

At a glance: the new EU Prospectus Regulation – key changes for repackagings and other structured finance transactions

The new regime established by the Prospectus Regulation (EU 2017/1129) will apply in full from 21 July 2019 and will impact on the marketing of securities offered to the public or admitted to trading on a regulated market in the European Economic Area.

Framework

- > The overarching principles can be found in the Regulation (Level 1).
- > Three Commission Delegated Regulations flesh out the detail (Level 2).
- > New Level 3 Guidance, with existing guidance to be adapted and carried over.
- > Grandfathering provisions apply for programmes issuing by way of Final Terms.

What is familiar?

- > An approved prospectus is still required on public offer and/or admission to trading within the EEA.
- > The prospectus format will continue to comprise a summary (retail only), securities note and registration document. Content will continue to be formed from building blocks.
- > Scrutiny and approval required by a Competent Authority (“NCA”).
- > Obligation to supplement retained.

Necessary information test

- > The prospectus must contain the “necessary information which is material to an investor” for making an informed assessment of the assets and liabilities, profits and losses, financial position, and prospects of the issuer, rights attaching to the securities and reasons for the issuance and its impact on the issuer.
- > The new test recognises that the information in a prospectus may vary depending on the nature of the issuer, type of securities, and circumstances of the issuer.

Risk factors

- > New, detailed requirements, supported by ESMA guidelines to NCAs.
- > Risk factors are required to be presented in a “limited number of categories” (a maximum of 10 for standalone prospectuses – more are permitted for multi-product base prospectuses), with the most material risk within a category appearing first. A risk factor should only appear once, in the most appropriate category.
- > There must be a clear and direct link between the risk factor and the issuer/securities – expect generic risk factors to be challenged.
- > Issuers are required to assess the “materiality” of risk factors, with quantitative information included if appropriate. Risk factors may be ranked using a scale of low, medium or high. Mitigating language should be used sparingly and the significance of the remaining risk should be clear.
- > The materiality and specificity of each risk factor should be corroborated by the broader prospectus disclosure.

The prospectus summary (retail only)

- > The regime remains prescriptive, with rigid format requirements. The prohibitions on cross references to other parts of the prospectus and to incorporation by reference of other documentation are maintained.
- > The maximum length of the summary will, typically, be seven sides of A4.
- > The summary must include a brief description of the most material risk factors specific to the issuer, up to a maximum of 15 in total.
- > Ability to include a PRIIPS KID as part of the summary.

The new EU Prospectus Regime



Use of websites

- > The prospectus must contain a hyperlink to the issuer’s website (if it has one) and its up-to-date constitutional documents (irrespective of whether it has its own website).
- > The trust deed, or any other contract under which noteholders are represented, must also be made available to the public on a freely accessible website.

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Advertisements

- > Scope is broader, with the regime covering “communications” rather than “announcements.” An advertisement must still relate to a specific offer to the public or admission to trading and aim to specifically promote the potential subscription or acquisition of securities.
- > Enhanced requirements for retail advertisements and on prospectus identification.
- > NCAs in Member States where advertisements are disseminated (ie not the “home” State) now have powers to ensure that advertisements comply with the new rules.

Underlying asset disclosure

- > For asset-backed securities with a small pool (five or fewer) of underlying obligors, reduced disclosure on the underlying asset is only permitted where the relevant obligor has securities admitted to trading on an EEA regulated market, an equivalent third country market or an SME growth market.
- > There are currently no “equivalent third country markets” designated by the European Commission, which significantly narrows the scope of this provision compared to the PD2 regime, under which individual NCAs could (and would) designate equivalent markets.

Derivative securities disclosure

- > The additional disclosure requirements for derivative securities are now set out in a building block, rather than a separate registration document and securities note annex.
- > There are new specific disclosure requirements for CLN reference entities and/or obligations, which largely replicate those relating to underlying obligors for asset-backed securities (see box above).

Other key features

- > A structure diagram of the transaction and a description of the cash flows must be included in the prospectus.
- > For securitisations, the prospectus must contain disclosure on compliance with risk retention rules and (if applicable) the STS criteria.
- > New requirement for retail prospectuses to be written in “plain language”.
- > The wholesale disclosure regime has been expanded to cover securities which are traded on a regulated market/segment which is only accessible by qualified investors (in addition to securities with a minimum denomination of at least €100,000).
- > ESMA will oversee a new centralised storage mechanism.
- > Key information to be included in the prospectus, including the ISIN and LEI (unique codes identifying the class of securities and the issuer), must be machine-readable, including where metadata is used.
- > List of documents that may be incorporated by reference is expanded.

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