

# Prospectuses for investors

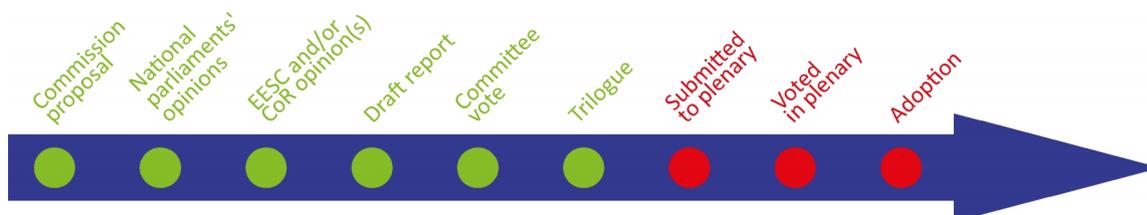
## SUMMARY

On 30 November 2015, the European Commission published a proposal for a regulation on prospectuses (legal documents that provide details about an investment offer in an easily analysable format) to replace Directive 2003/71/EC, as amended by Directives 2008/11/EC, 2010/73/EU and 2010/78/EU. The aims of the regulation are to contribute to further financial market integration and to improve investor protection in the European Union. The proposal broadens the scope of the legislation and introduces changes to how the prospectus is drawn up.

On 3 June 2016, the Dutch EU Council Presidency published its proposal for a general approach on the Commission proposal and on 15 September 2016, the European Parliament adopted its amendments to the Commission proposal. Finally, on 16 December 2016, the European Parliament and the Council stroke a compromise on the prospectus Regulation, which is to be voted by the co-legislators.

## 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

<i>Committee responsible:</i>	Economic and Monetary Affairs (ECON)	COM(2015) 583 of 30.11.2015
<i>Rapporteur:</i>	Petr Ježek (ALDE, Czech Republic)	<i>procedure ref.:</i> 2015/0268(COD)
<i>Next steps expected:</i>	First-reading vote in plenary	Ordinary legislative procedure



This briefing updates an earlier edition, of May 2016: [PE 582.019](#).

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## Introduction

On 30 November 2015, the European Commission published a proposal for a regulation on the prospectus to be published when securities are offered to the public or admitted to trading ([COM\(2015\) 583 final](#)). Its key aims are to **reduce fragmentation in financial markets** in order to make it easier for EU businesses to obtain funding, and to **improve protection of investors** by giving them shorter, yet detailed and comprehensible information on investment products, to help them decide whether to invest or not.

## Context

[Prospectuses](#) are legally required documents presenting the information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses, and prospects of the issuer and of any guarantor, and of the rights attached to investment products.

A prospectus is composed of three parts.<sup>1</sup> A [summary](#) provides an introduction containing warnings, as well as key information on the issuer, the offeror or the person asking for admission, on the securities and on the offer itself and/or the admission to trading. A [registration document](#) (a) identifies the directors, senior management, advisers and auditors; (b) summarises essential information about the issuer (financial situation, capitalisation and risk factors); (c) provides information on the company (business operations, products/services, factors affecting the business); (d) makes available an operating and financial review (and prospects); (e) supplies extra information on the directors, senior management and employees; (f) provides information regarding the major shareholders and related-party transactions; and (g) specifies financial information that must be included in the document (periods to be covered, age of financial statements and other information of a financial nature). Finally, a [securities note](#) names the directors, senior management, advisers and auditors; presents offer statistics as well as an expected timetable; supplies essential information about the issuer; discloses the interests of experts or advisers the company is dealing with; provides information on the details of the offer and admission to trading; and discloses additional information of a statutory nature that is not covered elsewhere in the prospectus.

Once the competent authority of a European Economic Area (EEA) Member State approves a prospectus, it can be used (through a passport mechanism) for raising capital by means of a public offer or admission to a regulated market in other Member States.

## Existing situation

The purpose of [Directive 2003/71/EC](#) (the 'Prospectus Directive') was to improve the quality of information provided to external investors by companies that want to raise capital in the EU. In addition, it aimed to ensure that adequate and equivalent

disclosure standards were in place in all EU countries in the event that the securities were offered to all European investors. This was to be achieved by establishing rules on the prospectus that EU companies are required to publish when issuing securities to attract investments. By virtue of these rules, once a prospectus has been approved in one EU country, it is valid across the EU (serving as a 'single passport' for the issuers).

The Directive was revised in 2010 ([Directive 2010/73/EU](#)). The revision aimed to reduce to the minimum necessary a number of burdensome obligations imposed on companies by Directive 2003/71/EC, without compromising the protection of investors and the proper functioning of the securities markets in the EU; and to improve the summary of the prospectus in terms of simplicity and readability, in order to further enhance investor protection and thus respond effectively to the global financial crisis.

The Commission's impact assessment showed that, although the amended prospectus regime functioned well overall, the Prospectus Directive could still be improved to reduce the administrative burden on companies that draw up a prospectus – especially small and medium-sized enterprises (SMEs) – and to make the prospectus a more valuable information tool for potential investors. This led the Commission to propose replacing the directive with a regulation.

## The changes the proposal would bring

### Changes in the general provisions

#### *Changes in the scope (Articles 1, 3 and 4)*

Directive 2003/71/EC set the prospectus requirement at €5 million, but left Member States free to set out national rules below that amount. To ensure legal clarity as to the lower threshold, Article 1(3)(d) provides that no prospectus is required under the regulation for 'an offer of securities with a total consideration in the Union of less than €500 000 ... calculated over a period of 12 months', because the cost of producing the prospectus in this case would be disproportionate to the proceeds.

Similarly, Article 3(2) provides that a Member State may also choose to exempt an offer of securities to the public from the prospectus requirement if (a) the offer is made only in that Member States, and (b) the total amount of the offer is less than €10 million, calculated over a period of 12 months.

#### *Definitions (Article 2)*

The main change in the area of definitions is that for 'small and medium-sized enterprises'. For the purposes of the regulation, the €100 million threshold that previously defined 'companies with reduced market capitalisation' has been raised to [€200 million](#), as stipulated in Directive 2014/65/EU.

#### *Voluntary prospectuses (Article 4)*

Article 4 allows issuers to opt in for the EU prospectus, even when the offer of securities to the public or an admission of securities to trading on a regulated market is outside the scope of the regulation, provided that the competent authority approves such a 'voluntary' prospectus. This means that the issuer would be eligible for an EU passport.

#### *Subsequent resale of securities (Article 5)*

Article 5 tackles the issue of subsequent resale of securities.<sup>2</sup> It stipulates that as long as the prospectus is valid and duly supplemented and the issuer consents to its subsequent use, financial intermediaries subsequently reselling the securities should be entitled to rely upon the initial prospectus. When the issuer does not consent, the subsequent reseller should be required to publish a new prospectus.

**Changes in the rules for drawing up the prospectus***The prospectus summary (Article 7)*

The new summary is closely modelled on the [key information document](#) required under the Packaged Retail and Insurance-based Investment Products (PRIIPs) Regulation. Its maximum length is set at six A4 pages.

*The base prospectus (Article 8)*

Base prospectuses should include a list of the information that will be included in the final terms of the offer, a 'form of the final terms' template and the address of the website where the final terms will be published. They may now be drawn up for any kind of non-equity securities (this was not the case before) and can consist of several documents.

*The universal registration document (Articles 9, 10(2))*

These articles establish a (new) 'universal registration document' (URD). Similar to the [shelf registration](#) in the US, the URD is intended for frequent issuers who have their registered office in a Member State and who have been admitted to trading on regulated markets or [multilateral trading facilities](#). Article 9 provides that those issuers who choose to draw up a URD every financial year and submit it successfully for approval to the competent authority of their home Member State for three consecutive years, can file subsequent URDs with the competent authority without prior approval. Furthermore, Articles 9 and 10(2) also incorporate detailed rules on the practical administration of the URD, by clarifying which documents need to be approved in the cases where the document has been either approved or filed without approval. They also describe the process for amending the document, which follows a different approach from the process for supplementing a prospectus (as there is no public offer or admission to trading until the URD becomes part of a prospectus).

*Treatment of non-equity securities of high denomination per unit (Articles 1 and 13)*

The proposal seeks to remove the incentives to issuing debt securities in large denominations. This translates into two measures:

- removing the prospectus exemption for offers of non-equity securities with a denomination above €100 000,3 in order to increase secondary liquidity on bond markets. However, issuers offering non-equity securities solely to qualified investors or requiring a minimum commitment of €100 000 per investor will still benefit from a prospectus exemption;
- replacing the dual (retail/wholesale) standard of disclosure for non-equity securities admitted to trading on a regulated market by a single unified prospectus template.

*Specific disclosure regimes (Articles 14 and 15)*

The proposal contains two non-obligatory sets of specific disclosure rules which replace the [proportionate disclosure regime](#) introduced by Directive 2010/73/EU:

- a secondary issuances regime that applies to offers or admissions concerning securities issued by companies already admitted to trading on a regulated market or an SME growth market for at least 18 months.<sup>4</sup> In this case, the prospectus has to contain only minimal financial information covering the last financial year;
- an SME regime, which will allow SMEs to draw up a distinct type of prospectus, in the case of an offer of securities to the public where the SMEs have no securities admitted to trading on a regulated market. In this situation, minimum disclosure will

consist of a specific registration document and a specific securities note, with the information being adapted to the size and length of the track record of such companies. In addition, under certain specific conditions,<sup>5</sup> there will be an optional format for SMEs in the form of a 'question and answer' disclosure document.

#### *Risk factors (Article 16)*

To avoid overloading the prospectus, this article provides that risk factors featured in a prospectus shall be limited to risks which are specific to the issuer and/or the securities, and are of material importance in terms of taking an informed investment decision. In addition, the risks will be assigned to a maximum of three categories, based on the issuer's assessment of the probability of their occurrence and the expected magnitude of their impact.

#### *Incorporation by reference (Article 18)*

The proposal expands the scope of documents whose information may be [incorporated by reference](#) in a prospectus, subject to the condition that the information be previously or simultaneously published electronically and that it complies with the proposal's Article 25 on the use of languages.

### **Changes in the arrangements for approval and publication of the prospectus**

#### *Publication of the prospectus (Article 20)*

Whilst the obligation to provide a [free paper copy](#) to anyone who requests it is maintained, many of the options provided under Article 14 of Directive 2003/71/EC for publishing an approved prospectus have been removed. The only options now are those involving an electronic format.

### **Council**

On 3 June 2016, the Dutch EU Council Presidency published the [general approach](#) on the Commission proposal. Some of the key positions of the Council are the following:

The 20% condition of the article 1(4b) exemption<sup>6</sup> from publishing a prospectus does not apply when (i) a prospectus was drawn up in accordance with either the regulation or the 2003 directive upon the offer to the public or admission to trading of the securities giving access to the shares; (ii) the securities giving access to the shares were issued before the entry into force of the regulation; (iii) the shares result from the mandatory conversion of other securities in accordance with the contractual terms of such securities which, upon issue, are eligible to count towards the regulatory capital or the solvency capital requirement and the minimum capital requirement (article 1(4b)).

Where the prospectus relates to the admission to trading on a regulated market of non-equity securities with a denomination of at least €100 000, there is no requirement to provide a summary (article 7 (10a)).

Concerning supplements to the prospectus in the case of an offer of securities to the public, the right of investors, who have already agreed to purchase or subscribe for the securities before the supplement is published, to withdraw their acceptances is set to two working days after the publication of the supplement (article 22 (2)).

With regard to risk factors (article 16), the Commission's proposal to allocate them across a maximum of three distinct categories is deleted and, instead, it is proposed that they be allocated across a limited number of categories depending on their nature. In each category, the most material risk factors will be mentioned first according to the issuer's assessment at the time of the prospectus approval.

## National parliaments

The proposal has been examined by a number of [national parliaments](#). With the subsidiarity deadline passed on 16 February 2016, none delivered a reasoned opinion.

## Parliamentary analysis

In February 2016, the European Parliament's Ex-Ante Impact Assessment Unit delivered an initial appraisal of the Commission's impact assessment ([SWD\(2015\) 255 final](#)). According to this appraisal, the impact assessment provides some essential elements to assist decision-makers in understanding the rationale of the choices made by the executive. However, it considers that the scope of the impact assessment is limited and that the range of options analysed could have been wider. For further information, please see the [EPRS briefing](#) on the subject.

## Legislative process

### The ECB's opinion

On 21 March 2016, the European Central Bank published its [opinion](#) on the proposed regulation. While it generally welcomes and supports the aims the proposal pursues, and views it as a positive step towards the completion of the Capital Markets Union, it calls for five amendments to the text, to ensure that the obligation to report the International Securities Identification Number (ISIN) and use the Global Legal Entity Identifier (LEI) system is established in the proposed regulation, as well as in any further delegated acts.

The European Parliament adopted [amendments](#) to the Commission proposal for a regulation on 15 September 2016. The key amendments are the following:

The regulation does not apply to offers of securities to the public addressed to fewer than 350 persons per Member State and to no more than 4 000 persons in total in the EU, other than qualified investors or [European venture capital funds](#); or to offers with a total consideration in the EU of less than €1 000 000 over 12 months. With regard to offers to the public, Member States should refrain from imposing other disclosure requirements that could constitute disproportionate burdens ((article 1 (3)).

Securities can be offered to the public and/or admitted to trading on a regulated market only after prior publication of a prospectus. Member States may decide to exempt offers to the public from this obligation, provided that their total consideration in the EU is less than €5 000 000 over 12 months. Public offers made under this exemption, do not benefit from the passporting regime, must contain a clear indication that the public offer is not cross-border and cannot actively solicit investors outside the Member State of origin (Recital 13, article 3(1&2)).

Information in the prospectus has to be relevant and necessary for an investor to be able to make an informed assessment of: (a) the assets and liabilities, financial position, profit and losses, and prospects of the issuer and any guarantor, and (b) the rights attaching to such securities. It must be drafted and presented in a comprehensible and easily analysable form, and may vary depending on certain factors (article 6).

The prospectus summary has to read as an introduction to the prospectus and be consistent with its other parts. It should not be required where the prospectus relates to the admission to trading of non-equity securities offered solely to qualified investors. Its size must be six sides of A4-sized paper, although an exception would allow issuers to increase it up to 10, when certain conditions are met. Its first section shall be an

introduction containing warnings, including the extent to which investors could lose their investment. It should contain the name and ISIN of the securities; the identity and contact details (including the LEI) of the issuer and the offeror, if the offeror has legal personality (see ECB opinion, above) (article 7).

After the issuer has had a universal registration document (URD) approved by the competent authority for two consecutive financial years, subsequent URDs or amendments to URDs may be filed with the competent authority without prior approval, unless they concern an omission, material mistake or inaccuracy, which is likely to mislead the public with regard to elements essential for an informed assessment of the issuer (article 9).

The Commission should draw up two sets of separate and materially different prospectus schedules setting out the information requirements applicable to non-equity securities adapted to the different investor classes to whom the offer is addressed, taking into account the different information needs of those investors (article 13(1)).

The simplified disclosure regime for secondary issuances should also be applicable to multilateral trading facilities (MTFs), other than an SME growth market, if they have disclosure requirements equivalent to those required for SME growth markets under MiFID (article 14).

Article 15 provides a proportionate disclosure regime ('EU Growth prospectus regime') which is available to SMEs, to issuers making an offer to the public of securities that are to be admitted to trading on an SME growth market and to issuers offering securities to the public with a total consideration in the EU of less than €20 000 000.

In article 16 (risk factors) the amendment provides that they will also include the risks resulting from the level of subordination of a security and the impact on the expected size or timing of payments to holders of the securities under bankruptcy, or any other similar procedure, including, where relevant, the insolvency of a credit institution or its resolution or restructuring.

Concerning advertisements (article 21), the amended text provides that where material information is disclosed by an issuer or an offeror and addressed to one or more selected investors in oral or written form, such information shall be disclosed to all other investors to whom the offer is addressed, whether or not a prospectus is required under the regulation. Where a prospectus has to be published, such information shall be included in the prospectus or in a supplement to the prospectus.

### **Trilogue agreement**

On 16 December 2016, the Parliament and Council struck a [compromise](#) on the prospectus regulation in trilogue. The main amendments introduced by the compromise text include the following:

The regulation does not apply to an offer of securities with a total consideration in the EU of less than €1 000 000, calculated over 12 months. (Article 1(2a)).

The obligation to publish a prospectus does not apply to offers to the public whose denomination per unit amounts to at least €100 000 and to offers addressed to fewer than 150 persons per Member State (article 1(3)); to the admission to trading of non-equity securities issued in a continuous or repeated manner by a credit institution, where the total consideration is less than €75 000 000 over 12 months (article 1(4)).

Member States may decide to exempt offers to the public from the obligation to publish a prospectus provided that the total consideration of the offer in the EU does not exceed €8 000 000 calculated over 12 months (article 3(2b)).

Concerning the subsequent resale of securities, where a prospectus relates to the admission to trading on a regulated market of non-equity securities that are to be traded only on a regulated market to which only qualified investors can have access for the purposes of trading in such securities, they should not be resold to non-qualified investors, unless an appropriate prospectus for them is drawn up (article 5).

The information to be included in a prospectus is as Parliament's amendment, but must also include the reasons for the issuance and the impact on the issuer.

The prospectus summary is the same as in Parliament's amendment, but the number of A4 sides changes (7 A4 sides, maximum 10). Also, in the section 'key information on the securities' of the summary, the brief description of the securities offered should also include the relative seniority of the securities in the issuer's capital structure in the event of insolvency. Further, if there is a guarantee attached to the securities, this section should include the relevant key financial information for assessing the guarantor's ability to fulfil its commitments under the guarantee, and a brief description of the most material risk factors pertaining to the guarantor (article 7).

The URD provision is the same as the EP's proposal, but also includes the possibility for the competent authority –in case of amendment to the URD – to request a consolidated version of the amended URD, if such a version is necessary to ensure comprehensibility of the information provided in that document (article 9).

As regards the format of the prospectus, the base prospectus and the final terms, the Commission will adopt delegated acts to supplement the regulation. Concerning offers and admissions to trading of non-equity securities, the Commission will set out specific and appropriate information requirements for prospectuses that are to be sold only to qualified investors, or have a denomination per unit of at least €100 000 (article 13).

The simplified disclosure regime for secondary issuances should apply to issuers whose securities have been admitted to trading on a regulated market or an SME growth market continuously for at least the previous 18 months, and who either issue securities fungible with existing securities which have been previously issued, or issue non-equity securities. The regime is also available to offerors of securities admitted to trading on a regulated market or an SME growth market continuously for at least the previous 18 months. Lastly, the amended article contains a list of elements of information that should be included in the schedules (article 14).

The proportionate disclosure regime – as proposed to be amended by the EP – is also available to issuers other than SMEs but with a market capitalisation of less than €500 000 000, making an offer of securities to the public that are to be admitted to trading on an SME growth market. When specifying the reduced content and standardised format of an EU growth prospectus, the Commission will focus on material and relevant information for investors and on the need for proportionality between the size of a company and the need for a prospectus.

In article 16, the amendment provides that each of the risk factors be adequately described and presented in a limited number of categories. These will include the risks resulting from the level of subordination of a security and the impact on the expected size or timing of payments to holders of the securities under bankruptcy, or any other

similar procedure. Where there is a guarantee attached to the securities, the specific and material risk factors relating to the guarantor will be included.

With regard to the final offer price and number of securities, the amendment to article 17 provides that both the maximum price and/or amount of securities and the valuation methods and criteria will be disclosed in the prospectus.

Concerning advertisements (article 21), in addition to the EP amendment, it is established that competent authorities of host Member States cannot impose any requirements or administrative procedures in addition to those required for the exercise of their supervisory tasks, and can only charge fees linked to the performance of these tasks. The fees in question should be non-discriminatory, reasonable and proportionate, and their level be disclosed on the website of the competent authority.

Supplements to the prospectus (article 22) must contain a prominent statement concerning the right of withdrawal, stating clearly that it is only granted to investors who had already agreed to purchase or subscribe for the securities before the supplement was published, the time period in which investors can exercise the right of withdrawal, as well as the person investors may contact should they wish to exercise that right. In addition, when the securities are purchased through a financial intermediary, that intermediary must inform investors of the possibility of a supplement being published, where and when it would be published and that the intermediary would assist them in exercising their right to withdraw.

A new article (24a) provides rules for the notification of competent authorities concerning registration documents or universal registration documents. It states, among other things, that no fee will be charged by those competent authorities for the notification, or receipt of notification, of RDs or URDs, or any related supervisory activity.

Concerning cooperation with third countries, an amendment to article 28 excludes from the conclusion of cooperation agreements third countries that are on the list of jurisdictions which have strategic deficiencies in their national anti-money-laundering and 'countering the financing of terrorism' regimes, and pose significant threats to the financial system of the Union, adopted in delegated acts of the Commission pursuant to Article 9 of the fourth Anti-Money-Laundering Directive.

In annex III, point IIIa states that essential information about the securities includes a description of the type and class of the securities being offered and/or admitted to trading, the currency in which they are issued, their relative seniority in the issuer's capital structure in the event of the issuer's insolvency, the dividend and payout policy, as well as description of any rights attached to the securities.

Lastly, two new annexes (V and VI) are added. Annex V contains detailed information about the EU growth prospectus, including the responsibility for the registration document, the strategy, performance and business environment of the company, its corporate governance, information to shareholders, and its financial statements and key performance indicators.

As for annex VI, it contains similar provisions for the securities note for the EU growth prospectus (responsibility for the securities note, terms and conditions of the securities, details of the offer and expected timetable, and information on the guarantor).

### Next steps

The text of the compromise agreement is now to be voted by the co-legislators. The vote in plenary is tentatively scheduled for the April plenary session. As for the Council, in [December](#) the Committee of Permanent Representatives endorsed the compromise text.

### References

European Commission [webpage](#) on the Prospectus Directive.

[Prospectus to be published when securities are offered to the public or admitted to trading](#), European Parliament, Legislative Observatory (OEIL).

### Endnote

<sup>1</sup> See [COM\(2015\) 583](#), annexes 1-3.

<sup>2</sup> A term which designates the placing of securities by the issuer with financial intermediaries and their subsequent resale to retail investors, after a period that may run to many months, possibly through one or more additional tiers of intermediaries.

<sup>3</sup> According to the [impact assessment](#) (point 5.3), the €100 000 denomination threshold which triggered a prospectus exemption for offers of non-equity securities may have created distortions in the European bond markets and made a significant share of bonds issued by investment-grade corporate issuers inaccessible to a wider range of potential investors.

<sup>4</sup> Such companies are subject to ongoing disclosure requirements under the [Market Abuse Regulation](#) and either the [Transparency Directive](#) or the rules of the operator of the SME growth market, as required under [Directive 2014/65/EU](#).

<sup>5</sup> SMEs making use of the aforementioned minimum disclosure regime and in addition offering shares or non-equity securities which are not subordinated, convertible or exchangeable, do not give a right to subscribe to or acquire other types of securities and are not linked to a derivative instrument.

<sup>6</sup> Article 1(4b) provides that the obligation to publish a prospectus does not apply to the admission to trading on a regulated market of 'shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, where the resulting shares are of the same class as the shares already admitted to trading on the same regulated market, provided that the resulting shares represent, over a period of 12 months, less than 20% of the number of shares of the same class already admitted to trading on the same regulated market.

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