EU Prospectus Regulation: Where We Are in Its Implementation

2 May 2019

INTRODUCTION

On 16 May 2017, the EU adopted a new prospectus regulation[1] with the aim of streamlining the previous EU prospectus regime. The new regulation, which repealed and replaced the EU Prospectus Directive (2003/71/EC) and the then-existing Prospectus Regulation (809/2004), entered into force on 20 July 2017; however, while certain provisions of the new regulation already apply – as discussed in our client update, Streamlining the EU Prospectus Regime –the majority of the new regulation's provisions will come into effect on 21 July 2019.

This client update summarises the aspects of the new regulation that have already come into effect and notes the key changes to the existing prospectus regime that will apply from 21 July 2019.

CHANGES IN EFFECT SINCE 20 JULY 2017

Under both the previous EU prospectus regime and the new EU prospectus regime, a prospectus is required for an admission of securities to trading in an EU jurisdiction and for an offer of securities to the public, subject to certain exemptions. As we noted previously, the new prospectus regime has introduced some new exemptions to the requirements for publishing a prospectus and altered some existing ones.

Since 20 July 2017, issuers with securities (including depositary receipts) admitted to trading on a regulated market, such as the London Stock Exchange's main market, are not required to publish a prospectus when issuing securities that represent up to 20% of a class already admitted to trading over a 12-month period. Under the previous prospectus regime, the exemption only applied to an issuance of shares representing up to 10% of a class already admitted to trading over a 12-month period.

[1] Regulation (EU) 2017/1129.

In addition, under the previous EU prospectus regime issuers with securities admitted to trading on a regulated market were able to admit shares resulting from the conversion or exchange of other transferable securities, where such shares are of the same class as the shares already admitted to trading, without having to publish a prospectus. Effective from 20 July 2017, the new prospectus regulation introduced a cap so that the exemption can only be relied on where such shares represent no more than 20% of the number of shares of the same class already admitted to trading on the same regulated market. This cap does not apply where the securities convertible into shares were issued before 20 July 2017.

CHANGES IN EFFECT SINCE 21 JULY 2018

The obligation to publish a prospectus does not apply to offers of securities to the public with a total consideration in the EU of less than €1 million in any 12-month period, which is a significant increase from the €100,000 threshold that applied prior to 21 July 2018. EU Member States have discretion to raise further the threshold at which a prospectus is required for offers to the public up to a maximum of €8 million in total over a period of 12 months (as compared to €5 million prior to 21 July 2018), provided that there is no application to trading on a regulated market. In the UK, HM Treasury decided to increase the exemption threshold up to the €8 million maximum available.[2]

KEY CHANGES APPLYING FROM 21 JULY 2019

Save for the changes discussed above, the remaining provisions of the new EU prospectus regulation will come into effect on 21 July 2019. While a significant portion of the new regulation broadly tracks the existing prospectus regime, there are certain key provisions that mark a notable departure from the existing regime. We have briefly summarised these changes below; for a more in-depth discussion, please see our previous client update.

Exemptions to the Requirement to Publish a Prospectus

The new prospectus regulation introduces a new exemption to the requirement to publish a prospectus where non-equity securities are issued in a continuous or repeated manner by a credit institution and where the total aggregated consideration in the EU is less than €75 million in any 12-month period, provided that those securities: (i) are not subordinated,

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[2] The increase to the threshold, amongst other changes, was implemented by the Financial Services and Markets Act 2000 (Prospectus and Markets in Financial Instruments) Regulations 2018 (2018/786) amending the UK Financial Services and Markets Act 2000, which came into force on 21 July 2018.

convertible or exchangeable; and (ii) do not give a right to subscribe for or acquire other types of securities and are not linked to a derivative instrument.

In addition, certain existing exemptions to the requirement to publish a prospectus have been simplified with effect from 21 July 2019. For instance, with regards to the exemption for securities offered in connection with a takeover or merger, an "equivalent document" (i.e., a document that is equivalent to a prospectus as required under the EU prospectus regime) will no longer be required, provided that a document containing information on the transaction and its impact on the issuer is made publicly available.

The exemption for employee share scheme offers has also been broadened so that the exemption applies regardless of the location of the issuer, and an issuer is no longer required to have its head office or registered office in an EU Member State or its securities listed on an EU regulated market, provided that the issuer discloses publicly and describes in a document the number and nature of the securities and the reasons for the offer.

New Prospectus Disclosure Rules

From 21 July 2019, the summary of a prospectus will be required to comply with new rules that seek to ensure that the summary is short, simple and easy for investors to understand. The content of the summary must be accurate, fair, clear and not misleading and must "read as an introduction to the prospectus", while the summary may not exceed a maximum length of seven pages of A4-sized paper when printed. The summary must also include a brief description of up to 15 of the most salient risk factors.

In addition, the new prospectus regulation introduces new disclosure rules to promote greater focus on only those risk factors that are specific to the issuer or the securities and which are material for making an informed investment decision. Under the new rules, risk factors will have to be categorised under a limited number of categories, and the issuer will have to assess the materiality of the risk factors and rank them in order of materiality.

Lighter Prospectus Regime for Secondary Issuances

From 21 July 2019, issuers will be able to publish a simplified prospectus with a lighter disclosure regime for secondary issuances where such issuer has securities already listed on a regulated market or SME growth market for at least the previous 18 months. For example, only one year of financial information will be required to be disclosed in the simplified prospectus.

Universal Registration Document for Frequent Issuers

Frequent issuers will be able to make use of a new "universal registration document" – similar to a shelf registration in the US – to streamline the process of issuing further securities. The universal registration document is available to issuers that have a registered office in the EU and that are admitted to trading on regulated markets and multilateral trading facilities. An issuer that files an approved "universal registration document" in each financial year can rely on a fast-track prospectus approval process whereby the competent authority must provide a decision on a draft prospectus within five working days (as compared to the usual 10 working days).

WHAT HAPPENS IF BREXIT OCCURS PRIOR TO 21 JULY 2019

Following the EU's decision to grant a further extension to the Brexit process under which the UK will, absent of a further extension, a revocation of Article 50 or ratification of the EU Withdrawal Agreement by the UK Parliament, leave the EU on 31 October 2019, the provisions of the new prospectus regulation will apply to equity and debt offerings in the UK.

The ever-changing dynamics of the Brexit process, however, mean that one cannot rule out the possibility of a breakthrough being reached by the UK Parliament, resulting in the approval and ratification of the EU Withdrawal Agreement prior to 21 July 2019. While this would trigger the UK's exit from the EU, the UK will still be subject to EU law during the transition period provided under the EU Withdrawal Agreement, which would result in the new prospectus regulation being embedded into UK law until (and unless) the UK government determines whether to amend or repeal it.

On the other hand, if Parliament reverses course and votes to leave the EU without a deal prior to 21 July 2019, the UK would not be bound to implement the remaining provisions of the new prospectus regulation. This is a highly unlikely scenario as the UK government has previously indicated its intention to implement the new prospectus regulation, and the draft legislation[3] is currently at the report stage and third reading in the House of Commons to put this into effect.

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Please do not hesitate to contact us with any questions.

[3] The Financial Services (Implementation of Legislation) Bill.

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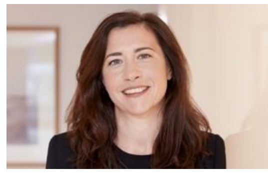

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