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## Reforming EU Securities Laws: The New EU Prospectus Regulation

The new EU Prospectus Regulation is expected to be published in the Official Journal of the EU shortly (the Regulation) and will replace the EU Prospectus Directive (2003/71/EC (the Prospectus Directive)), which has governed the offer of securities in the European Union since 2005. Unlike the Prospectus Directive, the Regulation will not require implementation by each EU Member State but will be directly applicable in all Member States. The Regulation is part of the EU Commission's plans for a Capital Markets Union launched in September 2015, which is intended to achieve a true single market for capital across the EU and allow companies to access the capital markets in a more cost efficient way. The Regulation will enter into force on the twentieth day after its publication, with most of its provisions applying two years from then (Q3 2019), although a few provisions will apply earlier. The new Regulation requires the EU Commission and the European Securities and Markets Authority (ESMA) to develop several implementing rules and standards in the upcoming months.

The new regulation includes several changes relevant for both equity and debt capital market transactions, including in relation to prospectus exemptions and the content and format of prospectuses, and introduces a new fast track prospectus approval for frequent issuers.

### *Prospectus Exemptions*

#### > Exemptions from Prospectus Requirement – for Less than 20 Percent of Existing Listed Securities

The new Regulation gives regulated market issuers the ability to conduct private placements of new securities of less than 20 percent of their existing listed securities for a 12-month period and to have those new securities admitted to listing without the need to issue a listing prospectus, up from currently less than 10 percent. This new feature applies with immediate effect, not just to shares as previously, but more widely to all listed securities. For equity issuances this exemption will be quite relevant in practice, although in many European countries existing shareholders' pre-emption rights would have to be disapplied first to use the exemption. The exemption will also be useful in the context of consideration shares issued in M&A processes. The extension to debt issuances may be of more limited practical relevance as debt issuers can already make tap issuances relatively easily under debt programs.

## > **Exemptions from Prospectus Requirement – for an Admission to Trading of Convertible or Exchangeable Securities**

This exemption also extends to shares resulting from convertible or exchangeable securities (e.g., convertible bonds) which are of the same class as shares already admitted to trading on the same regulated market, if the resulting shares represent less than 20 percent of the shares already admitted to trading on the same regulated market over a period of 12 months (subject to certain exceptions). Previously, issuances of shares on conversion of a convertible bond were exempt altogether, but this exemption was deleted in the new Regulation. Accordingly, issuances of 20 percent or more of shares on conversion are in principle subject to the obligation to publish a prospectus, but this does not apply where a prospectus was drawn up under the Prospectus Directive or the new Regulation upon the offer to the public or admission to trading of the securities giving access to the shares. This requirement will also have immediate effect, but securities issued before this date will be grandfathered. In practice, this means that issuers who have previously avoided publishing a prospectus by issuing convertible notes to qualified investors on a nonregulated market which then convert into shares that are admitted to trading on a regulated market, will need to publish a prospectus for the initial issuance of convertible securities (or find another way of structuring their issuance).

## > **Exemptions from Prospectus Requirement for Small Offers Amended**

The new Regulation also contains a change to the exemption for small offerings, which will only be exempt if they are for a total consideration of EUR 1 million or less over a 12-month period (previously EUR 2.5 million). This threshold may be increased to an upper limit of EUR 8 million for the same period at the discretion of Member States (previously the upper threshold was EUR 5 million). Member States can require other disclosure requirements at the national level for issues not exceeding the threshold if they are not unnecessarily burdensome. This requirement will take effect 12 months from the date the Regulation enters into force, *i.e.*, in Q3 2018.

## ***Changes to the Content of Prospectuses***

The new Regulation emphasises that the information in a prospectus shall not only be “easily analysable” and in “comprehensible form”, but also be “concise” (Art. 6(2)). The new focus on making the prospectus more concise is especially embodied in the new content requirements for risk factors discussed below, and also featured in the Regulation’s provisions for a shortened summary.

## > **Risk Factors – Materiality Assessment Across Categories**

The new Regulation introduces significant changes to the substance of risk factors. Going forward, only risk factors that are material and specific to the issuer and its securities will be permitted in a prospectus. Issuers have to assess the materiality of risk factors based on the probability of their occurrence and the expected magnitude of their negative impact. Issuers will be required to allocate risk factors across a limited number of categories depending on their nature, and in each category the most material factors have to be mentioned first. ESMA will be given the power to develop guidelines on the assessment by competent authorities of the specificity and materiality of risk factors and their presentation across categories.

## > **Incorporation by Reference Expanded**

Issuers will be able to incorporate by reference a wider range of information than in the past, including periodic reports, audit reports and financial statements, management reports and corporate governance statements, certain valuation reports and remuneration reports, and memoranda and articles of association, provided information is published electronically and complies with the language requirements of the Regulation. The documents to be incorporated by reference may be published and made accessible online on the same electronic platform as the prospectus that refers to them, thereby reducing the time and money spent on making a regulatory announcement or publishing a supplementary prospectus when material documents are published after the date of the prospectus. ESMA will be given the power to develop regulatory technical standards to complete the list of documents required under EU law.

### > **New EU Growth Prospectus**

Fostering capital markets access by small and medium-sized enterprises (SMEs) is one of the key objectives of the EU Capital Markets Union. SMEs and certain larger companies will be able to use a simplified EU growth prospectus with “proportionate disclosure” for an initial public offering. This includes issuers, other than SMEs, whose securities are to be traded on an SME growth market, provided they have an average market capitalisation of less than EUR 500 million for the previous three calendar years. The growth prospectus is also available for offerings of up to EUR 20 million calculated over a 12-month period, provided that the issuer has no securities traded on a multilateral trading facility (MTF) and an average number of employees of only up to 499. The reduced disclosure requirements will, among others, include two years’ financial information for equity securities and one year for nonequity securities. Only equity issuers with a market capitalisation above EUR 200 million need to provide an operating and financial review and a working capital statement and statement of capitalisation and indebtedness.

### > **Simplified Disclosure Regime for Secondary Issuances**

Issuers that have already been admitted to trading on a regulated market or SME growth market for at least 18 months can use a simplified prospectus for secondary issuances of the same class of securities or for issuances of nonequity securities. The minimum disclosure regime consists of a registration document and securities note, and financial information is only required for the last financial year.

Already in 2012, a reduced (proportionate) disclosure regime had been introduced, but it was not used frequently in practice. Accordingly, the new simplified regime is intended to further reduce disclosure requirements for secondary issuances. In addition, the minimum disclosure regime has now been extended to debt issuers and may be used for both their base prospectuses and standalone prospectuses. It remains to be seen whether the new regime will be used more than the previous one.

### > **New Summary Requirements**

A new Article 7 sets out detailed requirements for the prospectus summary, which is meant to be an introduction to the prospectus and has to be consistent with the other parts of the prospectus. Key changes are that the summary will be shortened to a maximum length of seven pages of A4 written in a concise manner and that it can only contain the 15 most material risk factors specific to the issuer (cross-references to other sections remain prohibited). The summary has to comprise four sections – an introduction containing warnings, key information on the issuer, key information on the securities, and key information on the offer itself and/or the admission to trading. For each of the sections, the Regulation introduces a number of subsections with specific content requirements. Among others, the section regarding key information on the issuer will contain a subsection covering the key financial information regarding the issuer, consisting of a selection of historical key financial information, whose content and format has to be developed further by ESMA. The liability regime of the summary will remain unchanged.

### > **Scope of Wholesale Disclosure Regime Extended**

The new Regulation extends the scope of the definition of debt issuances in denominations per unit of EUR 100,000 and above (wholesale debt). In addition to offerings 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 for trading exclusively by qualified investors. However, in practical terms, the extension of this exception will only be relevant if more regulated markets for qualified investors will be established, keeping in mind that the definition of qualified investor will be narrowed with Directive 2014/65/EU (MiFID II) coming into force in January 2018. Wholesale bond prospectuses will continue to be exempt from the summary requirement, and there is also no need to include a summary for the new category of wholesale debt traded on a regulated market for qualified investors.

## ***Faster Prospectus Approvals***

### **> Universal Registration Document Introduced**

The Regulation introduces the new procedure of a universal registration document (URD), which can be used to register any type of equity or debt security in advance and can be kept up-to-date by submitting supplements. It can then be used to do a quicker “take-down” of securities by simply preparing a securities note and summary (where applicable) at the time of the desired offering or listing, so as to allow companies to go to market quickly when market conditions are favourable. A URD can be prepared by an issuer listed on a regulated market or an MTF annually and has to contain a description of the issuer’s organisation, business, financial position, earnings and prospects, governance and shareholding structure. The document can incorporate information by reference. The new Regulation states in a preamble that the standard of disclosure for the URD should be based on that for equity securities, as the URD can be used for issuances and admission to trading of equity and non-equity securities, but more detailed rules will need to be developed.

Once an issuer has obtained approval of its URD from its home Member State regulator for two consecutive years, it is considered to be “well-known” and can file subsequent URDs and any amendments thereto without prior approval. These issuers will be granted the benefit of a faster approval process of five, rather than ten working days when they want to do an offering or listing. Frequent issuers have to alert the competent authority at least five working days before the submission of an application for approval, and the submission when made has to include the securities note and the summary as well as amendments to the URD. If a frequent issuer does not file a URD one year, approvals are required for two consecutive years again in order to obtain well-known issuer status.

For well-known issuers, the competent authority can review the content of an URD on an ex-post basis where it deems necessary (based on assessing the risks of the issuer, the quality of its past disclosures, or the length of time since the last review of a URD). A URD can be amended, as long as it has not become a part of an approved prospectus, voluntarily by the issuer, or upon request of a competent authority following its review, in particular where a material omission or mistake was identified by the competent authority.

The URD bears resemblance to the U.S. shelf registration procedure, although the U.S. system still works more efficiently in that it does not require the regulator’s approval of a prospectus supplement that supplements a shelf (whereas the Prospectus Regulation approval for well-known issuers is five working days, and the five-day notice period before submission will, in practice, extend the period to ten days), and allows for forward incorporation by reference to future reports.

### **> Prospectus Supplements – Reduced Review Time**

Prospectus supplements that have to be filed in case of a new factor or material mistake arising between the prospectus approval time and closing will have to be approved in a maximum of five working days (rather than currently seven). Managers and financial intermediaries will have an obligation to inform investors about the supplement on the day of its publication, so as to enable investors to exercise their withdrawal rights within two working days after publication of the supplement.

## ***Other Areas***

### **> Third Country Equivalence**

The Regulation allows the competent authority of a home Member State of a third country issuer to approve a prospectus prepared in accordance with third country laws, provided the information requirements of that third country are equivalent to the Prospectus Regulation requirements and provided the competent authority has concluded cooperation arrangements with the relevant supervisory authorities of the third country issuer. The EU Commission will establish general equivalence criteria, and ESMA will develop standards to determine the minimum content of the cooperation arrangements between the regulators, which will have to deal with an efficient exchange of information

and possibly also the enforcement of obligations under the Prospectus Regulation in third countries. This is in line with the broader proposals at EU level for the development of third country equivalence arrangements across different regulations and directives.

> **Single Online Access for all Prospectuses**

ESMA will have to provide single access for all prospectuses for the first time. This has been in preparation for a number of years and will be quite significant in practice, as it will make it much easier to access prospectuses for offerings across the EU on one platform.

**Outlook**

The new Prospectus Regulation will change current prospectus rules and practice for both equity and debt issuances in several areas and will contribute to a more uniform European prospectus regime. It remains to be seen how ESMA and the EU Commission will shape a number of the Regulation's provisions in further implementing acts, and how all the new rules will be applied in practice from 2019. The increase of exempt offerings of existing listed securities to below 20 percent which will apply immediately could already help a number of issuers today to conduct offerings and listings without the need for a prospectus.

The new Regulation will also entail quite a few legislative changes to be carried out by the EU Member States, such as repealing (or changing) the national laws that had been adopted to implement the Prospectus Directive. In the UK, the new Regulation may become part of the "Repeal Bill", which as currently being discussed is intended to transpose all existing EU rules at the time of [Brexit](#) into UK law. It then remains to be seen if the UK will make changes to that regime following Brexit depending on the form Brexit will take. For EU Member States, the format of a regulation (rather than directive) that the new Prospectus Regulation has taken means that there will be much less room for divergence of prospectus rules, and the focus will be on convergence of application of the uniform rules in all Member States. To that end, the Regulation contains more stringent provisions for the cooperation among Member States and ESMA's role in coordinating cooperation and information exchange of Member State authorities, including by maintaining a central database of sanctions communicated to ESMA by competent authorities. Member States will have a choice as to whether they will impose criminal sanctions for infringement of the Regulation, but all Member States have to provide for administrative sanctions and measures in case of infringement of a range of the Regulation's provisions. The Regulation's success in making EU capital markets more uniform will depend to a great extent on whether the application of the new rules by Member States' regulators will be more consistent.

This *GT Alert* was prepared by **Dorothee Fischer-Appelt**. Questions about this information can be directed to:

- > [Dorothee Fischer-Appelt](mailto:fischerappeltd@gtlaw.com) | +44 (0) 203 349 8862 | [fischerappeltd@gtlaw.com](mailto:fischerappeltd@gtlaw.com)
- > Or your [Greenberg Traurig](#) attorney

<b>Amsterdam</b> + 31 20 301 7300	<b>Denver</b> +1 303.572.6500	<b>Northern Virginia</b> +1 703.749.1300	<b>Tallahassee</b> +1 850.222.6891
<b>Atlanta</b> +1 678.553.2100	<b>Fort Lauderdale</b> +1 954.765.0500	<b>Orange County</b> +1 949.732.6500	<b>Tampa</b> +1 813.318.5700
<b>Austin</b> +1 512.320.7200	<b>Houston</b> +1 713.374.3500	<b>Orlando</b> +1 407.420.1000	<b>Tel Aviv<sup>^</sup></b> +03.636.6000
<b>Berlin<sup>-</sup></b> +49 (0) 30 700 171 100	<b>Las Vegas</b> +1 702.792.3773	<b>Philadelphia</b> +1 215.988.7800	<b>Tokyo<sup>¤</sup></b> +81 (0)3 4510 2200
<b>Berlin-GT Restructuring<sup>-</sup></b> +49 (0) 30 700 171 100	<b>London<sup>*</sup></b> +44 (0)203 349 8700	<b>Phoenix</b> +1 602.445.8000	<b>Warsaw<sup>~</sup></b> +48 22 690 6100
<b>Boca Raton</b> +1 561.955.7600	<b>Los Angeles</b> +1 310.586.7700	<b>Sacramento</b> +1 916.442.1111	<b>Washington, D.C.</b> +1 202.331.3100
<b>Boston</b> +1 617.310.6000	<b>Mexico City<sup>+</sup></b> +52 55 5029.0000	<b>San Francisco</b> +1 415.655.1300	<b>Westchester County</b> +1 914.286.2900
<b>Chicago</b> +1 312.456.8400	<b>Miami</b> +1 305.579.0500	<b>Seoul<sup>∞</sup></b> +82 (0) 2.369.1000	<b>West Palm Beach</b> +1 561.650.7900
<b>Dallas</b> +1 214.665.3600	<b>New Jersey</b> +1 973.360.7900	<b>Shanghai</b> +86 (0) 21.6391.6633	

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