

The Capital Markets Union: an update on the European Commission's proposal for a new EU Prospectus Regulation

September 28, 2016

In the [fifth issue of Lex et Brexit](#) (our fortnightly publication on Brexit developments), we examined the impact of Brexit on the prospectus regime in the EU and the implications Brexit may have on the European Commission's proposed Capital Markets Union action plan and associated proposal for a revised European prospectus regime (an initiative we discussed in our December 4, 2015 memo, [European Commission Proposal for a New EU Prospectus Regulation](#)). Against the backdrop of the European Commission reiterating the importance of proceeding with the Capital Markets Union action plan, we concluded that the UK's role in driving capital markets union and further harmonization of prospectus regulation may be greatly diminished.

Since then, on September 15, 2016, the [European Parliament adopted](#) amendments to the European Commission's proposed new EU Prospectus Regulation. The proposed new EU Prospectus Regulation is intended to replace the existing EU Prospectus Directive (Directive 2003/71/EC) and would be directly applicable across EEA member states without the requirement for individual member state implementing legislation.

Notable amendments adopted by the European Parliament to the proposed new Prospectus Regulation include the following:

Prospectus exemptions

No prospectus will be required for offers of securities:

- addressed to fewer than 350 natural or legal persons per member state and to a total of no more than 4,000 natural or legal persons in the EU, other than qualified investors or investors investing at least €100,000 and who certify they are aware of the investment risks. The Commission's proposal, consistent with the current Prospectus Directive, exempted offers addressed to fewer than 150 natural or legal persons per member state, other than qualified investors;
- with a total consideration in the EU of less than €1,000,000 (up from the Commission proposal of €500,000) over a period of 12 months. The current position is €100,000;
- at the election of individual member states, if the total consideration of the offer in the EU does not exceed €5,000,000 (down from the Commission proposal of €10,000,000) calculated over a 12 month period. Any public offer made in reliance on this exemption will not benefit from the passporting regime, will need to clearly indicate that the offer is not of a cross-border nature and not actively solicit investors outside the relevant member state. Member states will be under an obligation to notify the Commission and ESMA of any decision taken to avail themselves of this exemption and the threshold chosen for the total consideration.

Prospectus summaries

- No summary will be required in a prospectus relating to the admission to trading on a regulated market of non-equity securities offered to qualified investors only.
- In exceptional cases, a competent authority may allow an issuer to prepare a summary of up to 10 pages (instead of the Commission proposal of a maximum of six pages) of A4 where the complexity of the issuer's activities, the nature of the issue, or the nature of the securities issued

so requires and where there is a risk that the investor would be misled without the additional information.

- A brief description of up to 10 (increased from the Commission proposal of five) of the most significant risk factors specific to each of the issuer and the securities, as contained in the prospectus, may be included in the summary.

Risk factors

- The Commission proposal that risk factors be allocated across a maximum of three distinct categories, differentiating them by their relative materiality based on the issuer's assessment of the probability of their occurrence and the expected magnitude of their negative impact has been deleted. The requirement that risk factors are limited to risks that are material and specific to the issuer and its securities remains.
- Risk factors should also include those resulting from the level of subordination of a security and the impact on the expected size or timing of payments to holders of the securities under bankruptcy or other similar procedures, including, where relevant, the insolvency of a credit institution or its resolution or restructuring in accordance with the Bank Recovery and Resolution Directive.

Prospectus disclosure standard

The amendments to the overarching prospectus disclosure standard depart from the Commission proposal, and current, standard by introducing an element of reasonableness and a context-specific approach to the general disclosure requirement. The prospectus will need to contain the *“relevant and necessary information which an investor would reasonably require in relation to an investment in securities in order to be able to make an informed assessment...”*, but there is an acknowledgment that this information *“may vary depending on”* the nature and circumstances of the issuer, the type of securities, the type of investor targeted and the likely knowledge of such investor, and the information that is available to such investors because it has been made public under other legal or regulatory requirements.

Universal registration documents (URDs) (shelf registration)

The number of consecutive financial years that an issuer will need to have filed its URD with, and have it approved by, the relevant competent authority before being able to file its subsequent URD without prior approval from the competent authority (outside of the context of an offer or admission to trading) has been reduced to two years from the Commission proposal of three years.

Reduced disclosure for existing listed issuers and SMEs

- The shorter-form prospectus that the Commission proposed be made available for offers or admissions of securities issued by companies already admitted to trading on a regulated market or an SME growth market for at least 18 months is extended to companies admitted to trading on an MTF (other than an SME growth market) that has disclosure requirements equivalent to those provided for an SME growth market, as specified under the relevant articles of MiFID. ESMA will be required to publish and regularly update a list of such MTFs.
- The Commission proposal for a minimum disclosure regime for SMEs has been reworked to introduce the concept of an “EU Growth prospectus” for SMEs, issuers whose securities are being admitted to trading on an SME growth market and other issuers whose offer of securities is of a total consideration in the EU not exceeding €20,000,000 calculated over a 12 month period, in each case where the securities are not being admitted to trading on a regulated market. The

EU Growth prospectus would be a standardized document, which is easy for issuers to complete, covering key information on the issuer, the securities and the offer. The European Commission will adopt delegated acts to specify the reduced content and format of the prospectus.

Third country issuer representative

The requirement proposed by the Commission that a third country issuer appoint a financial services firm as a representative in its home member state who would also be responsible for ensuring the issuer's compliance with the Prospectus Regulation has been deleted.

Next steps

The adopted amendments to the proposed new Prospectus Regulation will continue to go through the European legislative process during the remainder of 2016 and will, in due course, need to be accompanied by a number of implementing and regulatory technical standards prepared by ESMA, which remain to be determined. It is unlikely that the final text of the new Prospectus Regulation will be published in the Official Journal before early 2017 and it is currently proposed only to take effect 24 months after publication. Moreover, as we noted in the fifth issue of Lex et Brexit, following agreement in the legislative process on the text of the new Regulation, it is likely that the UK will be limited in its ability to materially influence the technical standards (for example, relating to the type and level of specific prospectus disclosure required) while the Brexit negotiations are ongoing.

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