



Capital Markets Union

Reforming the Prospectus

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A listing or public offer prospectus is a vital document that is designed to inform investors when listed companies or companies that intend to be listed issue or sell securities. Although improvements have already been made to the regime, the current review of the Prospectus Directive – which the European Commission has identified as a short-term priority of a Capital Markets Union (CMU) – must consider the criticism that has been put forward. Identified problems relate to such issues as size, cost and lack of clarity of the prospectus, the fact that the prospectus repeats information available elsewhere, the inadequate protection afforded to retail investors because the prospectus summary is way too long, the under-used proportionality regime for SMEs, and differing practices among national authorities in reviewing prospectuses.

Streamlined requirements for secondary issues

The prospectus remains entirely appropriate for initial public offerings where the issuing company is new on the market. But if companies have already made their entry on the stock market, it should be possible for subsequent issues (secondary issues) to benefit from a streamlined regime, considering the periodic and permanent reporting obligations to which issuers are subject.

While the Prospectus Directive already includes a number of streamlining measures for secondary issues, they do not go far enough. For this reason, the AMF proposes a new procedure based on the French “document de référence” system and the “Well-Known Seasoned Issuer” (WKSI) regime applied in the United States for a decade. Although the procedure would be different, the final goal would be the same, namely to give extra flexibility to issuers that have an enhanced disclosure track record. Subject to certain conditions, secondary issues with a moderate dilutive impact could therefore be exempted from the prospectus requirement.

An issuer could thus elect for this exemption regime if it meets the following criteria:

- listing for at least two years;
- submission of an annual information document the quality of which has not been challenged by the regulator and that includes details on the shareholding structure and key governance information;
- no dispute between the regulator and the issuer on periodic and permanent reporting;
- issuance of financial instruments the dilutive impact of which does not exceed 20% (this exemption would cover issues of shares as well as instruments giving access to capital); and
- publication of a standard press release on the issue, including information such as the reasons for the issue, risk factors and a financial situation statement, whereby national authorities would have a given period of time to vet the press release (for example no more than five days).

It might be possible to extend this exemption regime to certain bond issues provided that a reasonable maximum debt level could be established, notwithstanding the wide range of debt profiles of issuers across different sectors.

This optional exemption regime could be revoked if the issuer ceased to meet one of the criteria or if a dispute arose with its competent authority on its financial reporting.

A true prospectus summary

Although intended to reflect the issuer’s efforts to be concise and articulate, the prospectus summary in fact often resembles a mini-prospectus, sometimes replicating more or less extensively entire sections of the prospectus. To address the conflict between the need to be concise and the need to provide all the key information, the prospectus summary needs to be revisited. The AMF proposes to replace the prospectus summary with a new document based on the key information document (KID) required for investments products within the scope of the Regulation on Packaged Retail Investments and Insurance Products (PRIIPs Regulation). While maintaining the existing liability regime for prospectuses, the aim would be to have a short document (of no more than four or five pages) comprising predefined sections and including essential information on the issuer, the transaction and the financial instrument.

In case of issues subject to the obligation to prepare a prospectus under the Prospectus Directive and the obligation to prepare a KID under the PRIIPs Regulation, the summary would not be replaced by the KID, insofar as these two documents are not subject to the same requirements, notably in terms of timing and liability. A summary (based on the proposed format) would still be required, but information on the financial instrument could be covered by a cross-referenced to the KID or, if this is legally impossible, the same information would be provided in both documents.

A harmonised and streamlined approach for SMEs

SMEs that are listed on a regulated market must prepare a prospectus in the event of a public offer or an admission to trading. If these companies meet certain size criteria, they are eligible to a proportionate regime in terms of the information to be included in the prospectus. On a multilateral trading facility (MTF) – such as Alternext – admissions to trading without a public offer do not give rise to a prospectus but to an offering circular that is governed by market rules and which is not subject to the approval of the AMF. Furthermore, under the new Markets in Financial Instruments Directive (MiFID 2), MTFs that meet certain investor information criteria may ask to obtain a special European SME Growth Market (SME-GM) label.

The AMF believes that it would be inappropriate to extend the scope of the prospectus to ordinary admissions on MTFs. It is important to maintain certain structural differences between the regulated market and MTFs and to avoid increasing the obligations imposed on SMEs listed on MTFs. However, the definitions of what constitutes an SME (i.e. those used by the prospectus regime and the SME-GM label) need to be harmonised based on the SME-GM threshold, i.e. market cap of €200 million. Similarly, since there is broad agreement that the prospectus is insufficiently proportionate, additional streamlining measures could be considered, notably by reducing redundancies or establishing formal materiality thresholds for certain sections of the document.

Other adjustments

The AMF favours leaving the various prospectus exemption thresholds unchanged, for three reasons: the need to protect investors, the difficulty in setting more appropriate thresholds, and the preference for an exemption applicable to secondary issues (as proposed by the AMF). Given disparities in the size of domestic markets, the AMF also believes that the national discretion in terms of exemption threshold (between €100,000 and €5 million) should be maintained.

Public offers by companies based outside the European Union and not listed on a European market that target their employees established in the European Union should be covered by a conditional exemption, linked in particular to the equivalence of accounting standards. Moreover, a genuine equivalence regime for third country prospectuses needs to be put in place, subject to reciprocity.

For the sake of consistency, the scope of securities subject to prospectus requirements could be extended to include instruments that do not qualify as securities but that have similar characteristics, such as ownership shares in credit institutions and mutual certificates.

The enforcement regime provided for under the Prospectus Directive needs to be clarified, echoing steps taken during the revisions of several sectorial directives (Transparency Directive, UCITS V Directive and MiFID 2), insofar as breaches of the prospectus regime are currently essentially sanctioned under market abuse provisions (on the grounds of the dissemination of false or misleading information).

The AMF continues to support a procedure for the systematic ex ante approval of prospectuses, which provides legal certainty. While some concepts, such as the consistency and comprehensibility of the prospectus, could be clarified, it is above all important to continue efforts to promote convergence in the practices of national regulators under the aegis of ESMA. Additionally, the essential role played by national regulators in monitoring marketing documentation needs to be highlighted.

It does not appear that base prospectuses, which are widely used on the market for bond issue programmes, can be extended to equities, and a streamlined regime for secondary issues appears to be a more fruitful avenue.

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