

# PERSPECTIVE ON PROSPECTUS RULES

The updated EU-wide Prospectus Regulation came into force in July 2019. How many of the rules the UK retains post-Brexit, however, remains to be seen.

**Christine Phillips** outlines the key changes



The Prospectus Directive has set out a single regime to govern the content, format, approval and publication of prospectuses throughout the EU since 2004. These legislative and regulatory measures were repealed and replaced by the new directly applicable Prospectus Regulation, which came into force in July 2017. Its provisions have been applied on a staggered basis with further features in July 2018 and the remaining provisions coming into force in July 2019.

The new Prospectus Regulation seeks to alleviate the administrative burden associated with producing a prospectus and to enhance the value of the prospectus as an informative tool for investors.

The changes are directed at smaller growing companies as well as issuers who seek to access capital markets frequently, and seek to provide tailored disclosure requirements for different issuers.

## NEW RULES SINCE JULY 2018

Changes introduced by the new Prospectus Regulation in 2018 include:

- The **removal of offers** with a total consideration **of less than €1m** (in a 12-month period) from the scope of the prospectus regime.
- The increase in the **threshold for offers of securities to the public**. EU member states have the discretion to extend the limit for

offers **up to €8m** (increased from €5m). In the UK, the threshold was set at the maximum level of €8m from July 2018.

- The **exemption** on the requirement to publish a prospectus for **securities offered on a takeover or merger** no longer requires the preparation of a document equivalent to a prospectus, provided a document setting out information on the transaction and its impact is made available.
- The **employee share scheme** offer exemption has been **simplified**.
- The **exemption on the requirement to publish a prospectus** in relation to the conversion/exchange of securities (which came into effect in July 2017) was **capped at no more than 20%** of the shares already trading.
- The exemption on the requirement to publish a prospectus in relation to issues of additional securities (which came into effect in July 2017) was increased to cap this at admission of no more than 20% of the issuer's existing admitted shares.

## NEW RULES SINCE JULY 2019

The main changes introduced by the Prospectus Regulation, which came into force in July 2019, include:

- The introduction of a **narrative format for the prospectus summary** with four sections (replacing the modular format) and setting a limit of seven A4 pages.
- Changes to the **risk factors** requirements to limit these to a **maximum of 15** (applies to the new-form summary only). Factors specific to the

issuer, or the securities in question and material to making an informed investment decision, must be disclosed.

- **A simplified proportionate disclosure regime for secondary issues.** The prospectus must contain information on any significant changes in its business and financial position since the end of the preceding financial year, as well as the rights attaching to the securities and the reasons for the issue, its impact on the issuer, and use of proceeds. It must include annual and half-yearly information from the 12 months prior to the approval of the prospectus, a summary of relevant information disclosed under the Market Abuse Regulation in that period and a working capital statement. It needn't include an operating and financial review, information on capital resources, a remuneration and benefits section or information on board practices.
- **The new EU growth prospectus** for small and medium-sized enterprises (SME):
  - 1) issuers traded on an SME growth market with an average market capitalisation of less than €500m for the prior 3 years;
  - 2) an issuer that has an average number of employees of less than 250 and a total balance sheet not exceeding €43m or an annual net turnover not exceeding €50m; and
  - 3) other issuers with no securities traded on a MTF where an EU offer does not exceed €20m over 12 months and the issuer has no more than an average of 499 employees in the previous financial year.

In line with the principle of proportionality the disclosure requirements balance the need to disclose material and relevant information, and the size of the issuer and the cost of producing a prospectus.
- The ability for issuers to file a '**universal registration document**' (similar to the concept of a US 'shelf registration document') and achieve frequent issuer status.
- The **extension of the categories of information**, which may be incorporated by reference.
- Imposing new obligations on financial intermediaries where a supplementary prospectus is required.
- Updating the methods of publication for a prospectus.

**For the UK, the challenge will be how far it wishes to diverge from EU rules following Brexit. Some form of equivalence is, however, likely to continue to be the desired trade-off for frictionless admission to EU markets**

## THE UK'S APPROACH

While the Prospectus Regulation is directly applicable, some amendment to domestic UK legislation has been necessary to align the existing statutory measures and Financial Conduct Authority (FCA) rules with the requirements.

In particular, the FCA's Prospectus Rules sourcebook has been updated to reflect the new rules, and certain amendments have been made to the Financial Services and Markets Act 2000.

Commission Delegated Regulation 2019/980 sets out the format, scrutiny and approval requirements for a prospectus. The regulation sets out the detailed information that issuers must include in a prospectus together with the reduced contents list for EU growth prospectuses and minimum information for a universal registration document. There is no longer a requirement for profit forecasts or profit estimates to be accompanied by an accountant's or auditor's report.

In addition, Commission Delegated Regulation 2019/979 sets out the technical standards on key financial information in the summary of a prospectus and requirements for advertisements and a supplementary prospectus. Again, these provisions are reflected in the Prospectus Rules.

The FCA is in the process of updating its procedural and technical notes in the FCA Knowledge Base to reflect the application of the Prospectus Regulation. The European Securities & Markets Authority (ESMA) has published guidance on the interpretation of the prospectus regime, including on the specificity and materiality of risk factors, as well as draft guidelines about disclosure requirements in the Prospectus Regulation.

It is difficult at present to speculate on the impact that these changes will have on capital markets activity. A number of the respondents to ESMA consultation on the requirements commented that the proposed changes did not go far enough, but the reduced disclosure requirements, and the attempt to extend the requirements to cater for SMEs, may encourage some issuers to issue securities where they had not previously fallen with an applicable exemption.

For the UK, the challenge will be how far it wishes to diverge from EU rules and mechanisms following Brexit. Some form of equivalence is, however, likely to continue to be the desired trade-off for frictionless admission to EU markets. ●



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