

Your World First

C/M/S/

Law . Tax



The new Prospectus Regulation: *Good news for companies*

July 2017

The new Prospectus Regulation

As a result of the publication in the Official Journal on 30 June 2017 of the new EU Prospectus Regulation (2017/1129), significant improvements will be made to the EU prospectus regime over the next two years. In particular:

- From 20 July this year Main Market companies will be able to issue up to 19.9% of their ordinary share capital over a 12 month period without needing a prospectus. (Currently the limit is 9.9%.) This will make it cheaper and easier for Main Market companies to raise larger amounts of money through a placing or to use their own shares as consideration in larger acquisitions.
- From 21 July 2018, EU member states will be able to exempt from the prospectus requirement “domestic-only” offers to the public that seek to raise less than €8 million. (Currently the threshold is €5 million.) If the UK does raise the current threshold, more unquoted companies will be able to use crowdfunding, and more AIM companies will be able to do retail offers, without needing a prospectus.
- On 21 July 2019 various other changes will help to harmonise and simplify the process of producing a prospectus.

The 2017 [Prospectus Regulation](#) will replace the existing 2003 Prospectus Directive and its accompanying 2004 Prospectus Regulation (known as the PD Regulation), and has direct effect in all EU member states. Although the UK will probably have left the EU by 21 July 2019, we expect that, initially at least, the UK will put in place rules that are equivalent to the 2017 Prospectus Regulation in order to ensure that UK prospectuses can continue to be passported into the EU.

The key triggers for a prospectus will remain the same, namely when either: (i) an offer of transferable securities is made to the public in an EU member state; or (ii) transferable securities are admitted to trading on an EU regulated market, such as the UK Main Market.

The table over the page summarises the most important changes that affect issuers of shares and other equity securities.



This will make it cheaper and easier for Main Market companies to raise larger amounts of money through a placing or to use their own shares as consideration in larger acquisitions.

What is changing and when?

New rule	Current rule	When	Who or what will be most affected
Regulated market companies can issue less than 20% of their ordinary shares over a 12 month period without needing a prospectus	Less than 10%	20 July 2017	<p>Main Market company issuing its own shares as consideration: prospectus needed only if consideration shares take company up to or over 20% limit (which will occur only in larger share for share acquisitions) and no other exemption applies</p> <p>Main Market company can do placing of less than 20% without prospectus; but shareholder approval to disapply pre-emption rights likely to be needed for an issue for cash of more than 5% (or sometimes 10%)</p>
Regulated market companies can issue options, warrants or convertibles that confer rights to acquire less than 20% of their ordinary shares without needing a prospectus	No limit specified, but regulators alert for attempts to circumvent prospectus requirement by using options, warrants or convertibles	20 July 2017	<p>Main Market company can issue bonds convertible into ordinary shares comprising less than 20% of existing class without prospectus</p> <p>Similarly with warrants – e.g. where seller on a large acquisition or an investor or lender wants warrants</p> <p>(New limit does not apply to, among others, convertible bonds, warrants etc issued before new Prospectus Regulation came into force or in respect of which a prospectus was published)</p>
“Domestic-only” ¹ offers to public of less than €8m ² , calculated over a period of 12 months, fall outside prospectus regime and therefore do not need a prospectus	Less than €5m, and member states have no discretion to adopt a higher or lower threshold	21 July 2018	<p>AIM companies and unquoted companies that seek less than €8m in equity or tradeable debt instruments through crowdfunding or similar – can offer securities to 150 or more persons in UK, and up to 149 persons in any number of other member states (not counting qualified investors in either case) without needing a prospectus</p> <p>AIM company can issue consideration shares worth less than €8m to more than 150 target shareholders in UK and up to 149 persons in any number of other member states (not counting qualified investors) without needing a prospectus</p>

¹ A “domestic-only” offer - i.e. where the company is not making an offer to the public outside the UK and therefore does not need to passport the prospectus into another member state.

² HM Treasury has not yet indicated whether it intends to increase the current threshold from €5m or what the new threshold would be. However, we have assumed that the threshold will be increased to the maximum of €8m permitted by the new Prospectus Regulation. We have also assumed that HM Treasury will not introduce any minimum disclosure requirements for issues below that threshold. Each member state must notify the Commission and ESMA of the threshold it decides to apply.

New rule	Current rule	When	Who or what will be most affected
<p>Less onerous prospectus for SMEs³ and certain other small and mid-sized companies that have shares traded on AIM or an EU growth market or that are unquoted (EU growth prospectus) (Exact disclosure requirements not yet known)</p>	<p>Proportionate disclosure regime for SMEs and small cap Main Market companies (i.e. market cap below €100m) in Annexes XXV to XXIII <u>introduced in July 2012</u> but rarely used</p>	<p>21 July 2019</p>	<p>Should be cheaper and easier for the following types of company to produce a prospectus, provided information that could otherwise be “omitted” does not need to be included in order to satisfy investor requirements or non-EU securities laws:</p> <ul style="list-style-type: none"> – Unquoted SMEs that seek investment through crowdfunding or another type of offer to the public – SMEs with shares traded on AIM or an SME growth market⁴ that do a rights issue or open offer – Companies with shares traded or to be traded on an SME growth market that are not SMEs but whose average market cap is less than €500m that do a rights issue or open offer – Companies with fewer than 500 employees and no shares traded on AIM or any other multi-lateral trading facility (MTF) that seek to raise €20m or less
<p>Simplified prospectus for rights issues and other secondary issues by company with shares already admitted to a regulated market or SME growth market⁵ for at least 18 months (Exact disclosure requirements not yet known)</p>	<p>Proportionate disclosure regime for rights issues etc in Annexes XXIII and XXIV <u>introduced in July 2012</u> but rarely used</p>	<p>21 July 2019</p>	<p>Should be cheaper and easier for a Main Market company doing a rights issue or open offer to produce a prospectus, provided information that could otherwise be “omitted” does not need to be included in order to satisfy investor requirements or non-EU securities laws</p> <p>AIM companies will benefit only if and when AIM becomes a SME growth market</p>

³ SME - a company which either: (i) satisfies two or three of the following criteria: less than 250 employees; net assets of €43m or less; and annual turnover of €50m or less; or (ii) has a market cap of less than €200m.

⁴ SME growth market – a MTF that has been recognised by the competent authority of its jurisdiction as meeting certain conditions set out in Article 33 of the MiFID II Directive (2014/65/EU). A MTF cannot obtain SME growth market status until MiFID II comes into effect on 3 January 2018. SME growth markets are designed to be a sub-category of MTF that cater specifically for the needs of SMEs: among other things, at least 50% of companies on the market must be SMEs. Whether AIM will apply to become a SME growth market is not yet known.

⁵ See previous footnote

New rule	Current rule	When	Who or what will be most affected
Wider exemption for offers of shares to EU employees	Current exemption allows all EU-incorporated companies, but only certain non-EU companies, to offer shares to their EU employees without needing a prospectus. Company must provide employees with an information document, which is much shorter than a prospectus and whose content is not prescribed	21 July 2019	All non-EU companies, even those that do not have shares traded on any market, can offer shares to their EU employees without needing a prospectus. As now, company will have to provide employees with a much shorter information document
Prospectus summary usually must be no longer than seven sides of A4 and have no more than 15 risk factors; modelled on key information document (KID) for packaged retail and insurance-based investment products that will be required under the PRIIPs Regulation	Content, length and order of items prescribed	21 July 2019	All companies will need to comply Will be easier to ensure a retail prospectus complies with PRIIPs Regulation as well as prospectus regime

Other changes (from 21 July 2019)

- **Risk factors:** risk factors will have to be organised into categories. The most material risk factor in each category must appear first.
- **Incorporation of other documents by reference:** companies will be able to incorporate a wider range of documents by reference into a prospectus.
- **Optional “shelf” registration document for frequent issuers:** Main Market and AIM companies that frequently issue either debt or equity will be able to draw up a “universal registration document” containing key information about the company and get it approved by the FCA on an annual basis. The URD will be made public once it is approved. A company that regularly maintains an updated URD with the FCA will benefit from a five-day (instead of a ten-day) fast-track approval process when it wishes to issue shares, bonds or other securities.

What is not changing

Under the 2003 Prospectus Directive, no prospectus is required for an offer of securities to the public that is made to: (i) qualified investors only; or (ii) fewer than 150 persons per EU member state, not counting qualified investors. No change is being made to either of these important exemptions. Similarly, no change is being made to the definition of “offer to the public”.

Future developments

Because the new Prospectus Regulation has direct effect in EU member states, it does not need to be implemented by UK legislation. However, consequential amendments will need to be made to the FCA’s Prospectus Rules and the Financial Services and Markets Act 2000 to reflect the introduction of the Prospectus Regulation and repeal of the 2003 Prospectus Directive.

In addition, the Commission or ESMA is due to publish over the next year or so drafts of delegated acts and technical standards specifying in more detail the information that will have to be included in the summary, a simplified prospectus for a rights issue etc, an EU growth prospectus and certain other types of prospectus. The delegated acts and technical standards will need to be finalised by the time the relevant rules come into force on 21 July 2019.



Companies will be able to incorporate a wider range of documents by reference into a prospectus