

The New Prospectus Regulation

Changes to Disclosure Requirements for Debt Capital Markets Transactions

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Introduction

On 20 July 2017 after its publication in the Official Journal on 30 June 2017, the new Prospectus Regulation ("PR3")¹ entered into force. PR3² provisions will begin applying on a rolling basis, with full application from 21 July 2019. PR3³ will replace the previous EU Directive 2003/71/EC (the "**Prospectus Directive**"). Unlike directives, regulations do not require further implementation measures by EU member states (the "**Member States**") to be effective⁴.

Headline Changes

Policy Area	Status Quo (PD2)	PR3 Amendment	Date in Force
Risk factors	No formal provisions	Risk factors must be categorised according to type of risk and listed in order of "materiality" ⁵ ; Assessment of the likelihood of a risk materialising (low, medium or high) may be disclosed; The Commission may release criteria which must be used to determine materiality of risks.	21 July 2019

¹ See <http://data.consilium.europa.eu/doc/document/ST-15574-2016-ADD-1/en/pdf>

² See <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P8-TA-2017-0110+0+DOC+PDF+V0//EN>

³ The majority of the provisions will apply as from 21 July 2019 (see below for exceptions).

⁴ The Commission and ESMA are mandated in 24 instances to develop level 2 and 3 acts of which (i) nine mandates commission delegated acts, (ii) fourteen mandates relate to the drafting of regulatory technical standards and (iii) one mandate commissions guidelines. Consultations with ESMA regarding the various delegated acts are currently taking place, and will close on 28 September 2017.

⁵ "Materiality" refers to a combination of likelihood of occurrence and magnitude of consequences.

Scope of "wholesale" alleviated disclosure regime	Less stringent disclosure requirements for securities with denominations of EUR 100,000+	Less stringent disclosure requirements for securities with denominations of EUR 100,000+ and where securities are admitted to trading on a regulated market that is only open to Qualified Investors ("QI")	Broadening of "wholesale" definition - 2 years after PR3 enters into force (Q3 2019); QI definition change – 1 January 2018 ⁶
Exemptions from obligation to produce a prospectus for an admission to trading for convertible bonds	Shares resulting from convertible bonds are exempted from the requirement to produce a prospectus.	Shares resulting from convertible bonds which are in the same class as shares already admitted to trading on the same regulated market will be subject to a requirement to produce a prospectus if the shares represent 20% or more of the total shares over a period of 12 months (subject to exceptions).	Date PR3 entered into force (20 July 2017)
Changes to General Exemptions	Issuers, whose shares are traded, or are to be traded on an SME growth market provided that those Issuers had an average market capitalisation of less than EUR 500 000 000 on the basis of end-year quotes. Offer of less than EUR 10,000,000 over 12 months	Issuers, whose securities are traded or are to be traded on an SME growth market, provided that those issuers had an average market capitalisation of less than EUR 500 000 000 on the basis of end-year quotes Offer of less than EUR 1,000,000 over 12 months, which may be raised to EUR 8,000,000 by Member States	21 July 2018
Incorporation by Reference⁷	Financial Statements plus certain other documents	Will also include management reports and corporate documents.	21 July 2019
Universal registration document ("URD")	No formal provisions	A URD may be used by "frequent issuers" as a constituent of the base prospectus; Completion of the URD annually would allow the issuer to obtain fast-track approval of a prospectus.	21 July 2019
Simplified disclosure for secondary issuances	No formal provisions	Regime applies to issuers of certain securities admitted to trading continuously for the preceding 18 months.	21 July 2019

⁶ Directive 2014/65/EU on markets in financial instruments and amending Directive <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0065&from=EN>

⁷ The list of documents that may be incorporated by reference will expand, streamlining the issuance process.

EU Growth Prospectus⁸	No formal provisions	Regime applies to SMEs/other issuers with SME growth market listed securities and 3 year average market capitalisation <EUR 500,000,000/others without SMEs growth market listed securities with average employees ≤499 and total consolidation of offers <EUR 20,000,000 ⁹ .	21 July 2019
Summary (Retail Issues Only)	Limitation to 7% of length of prospectus or 15 pages	Maximum of 7 pages (with possible exceptions); May be partly replaced by PRIIPs KID; Limitation of risk factors to 15.	21 July 2019
Supplements	Approval within 7 working days	Approval within 5 working days; Additional information requirements for managers/financial intermediaries.	21 July 2019

Risk Factors (Article 16)

For the first time, PR3 will directly address the presentation of risk factors in the prospectus. This is one of the most significant changes introduced by PR3. In future, risk factors will be categorised according to their nature and presented in order of "materiality" (a combination of probability of occurrence and magnitude of effect)¹⁰. The issuer, offeror or the person asking for admission to trading on a regulated market may disclose its assessment of the probability of the risk materialising (low, medium or high), though it may be argued that this ranking could increase the risk of unnecessary liability.

Furthermore, a risk factor relating to the subordination under bankruptcy, or any other similar procedure, including, where relevant, the insolvency of a credit institution or its resolution or restructuring in accordance with Directive 2014/59/EU (the "**BRRD**").

The changes made to rules regarding the presentation of risk factors, and in particular the requirement to categorise them, may cause difficulties in their practical application. This is particularly true for the presentation of risks in base prospectuses covering multiple products.

Scope of "Wholesale Issuance" (Articles 1.4 and 13)

PR3 widens the scope of the definition of wholesale issuance. In addition to issuances of securities with a denomination of at least EUR 100,000, the scope includes securities of any denomination that are offered only to, and traded on a regulated market which may be accessed exclusively by, qualified investors. Lower denomination issuances of this nature will benefit from the less onerous disclosure requirements that accompany classification as a wholesale issuance in an admission to trading¹¹.

⁸ A new EU Growth prospectus with a "proportionate" disclosure regime for SMEs.

⁹ Various mechanisms will be put in place to lower the cost of compliance for SMEs and frequent issuers, including a new category of "Universal Registration Documents".

¹⁰ The Commission may later release criteria upon which materiality should be assessed.

¹¹ As it stands, very few such regulated markets exist (for example, though not a regulated market, the Professional Securities Market in the UK is restricted to qualified investors). Unless more of these markets are established, the broadened definition of wholesale issuance is unlikely to have significant practical effect. In addition, when Directive 2014/65/EU ("**MiFID II**") comes into force on 1 January 2018, the definition of "qualified investor" will become narrower. See <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN>.

Exemptions from the Obligation to Produce a Prospectus for an Admission to Trading - Convertible Bonds (Article 1.5(b))

Previously, the obligation to produce a prospectus was not triggered by issuing shares resulting from convertible bonds. Under PR3, such issuances are only exempt if they represent less than 20% of the total shares of the corresponding class already issued. Unlike the majority of provisions in PR3, this is effective now, as from 20 July 2017¹².

General Exemptions (Articles 1 and 3)

Many of the exemptions currently in place will remain the same, such as the exemption for EU sovereigns, local authorities, certain supranational entities and central banks.

One exemption which will be amended relates to small scale offerings. Offerings will now only be exempt from the requirements in PR3 if they are for a total consideration of EUR 1,000,000 or less over a 12 month period. This threshold may be increased to EUR 8,000,000 for the same period at the discretion of Member States. Issuances under this exemption cannot benefit from passporting to other Member States.

Incorporation by reference (Article 19)

The categories of documents that may be incorporated into a prospectus by reference will be broadened to include management reports and corporate governance documents amongst others¹³. Such documents may, from 20 July 2017, be published and made accessible online on the same electronic platform as the prospectus that refers to them. This reduces the time and money spent on making a regulatory announcement or producing a supplementary prospectus when material documents are published after the prospectus. Following the current regime, documents must remain accessible in the relevant electronic location for 10 years, with hyperlinks functioning for the same period¹⁴.

Universal Registration Document (Article 9)

An issuer with securities listed on a regulated market or on an MTF may choose to draw up a registration document annually in the form of a universal registration document ("URD"), akin to the US "shelf registration" or a French "*Document de Référence*" procedure ("frequent issuer"). This would contain, *inter alia*, a description of the issuer's organisation, business and financial position and shareholding structure. Information may be incorporated by reference.

A frequent issuer will benefit from a fast track approval procedure of five working days¹⁵. The URD may be updated by filing an amendment with the competent authority, and such amendment will not require pre-issue approval by the competent authority. However, the competent authority has the power to review the content of any URD at any time¹⁶.

It is unclear at this time what the standard of disclosure will be for the URD although paragraph 39 of PR3's preamble suggests that the standard of disclosure should be based on that for equity securities. If it follows the standard requirements of disclosure for equity securities (as it is the case in France, in respect of the *Document de Référence*), the URD may have less practical utility for debt issuers who do not have equity listings in the EEA.

The European Commission is consulting **ESMA** and the wider market on the filing and approval process of the URD, which will close on 28 September 2017. The European Commission must adopt a delegated act in this area 18 months after PR3 entered into force.

¹² Securities issued before this date will be grandfathered, therefore prospectuses will not need to be produced for those transactions.

¹³ For a full list, see Article 19 of PR3 <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=/EP/NONSGML+TA+P8-TA-2017-0110+0+DOC+PDF+V0//EN>

¹⁴ Further regulatory technical standards may be developed by ESMA.

¹⁵ Where an issuer has obtained approval of its URD from the competent authority of its home Member State for two consecutive years, subsequent URDs may be filed without prior approval. If it fails to file the URD one year, the status is lost and a new approval is required.

¹⁶ Similar to their power to review final terms.

Simplified Disclosure for Secondary Issuances (Article 14)

PR3 provides for a simplified disclosure regime for secondary issuances which is available to: (i) issuers on regulated markets whose securities have already been admitted to trading on a regulated market/SME growth market for at least the last 18 months and who issue fungible securities; (ii) issuers on regulated markets whose equity securities have already been admitted to trading on a regulated market/SME growth market for at least the last 18 months and who issue non-equity securities; and (iii) offerors on a regulated market of securities admitted to trading on a regulated market or an SME growth market for at least the last 18 months.

Under this new disclosure regime, the simplified prospectus shall consist of¹⁷: a summary pursuant to Article 7; a specific registration document; and a specific securities note (not applicable to issuers of equity securities issuing non-equity securities).

EU Growth Prospectus (Article 15)

This new concept will allow certain qualifying entities to benefit from lower disclosure obligations than under a standard prospectus.

An EU Growth Prospectus will be available for the following entities provided they have no securities admitted to trading on a regulated market: (i) SMEs; (ii) non-SMEs traded on an SME growth market with a market capitalisation of less than EUR 500,000,000; and (iii) issuers of securities with a public offer of less than EUR 20,000,000 (calculated over a period of twelve months) whose securities are not traded on an MTF and with up to 499 employees.

This new provision is aimed at allowing smaller companies to access capital markets more easily. However, this provision is only available to issuers listing their securities on non-regulated markets.

The European Commission is consulting ESMA and the wider market on draft technical on the content and format of the EU Growth Prospectus. It proposes a standardised format and content of the registration document, securities note and, where applicable, the summary. This consultation will close on 28 September 2017.

The Summary – Retail Issues Only (Article 7)

Under PR3, there is no requirement to produce a summary in relation to the now broadened category of wholesale issuances (see above) and base prospectuses¹⁸. Summaries are required on an issue-by issue basis for retail issuance only.

The summary must be presented in the form of questions with a maximum length of seven A4 pages (with possible exceptions). A warning relating to the risk of loss of all or part of the investment needs to be included.

The summary needs to contain a description of the securities, including specifically their seniority¹⁹.

Where an issuer is required to produce a key information document ("KID") under Regulation (EU) No 1286/2014 (the "**PRIIPs Regulation**"), parts of the content of the summary may be replaced by the information contained in the KID²⁰. Where the content of the KID is included in the summary of the prospectus, the obligation to provide a KID under the PRIIPs Regulation will be deemed fulfilled if a copy of the summary is provided to investors instead.

¹⁷ The relevant reduced information to be provided to the investors will include: the prospects of the issuer; the significant changes in the business and financial position of the issuer; the rights attaching to the securities; and the reasons for the issuance and its impact on the issuer.

¹⁸ Where only the final terms will include a summary.

¹⁹ The impact of a resolution under the BRRD will need to be included where relevant and a description of the offeror (relevant to credit institutions only).

²⁰ See Article 8.3 (c) to (i) of the PRIIPs Regulation: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R1286&from=DE>

One of the more challenging changes to the summary requirement is the limitation of the total number of risk factors within the summary to 15. Further, the summary needs to contain a brief description of the most material risk factors (see more on risk factors above). The restriction on the number of risk factors could be burdensome and may increase the risk of prospectus liability for the issuer and the dealers.

PR3 still excludes cross-references and incorporation by reference from the summary.

Prospectus Supplements (Article 23)

A shorter turnaround time for supplements to prospectuses to a maximum of five working days has been promised. Further, managers and financial intermediaries will have an obligation to inform investors about supplements. The dissemination of information to all investors of their potential withdrawal right as well as the assistance with the exercise of their withdrawal rights may cause important practical issues for intermediaries.

Other Consultations

In addition to the above mentioned consultations, the European Commission is also consulting ESMA and the wider market on the format and content of the prospectus, and the scrutiny and approval process of the prospectus.

ESMA's proposals on the format and content of the prospectus are largely similar to the existing regime, with key amendments being the reduction of costs for issuers, including the removal of the requirement for audited profit forecasts. This consultation closes on 28 September 2017, with a final report scheduled for the first quarter of 2018.

Proposals on the scrutiny and approval process of the prospectus largely mirror the current regime. Additionally ESMA proposes the adoption of standard criteria on the completeness, comprehensibility and consistency of the prospectus or URD. This consultation will also close on 28 September 2017, with a view to a final report being published in the first quarter of 2018.

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