

The new EU Prospectus Regulation – tailor-made disclosure under increasingly uniform rules

The current Prospectus Directive will be replaced by the new EU Prospectus Regulation on 21 July 2019. The new regulation will offer more opportunities and obligations for tailor-made disclosure under increasingly uniform rules.

Key takeaways

- Following the entry into force of certain provisions in 2018 and 2017, the new EU Prospectus Regulation will become applicable in its entirety on 21 July 2019, replacing the provisions under the previous Prospectus Directive and Commission Prospectus Regulation.
- In Finland, offers of securities between MEUR 1 and MEUR 8 are exempt from the duty to publish a prospectus. However, issuers will be required to produce a basic information document (FI: *perustietoasiakirja*). In Sweden, offers of securities under MEUR 2.5 are exempt from the duty to publish a prospectus.
- The new Prospectus Regulation allows for utilization of several types of prospectuses alongside standard prospectuses, which addresses the need for different types of securities, issuers, offers and admissions.
- The risk factors section in prospectuses will become more focused on the specificity and materiality of risk factors to the particular issuer. Risk factors must also be concise and presented in a limited number of categories with the most significant risk required to be disclosed first in each category.
- The length of prospectuses summaries will be limited in order to encourage issuers to select the information which is essential for investors. At the same time, issuers have more freedom to choose which information to present in the summary compared to the previous regime. Summaries should be modelled as much as possible on the key information document ("KID") prepared in accordance with Regulation (EU) No 1286/2014 (the "**PRIIPS Regulation**").
- Issuers offering own shares as payment in public takeovers, statutory mergers or de-mergers are, under certain circumstances exempt from the requirement to publish a prospectus, provided that an information document is produced in lieu of a prospectus.

Background

After certain provisions took effect on 21 July 2018 and 20 July 2017, the multi-staged entry into force of Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") will be completed on 21 July 2019. The Prospectus Regulation will replace the previous Directive (2003/71/EC) (the "**Prospectus Directive**") and Commission Regulation (EC) No 809/2004 (the "**Commission Prospectus Regulation**"), which have thus far been the primary sources of EU law for prospectuses in connection with offers of securities to the public and admission to trading on regulated markets such as Nasdaq Helsinki and Nasdaq Stockholm.

The Prospectus Regulation will from 21 July 2019 onwards replace the Prospectus Directive and its implementing provisions in Member States' national legislation. Despite its direct applicability and its objective of ensuring that regulations concerning prospectuses are applied in a uniform manner throughout the European Union, it does still leave some discretion to Member States. In particular, defining the threshold of an offer's total consideration that triggers duty to publish a prospectus, as well as the disclosure obligations applicable to offers falling below this threshold are left to the Member States, within certain defined limits.

Regulations already in force

The threshold for the exemption concerning *private placement listings* was increased from 10 to 20 per cent on 20 July 2017 facilitating, among other, larger accelerated equity raisings for issuers. The increased threshold also applies to shares of the same class as those already listed, which are received conversion or exchange, such as convertible bonds.

The total consideration threshold for the duty to publish a prospectus entered into force on 1 January 2019. Member States of the EU have been granted the possibility to define their national threshold within the range of MEUR 1 and MEUR 8. Sweden has opted for not changing the previously applied threshold of MEUR 2.5. Finland has opted to apply the maximum of MEUR 8. However, in order to ensure sufficient disclosure for offers exceeding MEUR 1 but falling below MEUR 8, a so-called basic information document (*FI: perustietoasiakirja*) will be required.

The basic information document will replace the previous so-called national prospectus in Finland. The requirements are less comprehensive than for a prospectus, and its length is generally limited to six A4 pages. The basic information document must, however, contain sufficient information to enable an informed assessment on the issuer and the securities. The basic information document does not require approval from the Finnish Financial Supervisory Authority (the "**FIN-FSA**") but must be delivered to the FIN-FSA for information. The FIN-FSA has also indicated that an exemption from the duty to publish a prospectus under article 1(4) of the Prospectus Regulation (e.g. offers to only qualified investors and/or fewer than 150 non-qualified investors per EU Member State) will also provide an exemption from the duty to publish the basic information document.

Still to come – provisions that enter into force on 21 July 2019

While some parts of the Regulation are already in force, the bulk will become applicable on 21 July this year. These provisions will address several technical aspects concerning the prospectus process, such as the format and machine readability of the prospectus, use of advertisements, supplements and key financial information to be presented in documents. For example, the requirements for certain prospective financial information will be relaxed so that an auditor statement will no longer be required in connection with profit forecasts or estimates.

The most relevant reforms, however, relate to the possibility to utilize different kinds of prospectuses and other documents tailored to the specific transaction, the universal registration document and the associated faster approval processes for frequent issuers, as well as the risk factors and summary of the prospectus.

Different kinds of prospectuses

The new Prospectus Regulation introduces (and in some aspects reintroduces) different types of prospectuses to address different types of securities, issuers, offers and admissions. The particular prospectus types include:

- a wholesale prospectus for non-equity securities;
- a base prospectus;
- a simplified prospectus for secondary issuances; and
- an EU growth prospectus.

For non-equity securities issues, issuers can utilize a wholesale prospectus or base prospectus. A wholesale prospectus can be drawn up for offers of non-equity securities such as bonds when the denomination per unit is at least EUR 100,000, and the offer is directed primarily towards professional investors. For all non-equity securities, including those that are issued in a continuous or repeated manner or as part of an offering program, issuers are also allowed to draw up a prospectus in the form of a base prospectus, similar to the type of a prospectus drafted under the Prospectus Directive.

Drafting a simplified prospectus for secondary issuances is available to issuers whose securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the last 18 months. The limitation to regulated markets and SME growth markets leaves multilateral trading facilities ("**MTFs**") such as the Nasdaq First North marketplace outside the scope of these simplified prospectuses. The securities issued under the simplified prospectus format must also be fungible with the issuer's previously issued securities.

The EU growth prospectus is reserved primarily for SMEs (i.e. small and medium-sized enterprises which fulfil certain criteria as to e.g. employees, total balance sheet, turnover and market cap), and issuers listed on SME growth markets with a market capitalization of under MEUR 500 for the previous three years.

The Universal Registration Document

Issuers will also be able to produce a Universal Registration Document (the "**URD**") in a process somewhat similar to the shelf registration possibility provided under the US federal securities laws. The URD must be filed annually with the FIN-FSA by Finnish issuers and the Swedish Financial Supervisory Authority (the "**SFSA**") by Swedish issuers, respectively. After the URD has been approved by the FIN-FSA/SFSA for two consecutive financial years, subsequent universal registration documents may be filed without the FIN-FSA/SFSA's prior approval. An URD may be updated by filing an amendment with the FIN-FSA/SFSA before the URD becomes a constituent part of a prospectus. After the URD has been approved to form part of a prospectus, it must be updated in accordance with the normal process of publishing a prospectus supplement.

Frequent issuers of securities that have drawn up a URD will also have access to a fast-track approval procedure for their prospectuses. For such issuers, the FIN-FSA/SFSA must give its decision on the approval within five working days, provided that the FIN-FSA/SFSA has been informed at least five working days before of the intent to submit an application for approval.

The status of frequent issuer can be obtained if the issuer upon the filing or submission for approval of each URD confirms that it has complied with its disclosure obligations under the Directive 2004/109/EC (The "**Transparency Directive**") and Regulation (EU) No 596/2014 (the "**Market Abuse Regulation**") over the last 18 months or over the period since the obligation to disclose regulated information commenced, whichever is the shorter. The issuer must also confirm that issuer it has amended its URD according to the instructions of the FIN-FSA/SFSA, if it has been required to do so during the URD's review process.

Risk factors

Under the Prospectus Regulation, risk factors featured in a prospectus must be limited to risks that are specific to the issuer and/or to the securities and which are material to an informed investment decision, as corroborated by the content of the registration document and the securities note. In other words, risk factors must fulfill the requirements of specificity, materiality and corroboration. The requirement of information being limited to what is specific and material for the issuer or its securities also applies as a general principle to the rest of the prospectus. Prospectuses should not contain risk factors which are generic and only serve as general disclaimers.

The interpretation of the provisions concerning risk factors has been further clarified by the European Securities and Markets Authority's ("**ESMA**") guidelines, which were published in a Final Report on 29 March 2019. The guidelines stipulate that the specificity and materiality of each risk factor must be apparent from the disclosure. They also provide guidance on the categorization of risk factors, as well as the requirement to present them in a focused and concise form.

The materiality of the risk factors must be assessed based on the probability of their occurrence and the expected magnitude of their negative impact. Providing quantitative information within the disclosure of risk factors helps to demonstrate the materiality of a specific risk factor. Where quantitative information is not already available or where it is not appropriate to include such information, the description of the potential negative impact of the risk factors should be described using a qualitative approach. One possible approach would be to indicate the qualitative significance of a risk factor by using a scale of low, medium or high. There is no obligation to use a scale approach but the impact of the risks should in any case be adequately explained in a manner that makes the materiality of the risk factor evident.

Risk factors must also be presented within a limited amount of categories depending on their nature, with the possibility of including sub-categories. Categories must be identified within the risk factors section of the prospectus via the use of appropriate headings. A risk factor should only appear once in a prospectus and in the most appropriate category. The most material risk factors must be mentioned first in each category, but there is no requirement to rank the rest of the risk factors within the category in order of their materiality.

The number of categories and sub-categories should be proportionate to the size or complexity of the transaction and risk to the issuer or guarantor. ESMA has provided an illustrative benchmark maximum of ten categories. In its final report of the guidelines, ESMA acknowledged that the

numerical restriction should not be applied in an inflexible manner and that the final guidelines concerning the number of categories should be applied on the basis of a case-by-case analysis.

Shorter summaries

The Prospectus Regulation will limit the maximum length for the summary to seven sides of A4-sized paper when printed, with the possibility of extending of the summary in certain exceptional situations, e.g. when the summary covers several securities which differ only in very limited details, and where the issuer opts to substitute information set out in the Prospectus Regulation with the information in a key information document ("**KID**") prepared by the issuer in accordance with Regulation (EU) No 1286/2014 (the "**PRIIPS Regulation**"). According to the recitals of the Prospectus Regulation, the summary should be modelled as much as possible on the KID.

Compared to the previous regime, the new Prospectus Regulation does not stipulate in detail which information should be included in a prospectus summary. Consequently, issuers will enjoy a larger freedom to select which information the issuer considers the most relevant to include in the summary. The prospectus summary should contain a limited selection of the specific risks, which the issuer considers to be most relevant to investors.

Exempted documents

An issuer is exempted from the obligation to publish a prospectus for the offer and admission to trading on a regulated market of securities in connection with a takeover, statutory merger or demerger, provided that it publishes a document containing information describing the transaction and its impact on the issuer. Unlike under the Prospectus Directive, where the issuer had to submit the document to the national competent authority for review, in order for it to confirm that the document was regarded by the competent authority as being equivalent to that of a prospectus, such document under the new Prospectus Regulation will not be subject to approval nor review by the competent authority. In Sweden however, issuers will have the possibility to submit such document for voluntary review prior the publication of such document.

Tap issues in Sweden

As the new Prospectus Regulation enters into force, the SFSA has informed that issuers in Sweden seeking for the admission of trading of bonds will no longer be able to use standalone prospectuses for more than *one* admission to trading. Issuers in Sweden have under the old prospectus regime been able to rely on a single standalone prospectuses during the 12-month validity period when listing several tranches after issuing subsequent tap-issues in accordance with the terms set out in the approved prospectus. The listing of such tranches will under the new Prospectus Regulation require either a new prospectus approved for each admission to trading or the use of a base prospectus or any of the other types of prospectuses set out in the Prospectus Regulation.

Anticipated practical impact

While the content requirements for standard prospectuses remain generally the same and a prospectus will generally be required when securities are admitted to trading on a regulated market or are offered to the public, specific requirements been clarified, updated or in certain cases simplified. The higher consideration threshold, broader exemptions and simplified requirements for frequent issuers and SMEs will however mean that fewer transactions will require a full standard prospectus.

More generally, the new Prospectus Regulation provides more opportunities for tailor-made solutions in prospectuses, which take into account the nature, scale and characteristics of issuers and their businesses. This general approach does, however, also involve stricter requirements for issuers to draft prospectuses in a manner which ensures that the information provided is specific to the issuer, particularly with regards to risk factors.

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