EU's Capital Markets Union Action Plan. Based on technical advice on the part of the European Securities and Markets Authority (ESMA), the Commission is currently finalizing the so-called "level 2 measures", *i.e.*, the delegated acts relating to the Prospectus Regulation.

The Prospectus Regulation applies to both equity and non-equity securities offered to the public or admitted for trading on regulated markets. It pursues three main objectives: (i) to provide the issuers with custom-made disclosure rules; (ii) to make the prospectus a more useful tool for the information of potential investors; and (iii) to eliminate the existing differences between the norms applicable in different member states.

Exceptions to the obligation to issue a prospectus

Under the Regulation, the general obligation to publish a prospectus suffers a number of exceptions. Offers to the public where the total consideration is below €1 million do not require a prospectus. Member states are, however, entitled to impose other disclosure requirements, unless they represent an unnecessary burden in relation to such offers of securities. What is more, in light of the different sizes of financial markets in the EU, the member state may exempt offers of securities to the public of up until €8 million from the obligation to publish a prospectus. As a consequence, the threshold should lie between €1 and €8 million across the single market. Beyond the limit adopted by a member state, the drafting of the prospectus shall be compulsory. It is important to note that offers below that amount cannot benefit from the passporting regime. In addition, the prospectus will not be required for offers of securities to the public which are limited to qualified investors. Furthermore, when an offer of securities is addressed to a restricted circle of (not qualified) investors (150 persons), the issuers are exempted from the obligation to publish a prospectus. Finally, if an offer is addressed simultaneously to qualified investors and to non-qualified investors that commit to invest at least € 100.000 each, no prospectus is required. When an issuer already has shares traded on a regulated market, any issuance of new shares of the same class on the same regulated market – provided that the newly admitted shares represent a limited proportion in relation to shares of the same class already admission – is exempt from the need to obligation up a prospectus. The securities must represent, over a period of 12 months, less than 20% of the number of securities already admitted to trading on the same regulated market.

Prospectus summary

The purpose of the prospectus summary is to provide useful information for retail investors. According to public consultations, the format defined in Amending Directive (Directive 2010/73) had not met its objectives. The new summary is modelled on the key information document (KID) required under the PRIIPS Regulation (Regulation 1286/2014). It shall have a maximum length

of 6 sides of A4-sized paper. The Prospectus Regulation maintains the prohibition to incorporate information by reference into the summary. Established in the Prospectus Directive, this rule aims to avoid that the summary becomes a mere collection of hyperlinks and cross-references.

Base prospectus

The provisions pertaining to the base prospectus remain virtually unchanged compared to the existing regime. However, the Prospectus Regulation now specifies that all non-equity securities (including those that are issued in a continuous or repeated manner) may have a base prospectus. What is more, the drafting can consist of three separate documents, which allows for more flexibility. Finally, for the sake of higher cost-effectiveness, the new rules provide that the registration document of a base prospectus can take the form of a universal registration document.

Universal registration document

Under the Prospectus Regulation, companies that aim to have frequent recourse to capital markets may use a universal registration document. Specifically, issuers whose securities are admitted to trading on regulated markets or multilateral trading facilities will have the possibility to draw up and publish, every financial year, a universal registration document that provides legal, business, financial, accounting and shareholding information. This new element of the EU's prospectus regime is based on the idea that an issuer who makes the effort of drawing up every year a complete registration document should be awarded a fast-track approval with the competent authority when a prospectus is later required.

Specific disclosure regimes

The Prospectus Regulation sets out special optional regimes for secondary issuers and for SMEs that are already admitted to trading on a regulated market or a SME growth market for at least 18 months, in the event of an offer of securities to the public or of an admission to trading of securities on a regulated market. In fact, these companies need to satisfy already the disclosure requirements under the Market Abuse Regulation (Regulation 596/2014) and either Transparency Directive (Directive 2013/50/EU) or the rules of the operator of the SME growth market. The special prospectus contains only minimum financial information. Specifically, it only needs to comprise information regarding the last financial year, which may also be incorporated by reference. However, other elements (e.g. risk factors, board practices, directors' remuneration) still need to be included.

Risk factors

Given the general tendency to cover every risk, including generic risk factors (mostly serving as disclaimers), the new rules require the prospectus to mention only those risk factors that are material and specific to the issuer.

Conclusion

The Prospectus Regulation will clearly reduce the administrative burden arising from the production of a prospectus.