Third time lucky for the EU Prospectus Regime from a debt capital markets perspective?

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Agenda – we aim to cover the following in the seminar

- Timeline and Grandfathering
- Triggers for a prospectus under the Prospectus Regulation (so-called PD III)
- Content and format of a prospectus under the Prospectus Regulation
- Scrutiny, approval and publication of a prospectus under the Prospectus Regulation
- Related matters – supplements and advertisements under the Prospectus Regulation and general implications of Brexit for the prospectus regime
Certain limited provisions of the Prospectus Regulation already apply and the Level 2 detailed requirements are still going through the legislative process ahead of full application on 21 July 2019

- June 2017 - Prospectus Regulation published in Official Journal
- July 2017 – exemption for fungible issues and 20% limit re convertibles apply
- July – Sept 2017 – ESMA consultations on format and content, scrutiny and approval
- December 2017 – March 2018 ESMA consultation on draft RTS on publication, advertisements, supplements, etc
- Q3 2018 – ESMA consultation on guidelines on risk factors
- July 2018 – exemption for small public offers applies
- July 2018 – ESMA submits draft RTS on publication, advertisements, supplements etc. to Commission
- March 2019 – final ESMA Guidelines on risk factors published
- By 31 August 2019 – ESMA to provide technical advice on equivalence
- 21 July 2019 – "date of application" of Prospectus Regulation
- March 2019 – Commission adopted delegated acts
- April 2018 – ESMA final report on format and content, scrutiny and approval
- December 2018 – Commission publishes proposed draft delegated regulation re format, content, scrutiny and approval
- February 2019 – ESMA published list re Member State small public offer exemption thresholds
- July 2018 – exemption for small public offers applies
- March 2019 – exemption for fungible issues and 20% limit re convertibles apply
Grandfathering provisions mean that the majority of issuers with debt programmes will not have to consider the new Prospectus Regulation disclosure requirements in relation to base prospectuses until 2020 update season.

- **Grandfathering – Prospectuses approved pre 21 July 2019**
- **Grandfathering – Supplements to prospectuses approved pre 21 July 2019**
- **No grandfathering for prospectuses approved, or advertisements published, post 21 July 2019**
Agenda – Triggers for a prospectus under the Prospectus Regulation (so-called PD III)

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The triggers for when a prospectus is required under the PR remain broadly unchanged

The relevant securities are in scope

The issuer is not exempt

A PR prospectus will be required if…

The securities are being offered to the public in the EEA

The securities are being admitted to trading on an EEA regulated market
Offer exemptions under the PR remain the same as under the PD, although the wholesale disclosure regime will have broader application.

**Offer exemptions**
- Qualified investors
- Less than 150 persons per Member State
- Securities with a denomination of at least EUR 100,000
- Total consideration per investor of at least EUR 100,000

→ Selling restrictions

**Wholesale disclosure regime**
(admission to trading prospectus)
- Non-equity securities with a denomination of at least EUR 100,000
- Admission to a Regulated Market or specific segment of a Regulated Market to which only Qualified Investors have access

→ Disclosure
Agenda – Content and format of a prospectus under the Prospectus Regulation

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Content 1 - “The PR is unequivocal in terms of seeking to influence a change of course” on risk factors (ESMA)

- PR and ESMA Guidelines
- Extent of change will depend on competent authority practice
- Competent authority may take into account type of investor
- As now – risks must be specific and material
- Risks must be corroborated – corresponding specific info or overall picture
- Quantitative information where available and appropriate
- Limited number of categories – 10 “categories and sub-categories”
- Most material risk factors first in each category (UK FCA current approach)
- Challenge to overall length if obscures comprehensibility
Content 2 - All change on summaries again

- ‘Key information’ definition and Annex XXII PD Regulation – deleted

- 15 pages/7% length of prospectus – reduced

- 5 part summary - reduced

PD Regime

PR Regime

- Article 7 is prescriptive about what a summary must contain; strip away table format; sub-sections with mandated headings

- Maximum 7 sides of A4 with an extension by:
  - 2 sides of A4 where summary covers several securities
  - 1 side of A4 per guarantor

- 4 part summary – Risks covered within Issuer and Securities sections

- No more than 15 risk factors in total

- Key financial information tables mandated by RTS

- Substitution of KID for part summary – optional/mandated?

Exemption for debt securities with EUR 100,000 minimum denomination and for debt securities traded on a Qualified Investor only segment of a Regulated Market
Content 3 - There will be some changes to general disclosure requirements

Prospectus to contain warning stating:
- when its validity expires
- obligation to supplement does not apply when a prospectus no longer valid

Prospectus to contain mandated statement:
- approved as meeting standards of “completeness, comprehensibility and consistency”
- approval by competent authority is not endorsement of issuer

Information in prospectus must be concise as well as easily analysable and comprehensible

Documents incorporated by reference:
- Prospectus to contain hyperlinks to documents incorporated by reference
- To remain functional for 10 years
- Expanded list of documents

Hyperlinks to other websites:
- Prospectus to include statement that information on websites is not part of prospectus and not scrutinised/approved by competent authority
Content 4 - There will also be some new and some amended requirements on disclosure in a number of areas

<table>
<thead>
<tr>
<th>Registration Document</th>
<th>Securities Note</th>
</tr>
</thead>
<tbody>
<tr>
<td>– Issuer’s website and disclaimer that not part of prospectus (R+W)</td>
<td>– Use of proceeds in Wholesale SN (W)</td>
</tr>
<tr>
<td>– Material changes in issuer’s borrowing and funding structure, expected financing of issuer’s activities (R)</td>
<td>– Warning re tax legislation in Investor/Issuer State may impact income (R)</td>
</tr>
<tr>
<td>– Removal of Banks’ Registration Document</td>
<td>– Expansion of listing disclosure to third country markets, SME Growth Markets and MTFs (R,W)</td>
</tr>
<tr>
<td>– Wording of ‘no significant/material change’ statements (R+W)</td>
<td>– Trust Deed (and documents on display) on accessible website (R+W)</td>
</tr>
<tr>
<td>– Changes to requirement for consistency with next year’s financials (R+W)</td>
<td>– Disclosure of MiFID II/PRIIPs expenses in price (R)</td>
</tr>
</tbody>
</table>
Content 5 - Application of wholesale disclosure regime will be broader, but implications of this under the PR remain substantially the same as under the PD
Content 6 - It is not yet clear to what extent the PR secondary issuance regime will prove useful in a debt context

Summary of information disclosed under MAR over last 12 months

‘Type, class and amount’ labelled as Cat A; problematic for wholesale programme issuers

Limited lighter SN disclosure requirements

Available to non-equity issuance where issuer’s equity is RM – listed for 18 months

Lighter RD disclosure requirements, e.g. no disclosure on group

Only 12 months of financial statements (including half-yearly statements)
Format - the base prospectus/final terms format remains, but there will be some new requirements re summaries and overall comprehensibility to consider

New provisions
- A summary shall only be drawn up once final terms are prepared and shall be specific to the individual issue
- Information on different securities to be clearly segregated
- Level 2 requirements re scrutiny of comprehensibility

Competent authority approaches may impact practice
Issue specific summary
- Removal of requirement for a base prospectus summary is welcome
- Provisions unclear on whether base prospectus should include a form of issue specific summary
- If not, inclusion in OAPM may be helpful

Segregation and comprehensibility requirements – current market approach under PD should satisfy these
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The new scrutiny and approval provisions in the PR are designed to drive convergence of competent authorities’ approaches.

- Need to consider type of issuer, type of issuance, type of security and type of offer/admission
- Limited scope for competent authorities to gold plate requirements
- Completeness
- Comprehensibility
- Consistency
- Retail prospectuses to be written in plain language
- Alignment of disclosure in risk factor section, summary and use of proceeds section with rest of the prospectus
New provisions on submission of data related to prospectuses/final terms could present problems in practice

- Competent authorities to notify ESMA of approval of prospectus and data necessary for:
  - classification in ESMA Storage Mechanism
  - ESMA’s Article 47 annual report containing statistics on prospectuses approved

- RTS specifies:
  - the data necessary – Annex VII RTS
  - Common XML format

- Requirement to provide data falls on competent authorities
  - No specific provision giving them power to require issuers to provide data, but general power re provision of information
  - They may push data submission exercise to issuers

- Completion of Annex VII RTS is not a simple prospectus/FTs extraction process
  - Time/cost involved, particularly in short term
  - Inaccuracy/inconsistency of data submitted while process beds down
Provisions relating to publication under the PR will mainly reflect the PD requirements, but there are refinements some of which will require consideration.

- Competent authority to also publish and may do so first?
- Prospectus to be publicly available for, and hyperlinks functional for, 10 years
- On dedicated section of website
- Electronic publication on website of issuer, financial intermediaries or RM
- Downloadable, printable, searchable (not modifiable)
- Measures to avoid targeting jurisdictions where no offer
- Where no RM, website of MTF operator?
- Prospectus to be publicly available for, and hyperlinks functional for, 10 years
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There are a few revisions to requirements re supplements under the PR regime, but core requirements unchanged

- Helpful clarification in drafting
- ‘Material inaccuracy’
- Prominent statement re withdrawal
- Withdrawal rights do not apply to admission to trading prospectuses
- Amendments to/withdrawal of profit forecast
- New financials/ change of control/ significant gross change re underlying issuer of shares in convertibles/exchangeables/physically settled derivatives

ESMA Final Report – Withdrawal re exempt offers

New obligations on financial intermediaries could be challenging

RTS mandates additional situations when a supplement is required

- Who has the right
- When it can be exercised
- Who to contact
- Inform investors of possibility of supplement
- Contact investors on day of supplement
- Relevant to retail offers

- Relevant to retail offers
Additional provisions on advertisements in PR will require some changes in practice even where related to a “grandfathered” prospectus

### A broader regime?
- ‘A communication’
- Relating to a specific offer/admission
- Aiming to specifically promote

### ICMA Considerations
- Draft rubric?
- Avoid proliferation of disclosures being identified as advertisements

### Prospectus location
- Identify website (written; non-electronic)
- Hyperlink (written; electronic)
- Information on location (other; oral)

### Impact of Supplements
- Provisions re dissemination of amended advertisements post a supplement remain
- Helpfully, only where advertisement materially inaccurate/misleading

### Advertisements to retail
- Additional requirements: ‘advertisement’; read prospectus; different in format and length from prospectus

### Oversight
- Falls to competent authority of Member State where advertisement disseminated
- Not a pre-condition to offer/admission
The Brexit delay most likely means the UK’s prospectus regime will be PD III based post-Brexit
Questions?

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