

Update Capital Markets

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Proposal of the EU Commission for a new Prospectus Regulation

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On 30 November 2015, the European Commission presented a proposal for a new prospectus regulation. By setting out new exemptions and simplifying the legal requirements for prospectuses and subsequently reducing administrative and financial burdens, access to the capital markets shall be made easier in particular for small and mid-sized companies.

On 30 November 2015, the European Commission presented a proposal for a regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading, and a Commission delegated regulation (EU) supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No 809/2004. This initiative is part of the action plan of the European Commission on building a capital markets union.

By the new provisions, administrative expenses shall be reduced and at the same time, investor protection and confidence in the capital markets shall be strengthened. In the year 2015, the Commission carried out a consultation which revealed that compliance with the current regulations involves significant administrative burdens. Furthermore, the prospectus information is often presented in a legal terminology which many investors have difficulties to understand.

Reduction of administrative burdens, strengthening of investor protection and confidence in the capital markets

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To ensure a uniform implementation across the Union, the current Prospectus Directive 2003/71/EC, which had to be transposed into national law by legal acts of each Member State, shall be replaced by a regulation, which is directly applicable in all Member States.

As regards prospectus liability, the proposal of the Commission only provides for an obligation of the Member States to ensure that responsibility for the information provided in a prospectus is to be carried by the issuer or its administrative, management or supervisory bodies, the offeror, or the person applying for the admission to trading on a regulated market or the guarantor.

The proposal of the Commission will particularly trigger the following key changes in respect to the current Prospectus Directive 2003/71/EC, which was implemented in Germany by the Securities Prospectus Act (*Wertpapierprospektgesetz*, WpPG).

The European Securities and Markets Authority (ESMA) has been commissioned to prepare regulatory and technical standards specifying the provisions of the prospectus regulation. The proposed regulation stipulates that a number of these standards have to be presented by ESMA only three months prior to the application of the new provisions (see below). Companies and advisors will thus only have little time to familiarize themselves with the new requirements.

Currently, a prospectus is not required if the total offer volume is less than EUR 100,000 across the European Union over a period of twelve months. Under the prospectus regulation proposal, this threshold shall be raised to EUR 500,000.

Member States may decide to implement an exemption from the prospectus requirement for securities offered to the public if the offer is made only in that particular Member State and the total volume of the offer is less than an amount of EUR 10,000,000 over a period of twelve months.

Currently, a prospectus is not necessary if, over a period of twelve months, shares are issued which represent less than 10 per cent of the number of shares already admitted to

Uniform implementation in all Member States

Responsibility for prospectuses

Changes in respect of the Prospectus Directive

Specifications by ESMA

No prospectus requirement for offers of less than EUR 500,000

Member States may exempt securities offers of up to EUR 10 million from the prospectus requirement

Larger capital increases possible without a securities prospectus

trading on the same regulated market. The draft regulation provides for an increase of this threshold to 20 per cent, which would make in particular rights offerings easier without the need for a securities prospectus.

For secondary offers by companies which are already listed on a regulated market or an SME growth market for at least 18 months and which intend to issue additional shares or bonds, only a simplified prospectus will be required. For instance, the minimum financial information to be disclosed in the prospectus only needs to cover the last financial year. The Commission will adopt delegated acts to specify the reduced information.

According to the proposed regulation, smaller companies with a market capitalization under EUR 200 million may prepare a simplified prospectus, provided that they are not listed on a regulated market already. The market capitalization will be calculated on the basis of the year-end stock prices of the last three calendar years. The current threshold amounts to a market capitalization of EUR 100 million. The requirements for the simplified prospectuses shall also be reduced compared to the current legal situation. For instance, a prospectus could be prepared using a “question and answer” format with standardized text. The Commission will adopt delegated acts to specify the reduced information.

The regulation shall support the preparation of shorter and easier to understand prospectuses. In order to achieve this purpose, the proposal provides for an extension of the range of information required in the Union, which can be incorporated by reference and which thus does not have to be repeated. Going forward, references to annual and interim financial information, audit reports and financial statements will be possible.

Furthermore, risk factors shall only be disclosed if the risks are specific to the issuer and its securities and are material for the investors to make an informed investment decision. Risk factors shall be allocated across a maximum of three distinct categories subject to their relative materiality. Such relative materiality shall be based on the issuer’s assessment of the probability of their occurrence and the expected magnitude of

Simplifications for secondary offers

Significantly simplified prospectuses for small caps

Expanded range of references

Presentation of risk factors

their negative impact. ESMA has been commissioned to develop guidelines on the assessment by competent authorities of the specificity and materiality of risk factors and on the allocation of risk factors across categories.

Prospectus summaries shall be simplified and limited to a maximum of six pages. The current limitation of length is at 15 pages or seven per cent of the total length of the prospectus. The reduction shall be achieved, *inter alia*, by limiting the number of risk factors to be disclosed in the summary to no more than five risk factors specific to the issuer and no more than five risk factors specific to the securities, each contained in the category of highest materiality.

Independent from a specific prospectus approval process, issuers may draw up a registration document in the form of a universal registration document every financial year. The universal registration document contains the most important information on the issuer and has to be approved by the competent authority. The universal registration document has to be updated yearly; if the universal registration document has been approved by the competent authority every financial year for three consecutive years, subsequent universal registration documents may be filed with the competent authority without prior approval. If a universal registration document is filed, prospectuses shall be approved in an accelerated procedure of five instead of ten working days. By filing the universal registration document, issuers shall also have the possibility to fulfil their obligation to publish financial information required to be disclosed in the annual and half-yearly financial reports.

Also the requirement for tax information in prospectuses shall be reduced according to the proposal of the Commission. In the future, prospectuses may contain only a warning that the tax legislation of the investor's Member State and of the issuer's Member State of incorporation may have an impact on the income received from the securities. However, the prospectus will still have to contain appropriate information on taxation where the proposed investment entails a specific tax risk, for instance in the case of investments in securities granting investors a favourable tax treatment.

Shorter summaries

Universal Registration Document

Simplification of tax information

Going forward, prospectuses shall only be published in electronic form, e. g., on the website of the issuer or of the regulated market where the admission to trading is sought. However, a paper copy of the prospectus will still have to be delivered upon request.

If securities shall (also) be offered to the public or admitted to trading on a regulated market in a Member State other than the home Member State and if the prospectus approved by the home Member shall be valid in that Member State, not only the competent authority of such host Member State but also ESMA has to be notified in the future. Further, ESMA shall make available an online access with a search function for all prospectuses approved in the European Union, free of charge, in order to improve investor information.

The proposal of the European Commission was sent to the European Parliament and the Council of the European Union for discussion and adoption. It is to be expected that changes to the proposal will be made in the course of the political coordination process. The proposal stipulates that the regulation shall apply from the date which is twelve months after the date on which it enters into force. It is therefore likely that the new provisions will take effect only in the course of 2017 or even later.

The proposals of the European Commission would indeed make access to the capital markets easier and more cost effective, in particular for small and mid-sized companies, which could even benefit from the possibility to prepare prospectuses using a “question and answer” format with standardized text. Should the German legislator decide to exercise its option to exempt securities offers for domestic issuances up to EUR 10 million from the prospectus requirement, this would significantly simplify capital market financings for a large number of issuers. The possibility for companies whose shares have been admitted to trading on a regulated market to carry out capital increases by up to 20 per cent without a prospectus also constitutes a major simplification. Furthermore, the provisions of the Commission’s proposal with regard to the specific content and format of prospectuses will also likely help to reduce

Publication of prospectuses

Strengthening the position of ESMA

Application of the new provisions

Conclusion

expenses for issuers although the definite form will depend on the further legislative process and the specific regulatory and implementing technical standards of ESMA.



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