The new Prospectus Regulation and its implementing measures

Prospectuses are documents that set out information about an issuer and the securities they intend to issue or wish to have admitted for trading on a regulated market. Prospectuses are mandatory in this latter case and when making a public offering. The prospectus should give investors the information they need to make an informed decision on whether or not to invest in the securities. It therefore represents an **essential source of information for investors and one of the key tools for companies seeking to raise capital on EU securities markets.**

The first Prospectus Directive was approved in 2003 and revised in 2010. Subsequently, in 2015, the European Commission launched a consultation to identify possible shortcomings with the current system. In June 2017, the EU published Regulation (EU) 2017/1129, on the mandatory prospectus to publish in the event of public offering or listing of securities on a regulated market.

In this latest revision, Europe's lawmakers sought to **better specify some of the requirements for prospectuses, to alleviate the administrative burden particularly for small and mid-sized companies (SMEs), secondary issues and frequent issuers, and to make prospectuses more valuable information tools for potential investors.** Specifically, one of the key aims of the regulation is to prevent prospectuses becoming a barrier to companies' accessing European capital markets. It should be made easier for companies, especially SMEs, to meet their administrative obligations while ensuring that investors are well informed about the products in which they invest.

Secondly, this revision was necessary to bring the system into line with other EU regulations on disclosure, such as the Transparency Directive and Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs).

Finally, it should be noted that level 1 of prospectus regulation goes from being a Directive (the currently in-force Directive 2003/73/EC) to a Regulation. As recital 5 explains, this means rules will now be directly applicable in member states, a step that should reduce disparities between national practices and create greater legal clarity. The aim of promoting supervisory convergence in the process of prospectus review and approval is taken up by other measures in the Regulation, such as the Commission's delegated act specifying criteria for scrutiny and procedures for approval of a prospectus.

Updating the Directive is one of the planned measures in the Commission's 2015 Action Plan for Capital Markets Union (CMU), intended to **make it easier for companies to enter and raise capital on public markets.**

Based on the Commission proposal of 30 November 2015 and following intense negotiations, the European Parliament and Council reached an agreement in December 2016.

Regulation (EU) 2017/1129 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, the Prospectus Directive, was published on 30 June in the Official Bulletin of the European Union and came into force 20 days later, although measures will only take effect from 21 July 2019 except where the regulation states otherwise.

The new **Regulation also forms part of the Commission's Regulatory Fitness and Performance (REFIT) programme,** which aims to keep EU law simple, remove unnecessary burdens and adapt existing legislation without compromising on policy objectives.

*The Regulation introduces a number of **changes**, including in the following areas:*

a) **Exemptions** from the obligation to publish a prospectus

b) The **voluntary prospectus**
c) The prospectus **summary**
d) **Risk factors**
e) The new **universal registration document**
f) The new **simplified disclosure regime** for secondary issuers
g) The new standardised **EU Growth prospectus** form
h) A single access point for all EU prospectuses

Main changes to exemptions from the obligation to publish a prospectus:

First, a **prospectus is mandatory for all issues with a total volume of more than EUR 1 million,** measured as the total value of securities issued in the EU during a 12-month period. Notwithstanding which, member states may, in light of the size of their markets and their investor protection policies, set a threshold below which offers are exempted from the passporting regime. This threshold cannot be more than EUR 8 million and must be notified to the Commission by the member state that decides to apply it.

Also exempt are fresh issues of securities fungible with others already listed on the same regulated market, up to a maximum in any 12-month period of 20% of the initial volume outstanding. This represents a doubling of the volume allowed, from 10% to 20%, and its extension to all types of securities including fixed-income on condition that the securities with which they are fungible are already traded on a regulated market.

Also exempt from the obligation to publish a prospectus are listings of equities resulting from the conversion or exchange of other securities or the exercise of rights attached to other securities, provided the new shares are of the same class as others already trading in the same regulated market and make up less than 20%, over a 12-month period, of the shares previously outstanding in that class. This volume limit is new and will not apply to securities created by the conversion or exchange of other securities, own funds or eligible liabilities by order of a resolution authority exercising the powers referred to in Article 53(2), 59(2) or Article 63(1) or (2) of Directive 2014/59/EU.

Main changes resulting from the voluntary prospectus:

Notwithstanding the above, the Regulation allows an issuer, an offerer or a person seeking to have securities admitted for trading on a regulated market to voluntarily draw up and publish a prospectus in accordance with this Regulation, in certain circumstances that fall outside the scope of the Regulation or that exempt them from the usual obligation to publish a prospectus.

Main changes regarding the prospectus summary and the risk factors included therein:

There is no obligation to publish a summary when the prospectus solely concerns securities to be traded on a non-equity regulated market or segment to which only qualified investors have access, or, as in the old Prospectus Directive, where such non-equity securities have a denomination per unit of at least EUR 100,000.

Any prospectus summary must be at most 7 pages long. It cannot include more than 15 risk factors and these should be restricted to those the issuer considers most material to the investor and the securities for the purpose of making investment decisions. Materiality must be measured as the probability of occurrence and the expected magnitude of the resulting negative impact.

Main changes regarding risk factors:

The new Regulation recognises the special importance given in a prospectus to risk factors affecting the issuer and the securities, devoting a whole article to this issue. The article makes a number of significant changes, most of which have been called for over time by various competent authorities, including the CNMV.

One point to stress is that the information on risk factors included in the prospectus should include explanations about the expected impact that each might have. The Regulation further requires that risk factors mentioned should be specific to the issuer and/or securities, and be material or important to the making of investment decisions, this being corroborated by the content of the prospectus. Although not obligatory, issuers may use a qualitative scale of low, medium or high to describe the materiality of the risk factors disclosed in the prospectus. Finally, risk factors must be presented in a limited number of categories depending on their nature, the most material being shown first.

Main changes regarding the universal registration document:

Any issuer whose securities are admitted to trading on a regulated market or an MTF **may draw up every financial year a registration document in the form of a universal registration document** describing the company's organisation, business, financial position, earnings and prospects, governance and shareholding structure. The aim is that URDs should be used by frequent issuers as a base document in which annual and interim financial statements can be included under Directive 2004/109/EC or as a registration document when filing a prospectus. In fact, the Regulation allows issuers to meet their annual financial reporting obligations by publishing the universal registration document filed with or approved by the competent authority, provided it contains all mandatory disclosures, within four months of the end of each financial year. Issuers can equally fulfil their obligations to publish interim financial reports by publishing the URD or its amendments, filed with or approved by the competent authority within three months of the end of the half-year, again including all mandatory disclosures.

Further, an **issuer** whose URD has been approved for two consecutive years by a competent authority **can be classed as a frequent issuer and benefit from a fast-track prospectus approval process**, cutting the time allowed for approval from 10 to 5 working days. Issuers can even present the URD for following years if they wish, with no need for prior approval although the competent national authority will retain the option to revise it after the fact if it deems necessary. That said, where a securities note is submitted alongside a previously filed URD to form a prospectus, all documentation including the URD will have to be approved by the competent authority.

Changes to the simplified disclosure regime for secondary issues:

Issues and offers of securities already listed for trading on a regulated or SME growth market will be **able to publish an independent simplified prospectus with less extensive content** given the information already published under transparency and insider trading rules. The simplified prospectus will comprise a summary note, registration document and specific securities note.

The new EU Growth prospectus:

This is one of the biggest changes brought in by the new Regulation: it is intended for companies that do not have securities already traded on a regulated market. Three types of issuer can use this new prospectus:

(a) **SMEs** that meet at least two of the following criteria: fewer than 250 employees on average over the last financial year, balance sheet total of less than EUR 43 million and net annual billings of less than EUR 50 million. Also eligible are SMEs as defined by MiFID II article 4(1)(13).

(b) **Issuers (other than SMEs) whose securities are traded or will be traded on a Growth SME market,** which have an average market capitalisation of less than EUR 500 million based on the year-end trading price for the last 3 calendar years.

(c) **Other issuers, when the total value of the public offering in the EU does not exceed EUR 20 million over a 12-month period** and on condition that they have no securities traded on a MTF and fewer than 500 employees on average over the prior financial year.

This prospectus must be a **document in a standardised format, written in a simple language and which is easy for issuers to complete**, comprising a summary, registration document and securities note.

Single access point for all EU prospectuses:

The European Securities and Markets Authority (ESMA) will offer a free on-line access point for all prospectuses approved in the EEA. **Prospectuses no longer need to be published on paper,** although the person responsible for the prospectus will still have to provide a physical copy to any investor who asks for one.

Implementation of the new Prospectus Regulation

The Regulation envisages the Commission adopting a series of delegated acts to complement certain of its provisions. **On 28 February, the Commission mandated ESMA to provide technical advice on drafting these acts. The process is split into two parts.**
Part 1, to be adopted by the Commission before 21 January 2019, focuses on delegated acts to specify the following points:

a) The format of the prospectus, base prospectus and final terms, and the models defining specific information to include in a prospectus.
b) The model defining minimum information to include in a URD.

c) The reduced information to include in models used under the simplified disclosure regime for secondary issuers.
d) The reduced content, format and sequence of the EU Growth prospectus.
e) The criteria for scrutiny of prospectuses and the URD, particularly to verify the completeness, comprehensibility and consistency of the information they contain and procedures for their approval.
f) The procedures for registering the URD, criteria for amendments and how issuers might lose their frequent issuer status.

Part 2, with an extended deadline, will produce delegated acts to specify the following points:

a) The minimum information to include in documents published to support takeover bids based on exchanging securities and mergers or demergers that involve an immediate or future assignment of securities.
b) General equivalence criteria to apply to information requests by third countries.

In July, ESMA published **three consultation documents** containing their draft technical advice on Part 1 of the mandate. The first deals with the **format and content of the prospectus**, the second with f**ormat and content of the EU Growth prospectus** and the third with **scrutiny and approval of the prospectus.**

The consultation closed on 28 September 2017 having invited opinions from investors, issuers, offerers and persons seeking a listing for trading on a regulation market and any other market participant who may be affected by the new Regulation.

With the consultation now complete, ESMA will review responses and draft its final report on Part 1 of its technical advice mandate. This will be published on ESMA's website and sent to the Commission before the end of the first quarter 2018.

The draft proposes simplifying prospectus format and content to **alleviate the administrative burden and cost to issuers of the current regime** and requiring some new disclosures to enhance investor protection.

On criteria for **scrutiny and approval of prospectuses,** ESMA proposes a series of **standard criteria to verify the completeness, comprehensibility and consistency of the prospectus.** It also grants national competent authorities a degree of flexibility to deliver appropriate protection for investors or reduce scrutiny where this will enhance efficiency without compromising investor protection. Flexibility is essential as prospectus scrutiny is by its nature a qualitative exercise, which makes it impossible to lay down an exhaustive tick list of criteria.

On the **URD,** ESMA proposes applying the same scrutiny and approval criteria with a few tweaks to incorporate its specific features.

On **frequent issuer status,** ESMA thinks that the conditions for losing such status should mirror the conditions for obtaining it. These are already clearly defined in the new Regulation and so no additional level 2 development is needed.

On the **EU Growth prospectus**, ESMA, seeking to deliver a proportionate regime for SMEs, has adapted some disclosure obligations to the size of the issuers and the complexity of their operations. The proposal distinguishes between a model for information contained in the registration document and a second model for information on the securities. It also includes a proposal on the format and content of the summary for such prospectuses.

Finally, level 3 regulation must consider that all the material developed by ESMA and its predecessor the CESR will need to be reviewed, updated and, where necessary, added to before level 1 and 2 regulations come into force in order to ensure smooth implementation of the new regime. The regulation also requires ESMA to produce guidance for national competent authorities to support their scrutiny of the specificity and materiality of risk factors, and their categorisation.

Links:

Regulation (EU) 2017/1129 of the European Parliament and 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, the Prospectus Directive

Consultation Paper. Draft technical advice on format and content of the prospectus

Consultation Paper. Draft technical advice on content and format of the EU Growth prospectus

Consultation Paper. Draft technical advice on scrutiny and approval of the prospectus