
URÍA MENÉNDEZ

New European Regulation on the prospectus
when securities are offered to the public or
admitted to trading

3 July 2017

Index

1. AMENDMENTS TO THE SCOPE OF APPLICATION AND EXEMPTIONS TO THE OBLIGATION TO PUBLISH A PROSPECTUS
 2. UNIVERSAL REGISTRATION DOCUMENT
 3. NEW SIMPLIFIED REGIME FOR SECONDARY ISSUANCES
 4. EU GROWTH PROSPECTUS
 5. OTHER NOVELTIES
 6. ENTRY INTO FORCE AND APPLICATION
-

NEW EUROPEAN REGULATION ON THE PROSPECTUS WHEN SECURITIES ARE OFFERED TO THE PUBLIC OR ADMITTED TO TRADING

On 30 June 2017, the Official Journal of the European Union published Regulation No. 2017/1129 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 on a regulated market, and repealing Directive 2003/71/EC (the “**Regulation**”).¹

The Regulation’s approval is framed in the capital markets union creation process and aims to harmonise the legal framework of public offering or admission to trading prospectuses, facilitate issuers’ access to markets and make them more efficient, enhance cross-border transactions and guarantee an equivalent investor protection in every EU Member State.

We summarise below the main updates and changes introduced by the Regulation.

1. AMENDMENTS TO THE SCOPE OF APPLICATION AND EXEMPTIONS TO THE OBLIGATION TO PUBLISH A PROSPECTUS

One of the Regulation’s main goals is to reduce administrative burdens to minimize compliance costs for issuers and increase the efficiency of markets. To that end, the Regulation modifies the exceptions to the obligation to publish a prospectus for the public offer or admission to trading of securities, with the main novelties being the following:

- (i) The Regulation **reduces** the maximum amount of the offering (in a 12-month period) excluded from the scope of application to **EUR 1 million** (versus current **EUR 5 million** limit). The Regulation nevertheless allows Member States to increase the limit to **EUR 8 million**. In such a case, the exception to publish the prospectus does not apply to cross-border offerings and admissions.
- (ii) The Regulation **increases** the threshold of the exception for the **admission** of securities already admitted in the same market from 10 to **20%** (in a 12-month period), and **broadens** the scope of the exception to **securities that are fungible** with securities already admitted to trading, thus significantly facilitating the execution of share capital increases of listed companies through accelerated bookbuilt offers and new debt issues that are fungible with existing securities of the same issuer (taps).
- (iii) The Regulation **adds** an exception to the offer and admission of non-equity securities issued by **credit institutions** involving total aggregated consideration of **less than EUR 75 million** (in a 12-month period), provided that those securities:
 - are not subordinated, convertible or exchangeable; and
 - do not give a right to subscribe for or acquire other types of securities and are not linked to a derivative instrument.
- (iv) **Convertibles/exchangeables:** The Regulation limits the exemption to admit shares resulting from the conversion/exchange of other securities to **20%** (which previously had no limit). Furthermore, the exception cannot be combined with that described in paragraph (ii) for the admission of new shares in a 12-month period.

This limit does not apply when:

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1129&from=ES>.

- the prospectus for the public offering or admission of convertible/exchangeable securities has been drafted;
- the securities are issued before 20 July 2017;
- the shares to be admitted to trading are:
 - (i) Common Equity Tier 1 items² that result from the conversion of Additional Tier 1 instruments pursuant to Article 54.1.a) of Regulation (EU) No. 575/2013 (CRR); or
 - (ii) eligible own funds or eligible basic own funds that result from a conversion to fulfil the equity requirements pertaining to solvency and minimum mandatory capital, pursuant to Directive 2009/138/EC; or
 - (iii) a result of the conversion or exchange of other securities, own funds or eligible liabilities by a resolution authority due to the exercise of a power referred to in Article 53(2), 59(2) or Article 63(1) or (2) of Directive 2014/59/ EU.

These amendments may have a material impact on the current practice of issues of convertible/exchangeable securities offered to qualified institutional investors, incentivising their listing on regulated markets.

In any case, the Regulation allows issuers to **voluntarily** draw up and submit the prospectus for approval by the corresponding authority.

2. UNIVERSAL REGISTRATION DOCUMENT

The **Universal Registration Document** (URD) is created as a new specific category, which is a registration document pursuant to which issuers describe their company, business, financial situation, results and forecasts, corporate governance and shareholder structure and, as such, must be approved by the corresponding authority.

Nevertheless, the main difference and advantage of the URD compared to the current framework of the *registration document* is that it allows issuers who have obtained approval of the URD from the corresponding authority for two consecutive financial years (i) **not to require prior approval**³ to submit subsequent URDs (and amend them); and (ii) to become **frequent issuers** and benefit from the expedited approval process (which reduces the term for the authority to answer the prospectus approval request from ten to five working days).

The corresponding authority may **review** *ex post* the URD registered without prior approval, request amendments or add supplemental information (which the issuer, depending on the importance of the request, may add immediately or in the next URD). Furthermore, the URD may form part of a public offer or admission to trading prospectus although, in that case, the corresponding authority may also request amendments or add supplemental information before the prospectus is approved.

The URD must also be used to fulfil the obligation of publishing the **annual or half-yearly financial report** if it is made public four months following the end of the financial year, at the latest; or three months following the end of the first six months of the financial year, respectively.

² Pursuant to Article 26 of Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013, on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012.

³ If the URD is not submitted in any given year, the issuer automatically will forfeit its entitlement to registration without prior approval in subsequent years.

Issuers that drafted a registration document before 21 July 2019 pursuant to Annex I of Regulation 809/2004⁴ and received approval from the corresponding authority in at least two consecutive previous years will be allowed, from that date, to file a URD without prior approval.

3. NEW SIMPLIFIED REGIME FOR SECONDARY ISSUANCES

In order to **reduce the disclosure requirements** of issuers which are subject to information obligations according to the applicable transparency and market abuse regulations, the Regulation offers the possibility to prepare a simplified prospectus for **issuances** and **offerings** of securities **already admitted** to trading on a **regulated market** or a **SME growth market**⁵ continuously for at least the last **18 months**.

This regime also applies to new **non-equity** security issuances and listings by issuers whose equity securities fulfil the abovementioned requirements.

The simplified prospectus comprises a **prospectus summary**, a **registration document** and a **securities note**. The information provided must be drafted and presented in an easily analysable, **concise** and comprehensible way. The schedules applicable to the simplified prospectus are being developed, but they will include (a) annual and half-yearly financial information published over the 12 months prior to the approval of the prospectus; (b) where applicable, profit forecasts and estimates; (c) a concise summary of the relevant information disclosed under market abuse regulations over the 12 months prior to the approval of the prospectus; (d) risk factors; (e) in relation to equity securities, the working capital statement, the statement of capitalization and indebtedness, a disclosure of relevant conflicts of interest and related-party transactions, major shareholders and, where applicable, pro forma financial information.

4. EU GROWTH PROSPECTUS

With the aim to facilitate their access to capital markets, small companies with **no securities** admitted to trading on a **regulated market** are entitled to prepare what the Regulation calls an “EU growth prospectus”. Specifically, the following are eligible for this regime:

- (i) SMEs⁶ (and offerors of securities issued by SMEs);
- (ii) issuers and offerors of securities which are traded (or are to be traded) on a **SME growth market**, with an average market capitalization of less than **EUR 500 million** for the previous three calendar years; and
- (iii) offers not exceeding **EUR 20 million** (over a 12-month period) from issuers with no securities traded on a **multilateral trading facility** and have an average number of employees of less than **500**.

The content of the EU growth prospectus will be specified through delegated acts.

⁴ Commission Regulation (EC) No. 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements.

⁵ As defined in section 1, point 12 of Article 4 of Directive 2014/65/EU.

⁶ For the purpose of this Regulation SMEs are: (i) companies, which, according to their previous annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 million and an annual net turnover not exceeding EUR 50 million; and (ii) small and medium-sized enterprises as defined in Article 4.1.13) of Directive 2014/65/EU (enterprises with a market average capitalization below EUR 200 million over the past three years).

5. OTHER NOVELTIES

5.1. Prospectus summary: content and exemptions

The maximum **length** is set at **seven sides** (nine for the prospectus of securities already admitted to trading on another regulated market) and the **number of risk factors** contained in it is limited to **15** (even if the prospectus includes a higher number), so issuers shall select those of the highest relevance for investors.

Its content must be **divided up into four sections**, with subsections in a fixed content question format. The **warnings** must include the extent of the investor's maximum potential loss.

It is not necessary in prospectuses for **admission** to trading on a regulated market of **non-equity securities** when (i) such securities are to be traded only on a regulated market, or a specific segment thereof, to which only **qualified investors** can have access for the purposes of trading in such securities; or (ii) such securities have a denomination per unit of at least **EUR 100,000**.

5.2. Risk factors

The Regulation strengthens the preexisting obligation to **limit** risk factors to those important and specific to the issuer (and the grantor, as the case may be) and the securities. Those of a generic type, which only serve as disclaimers or which are not corroborated by the content of the prospectus, are not allowed.

In that sense, risk factors must be disclosed in a limited number of **categories** depending on their nature and, in each category, they must also be **ranked** in order of importance based on (i) the probability of their occurrence and (ii) the expected magnitude of their negative impact.

In **debt issuances**, risk factors must also include the specific risks resulting from the level of subordination of a security and the impact in the event of insolvency or another similar procedure.⁷

According to the Regulation, the European Securities and Market Authority is expected to prepare specific **guidelines** on the assessment of the specificity and materiality and categorization of risk factors.

5.3. Incorporation by reference

The categories of **documents** that can be incorporated by reference are **broadened** to include documents such as corporate governance statements and other company reports.

5.4. Supplements

The publication of a supplement is only required for very material inaccuracies relating to the information included in a prospectus (in addition to significant new factors or material mistakes which remain unchanged), validating ESMA's interpretation of the Prospectus Directive in the same sense.

Financial intermediaries must (i) **inform** investors that a supplement may be published; and, if published, (ii) **contact** investors on the day the supplement is published; and (iii) **assist** them in exercising their right to withdraw their acceptance of the offer.

The Regulation specifies the content of the **statement** which the supplement must include in connection with the **right to withdraw** subscription or purchase orders.

Finally, the **period** for approval is **reduced** to a maximum of **five working days**.

⁷ Including insolvency, resolution or restructuring of a credit institution in accordance with Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council.

6. ENTRY INTO FORCE AND APPLICATION

This Regulation will enter into force **20 days** following its publication in the Official Journal of the European Union (20 July 2017). Nevertheless, it will be generally applicable **from 21 July 2019**, except for:

- the exemptions to publish the prospectus provided in sections 1(ii) and (iv), which will apply as of the date the Regulation **enters into force**; and
- the rules provided in section 1(i) in connection with prospectus exemption for small size offers, which shall apply from **21 July 2018**.

Contact lawyers



Gabriel Núñez

Partner. Madrid office

+ 34915860354

gabriel.nunez@uria.com



Javier Redonet

Partner. Madrid office

+ 34915860154

javier.redonet@uria.com



Alfonso Ventoso

Partner. Madrid office

+ 34915860354

alfonso.ventoso@uria.com

BARCELONA
BILBAO
LISBOA
MADRID
PORTO
VALENCIA
BRUXELLES
FRANKFURT
LONDON
NEW YORK
BOGOTÁ
BUENOS AIRES
CIUDAD DE MÉXICO
LIMA
SANTIAGO DE CHILE
SÃO PAULO
BEIJING