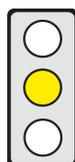


KEY ISSUES

Objective of the Regulation: The Commission wants to reduce red tape with regard to the preparation of prospectuses in order to give companies easier access to the capital markets.

Affected parties: Issuers and providers of securities, investors.



Pro: (1) Aligning the prospectus summary with the key information document under the PRIIPs Regulation enhances the comparability of the various securities investments.

(2) The simplifications for frequent issuers and secondary issuances are appropriate.

Contra: (1) Exemptions from the prospectus obligation result in distortions of competition; instead of thresholds there should be a general prospectus obligation.

(2) The proposed entitlement for Member States to exempt domestic issuances of up to € 10 million from the prospectus obligation leads to distortions of competition between issuers.

(3) The requirement for the prospectus to include only "material" risk factors will increase legal uncertainty among issuers.

CONTENT

Title

Proposal COM(2015) 583 of 30 November 2015 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

Brief Summary

Article numbers using the abbreviation "PD" refer to the existing Prospectus Directive (2003/71/EC), article numbers without the abbreviation refer to the proposed Regulation.

► Context and objective

- "Prospectuses" are documents which companies ("issuers") have to publish when securities are offered to the public or admitted to trading (Art. 1 (1)). They provide investors with a basis for their decision to invest in the company.
- A prospectus consists of a registration document, a securities note and a summary (Art. 6).
- The Prospectus Directive (2003/71/EC) currently stipulates the framework conditions for prospectuses in the EU (p. 2). It will now be repealed and replaced with this Regulation (Art. 44).
- According to the Commission, the existing Prospectus rules give rise to significant amounts of red tape and high costs and thus hinder access to capital markets. This deters, in particular, small and medium-sized enterprises (SMEs) from raising capital by way of the capital market. (p. 2).
- The aim of the Regulation is, in particular, (p. 3)
 - to reduce the administrative burden of drawing up prospectuses, particularly for SMEs,
 - to achieve more "convergence" with other EU disclosure rules, such as the key information document under the PRIIPs Regulation [(EU) No. 1286/2014, see [cepPolicyBrief](#)].

► Competent authorities and EU-wide recognition ("EU passport")

Until now, prospectuses have generally been "approved" and recognised as applying EU-wide by the competent authorities in the issuer's home country ("EU passport") (Art. 13, Art. 17 PD). This will continue to be the case in the future (Art. 19, Art. 23).

► Changes to scope

- Until now, the prospectus obligation has basically applied to offers of securities worth € 5 million and above (Art. 1 (2) (h) PD). A Member State can however require them for offers worth over € 100,000 (Art. 3 (2) (e) PD).
- In future, the prospectus obligation will basically apply to offers worth € 500,000 and above (Art. 1 (3) (d)). A Member State can however exclude offers worth up to € 10 million from the prospectus obligation. In this case, securities can only be traded on markets situated in this Member State. (Art. 3 (2))
- Below the threshold of € 500,000, Member States must refrain from imposing "disproportionate" disclosure requirements (Recital 12).

► Alleviations for small and medium-sized companies (SMEs)

- Until now, companies whose average market value over the last three calendar years was less than € 100 million have been considered as "companies with reduced market capitalisation" (Art. 2 Abs. 1 lit. f PD). In future, the threshold will rise to € 200 million. For the purposes of the Regulation, these companies will in future be deemed as "small and medium-sized enterprises" (SMEs). (Art. 2 (1) (f))

- Until now, the Commission has been able to allow alleviations to the prospectus obligation for (Art. 7 (2) (e) PD)
 - companies with "reduced market capitalisation",
 - banks issuing non-equity securities – securities which are not shares – amounting to less than € 75 million in a "continuous or repeated" manner, and
 - SMEs without special requirements.
- In future, the Commission will be able to permit alleviations for SMEs that are not listed on a "regulated market".
- These SMEs can issue the prospectus in the form of a questionnaire with standardised text ("question and answer sheet") where they are only offering shares or certain non-equity securities (Art. 15 (1) and (2), Recital 42).
- ▶ **Alleviations for frequent issuers**
 - "Frequent issuers" are issuers (Art. 9 (1), Recital 33)
 - whose securities are admitted to trading on a regulated market (e.g. stock exchange) or a multilateral trading facility (MTF) and
 - whose registration document has been "approved" for three consecutive years by the competent authority; in this case it is referred to as a "universal registration document".
 - The following applies to "frequent issuers" (Art. 9 (1), (2), (11) and (12) in conjunction with Art. 19 (5)):
 - As from the fourth year, the universal registration document no longer has to be approved by the competent authority but simply filed with it.
 - Where approval of the prospectus is nevertheless requested, it will take place within five rather than the currently applicable 10 days ("faster approval process").
 - The duties of disclosure under the Transparency Directive (2004/109/EC) are deemed to have been fulfilled if the frequent issuer includes in the registration document the latest annual financial report and the latest half-yearly financial report.
- ▶ **Alleviations for base prospectuses**
 - Base prospectuses are often used for regular offers of non-equity securities; they do not have to contain the final terms of a securities offering. The final terms are then published prior to trading approval or prior to the public offering. (Art. 2 (1) (r), Art. 8 (4))
 - Until now, base prospectuses have only been allowed for non-equity securities issued under an offering programme or issued in a "continuous or repeated manner" by credit institutions (Art. 5 (4) PD). An offering programme is a plan for offering similar securities. In future, base prospectuses will be allowed for all non-equity securities (Art. 8 (1)).
 - In the Commission's view, base prospectuses cannot currently be issued in three separate parts – registration form, securities note, summary – but only as a single document (Art. 5 (4) PD). In future, three-part documents will be allowed (Art. 8 (5)).
 - Universal registration documents can also be used for base prospectuses (Art. 8 (5)).
 - Until now, base prospectuses have had to contain a summary. Following clarification of the final terms of the respective offering, another summary also had to be drafted. (Art. 2 (1) (r) in conjunction with Art. 5 PD). In future only the final summary will be necessary (Art. 8 (7) and (8)).
- ▶ **Alleviations for secondary issuers**
 - Issuers use "secondary issuances" to effect capital increases.
 - Until now, in the case of secondary issuances, alleviations to prospectus rules have only applied (Art. 7 (2) (g) PD):
 - to stock companies whose shares are listed on a "regulated market" or an MTF and
 - where shareholders have a pre-emption right ("rights issues").
 - In future, prospectus alleviations will apply to secondary issuances (Art. 14 (1))
 - for stock companies or other issuers whose securities have been listed on a regulated market or an SME growth market for at least 18 months,
 - irrespective of whether a pre-emption right has been granted.
- ▶ **Prospectus, prospectus summary and "material" risk factors**
 - ▶ **Reference to risk factors in the prospectus**
 - In future, only "material" risk factors specific to the issuer and the securities will be indicated. These will be divided into three risk categories depending on their probability and negative impact. The European Securities and Markets Authority (ESMA) will develop guidelines on this. (Art. 16)
 - In future, prospectus summaries will only be allowed to contain a maximum of five of "the most material risk factors" specific to the issuer (Art. 7 (6) (c)) and the securities (Art. 7 (7) (d)). The risk factors referred to in the summaries must each fall into the highest risk category (Art. 7 (6) (c) and (7) (d)).

Reformulating the prospectus summary: Coherence with the PRIIPs Regulation and liability

- Until now, prospectus summaries have had to comprise no more than 7% of the prospectus or be a maximum of 15 pages [Art. 5 (2) sub-paragraph 1, Art. 24 (1) Delegated Regulation (EU) No. 809/2004]. In future, they will have to comprise no more than six pages (Art. 7 (1) and (3)).
 - In future, the content and structure of summaries will be consistent with the key information document under the PRIIPs Regulation (Art. 7 and p. 14). In the case of securities covered by the PRIIPs Regulation, issuers can use the section on "securities" from the PRIIPs key information document as part of the prospectus summary (Art. 7 (7), sub-paragraph 2).
 - Until now, issuers have only been liable for summaries which are "misleading, inaccurate or inconsistent" when read together with the other parts of the prospectus (Art. 6 (2) PD). This rule on liability remains in place (Art. 11 (2)).
- **Tightening of rules on non-equity securities with high minimum denomination**
- Until now, the prospectus obligation has not applied to securities being offered to the public with a minimum denomination of € 100,000 (Art. 3 (2) (d) PD); generally these are non-equity securities. This exemption has been removed (p. 17).
 - Until now, the Commission has been able to grant prospectus alleviations on admission to trading of non-equity securities with a minimum denomination of € 100,000 (Art. 7 (2) (b) PD). This possibility has been removed (Art. 13 (1)).

Statement on Subsidiarity by the Commission

According to the Commission, the Regulation creates a more level playing field for investors and issuers and prevents regulatory arbitrage. In particular, rules on the EU passport – issuers can also use an approved prospectus in other EU countries without any additional approval – can only be achieved at EU level.

Policy Context

The Commission announced a revision of the prospectus rules in the Communication on long-term financing in the European economy [COM(2014) 168, see [cepPolicyBrief](#)] and in the Green Paper on the creation of a Capital Markets Union [COM(2015) 63, see [cepPolicyBrief](#)]. In addition, in 2014, it included the existing Prospectus Directive in its "Regulatory Fitness and Performance Programme" (REFIT) in order to look at complaints about the high cost of issuing prospectuses.

Legislative Procedure

30 November 2015	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Financial Stability, Financial Services and Capital Markets Union
Leading Committee of the EP:	Economic and Monetary Affairs, Rapporteur: Petr Ježek (ALDE Group, CZ)
Leading Federal Ministry:	Ministry of Finance
Leading Committee of the BT:	Finance
Decision-making mode in the Council:	Qualified majority (adoption by 55% of the Member States making up 65% of the EU population)

Formalities

Legislative competence:	Art. 114 TFEU
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The prospectus obligation aims to reduce asymmetries of information between issuers and investors. Prospectuses thus serve to enhance market efficiency and improve the confidence of investors who are the less well informed parties.

A large number of Member States currently impose a prospectus obligation for offers of securities from as low as € 100,000. The new threshold of € 500,000 relieves the burden on SMEs and crowdfunding platforms, in particular, because their costs for raising capital on the capital markets are reduced. However, in many Member States, this involves a reduction in investor protection which is not easy to justify because the reasons for a prospectus obligation also apply to investments in SMEs and crowdfunding platforms. These investments are not less risky per se than higher volume investments which require a prospectus.

Any exemption to the prospectus obligation causes distortions of competition which manifest themselves in various capital raising costs; **instead of having thresholds** which give rise to a prospectus obligation, a

general prospectus obligation should therefore apply providing for reasonable minimum levels of information that do justice to the complexity of the respective offer.

The proposed entitlement, for Member States to exempt domestic issuances of up to € 10 million from the prospectus obligation, is subordinate to a uniform EU rule. Although national capital market traditions in the Member States certainly make differences in the prospectus obligation seem justifiable, this is an unconvincing argument because national trading venues are open to investors from all Member States. Furthermore, the national option **leads to distortions of competition between issuers from different Member States**, because issuers cannot issue their securities in another Member State with a lower level of investor protection without incurring significant expense.

The simplifications for frequent issuers – waiver of approval, faster approval of prospectuses and universal registration document – reduce red tape and allow frequent issuers to quickly adjust their offerings to market developments. The simplifications for **secondary issuances are also appropriate** because investors receive comprehensive information about the issuer and the security at the time of the primary offering which makes comprehensive prospectuses unnecessary.

The general alleviation relating to the prospectus obligation for SMEs is unconvincing; a simplification is only justified if it reflects a lower level of complexity as compared with large companies, otherwise it distorts competition since it reduces the relative cost of raising capital. Investments in SMEs are not necessarily less risky, in fact they are often less liquid than those in large companies. A different level of investor protection arising from simpler prospectus rules cannot therefore be justified. It is also largely unclear how extensive the alleviations for secondary issuances and SMEs are because the Commission has too much scope for discretion in this regard. The legislator must issue more precise rules.

The rule that only "material" risk factors can be included in prospectuses aims to prevent issuers from overloading prospectuses with references to too many risks in order to avoid subsequent liability. However, it **causes too much legal uncertainty among issuers**. Classifying risks into various risk categories is no trivial matter either, because the definition of a "material risk" remains unclear, and since the guidelines from the Securities and Markets Authority (ESMA) are not binding they will do little to change this.

Aligning the prospectus summary with the key information document under the PRIIPs Regulation enhances the comparability of the various securities investments and thus the ability of investors to make well-informed investment decisions. It also reduces red tape. **However, strictly limiting it to six pages is problematic**. Firstly, it **creates new liability risks for issuers** because the completeness of the prospectus cannot always be guaranteed and secondly, it **gives false incentives to investors**: short summaries may encourage investors to read them but the aim should be for the investor to consider the whole prospectus rather than just reading the summary.

Legal Assessment

Legislative Competency

The Regulation is correctly based on the internal market competence (Art. 114 TFEU). Harmonisation of prospectus rules and the EU passport for prospectuses strengthen the free movement of capital and reduce distortions of competition because uniform rules apply EU-wide and as barriers to cross-border activity are reduced so the uncertainty of issuers and investors about prospectus rules in other Member States decreases.

Subsidiarity

Unproblematic.

Proportionality with respect to Member States

Unproblematic. On the open EU capital markets, a directly applicable Regulation is better able than a Directive to achieve harmonised investor protection and a level playing field.

Impact on German Law

The Regulation applies directly in every Member State (Art. 288, para. 2, sentence 2 TFEU) so that no national transposition measures are necessary. For reasons of legal certainty, however, the Securities Prospectus Act will have to be amended.

Conclusion

Any exemption to the prospectus obligation causes distortions of competition; instead of thresholds, a general prospectus obligation should therefore apply providing for reasonable minimum levels of information. The entitlement for Member States to exempt domestic issuances of up to € 10 million from the prospectus obligation leads to distortions of competition between issuers from different Member States. The simplifications for frequent issuers and secondary issuances are appropriate. The general alleviation of the prospectus obligation for SMEs is unconvincing because investments in SMEs are not necessarily less risky. The requirement for the prospectus to include only "material" risk factors will increase legal uncertainty among issuers. Aligning the prospectus summary with the key information document under the PRIIPs Regulation enhances the comparability of the various securities investments. Strictly limiting it to six pages, however, creates new liability risks for issuers and gives false incentives to investors.