

A&O SHEARMAN

Prospectus regime changes in the EU and U.K. – a debt capital markets outlook

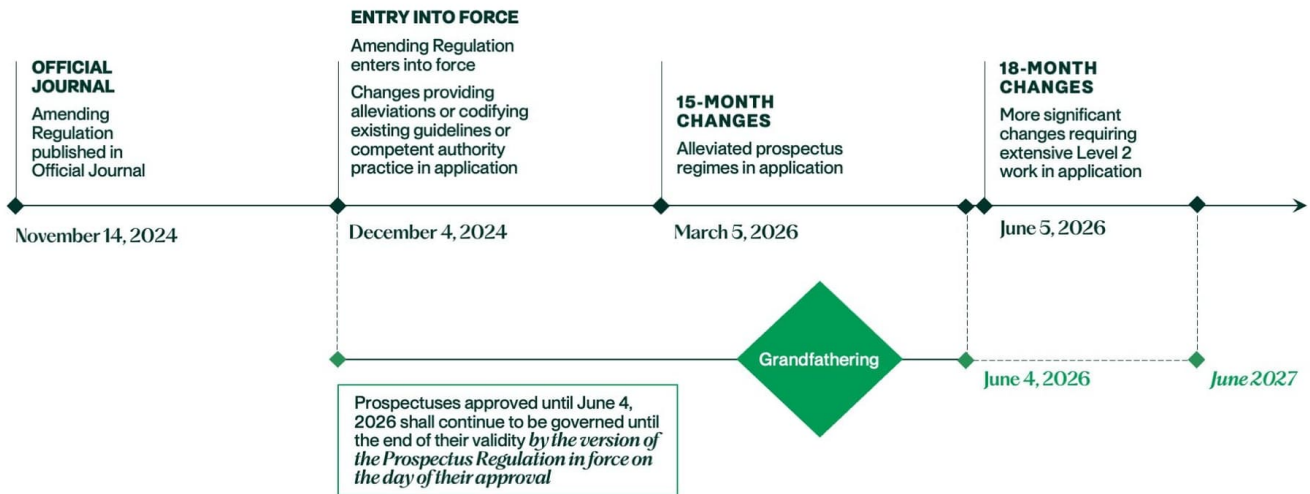
Nov 29 2024

The EU and U.K. prospectus regimes govern disclosure requirements for securities offered to the public and/or admitted to trading on a regulated market. Imminent and forthcoming changes to these regimes will have implications for issuers and other parties involved in debt capital markets transactions offered, or listed on regulated markets, in the EU or U.K.¹ In this article, we summarise the main changes and highlight some of the areas of likely divergence between the EU and the U.K. regimes.

EU prospectus regime: Imminent and forthcoming changes introduced by the Listing Act

Regulation (EU) 2024/2809 (the Amending Regulation), an element of the EU's Listing Act package, was published in the Official Journal on November 14, 2024 and will enter into force on December 4, 2024. The Amending Regulation introduces various changes to the Prospectus Regulation (EU) 2017/1129 (the PR). Some of these changes will apply immediately upon entry into force, others after a 15-month transitional period (i.e. from March 5, 2026) and a final batch after an 18-month transitional period (i.e. from 5 June 2026, with grandfathering for this final batch of changes), as detailed in the timeline below:

When will the amended PR apply?



Private and Confidential 1

What is changing on December 4, 2024?

The changes that will apply from December 4, 2024 are mainly aimed at providing alleviations or codifying existing guidelines or competent authority practice. These include:

- In relation to incorporation by reference, the requirement for a supplement to update annual or interim financial information in a base prospectus is being removed (although issuers can still voluntarily supplement for such financials). This will effectively allow programme issuers to incorporate future financial information by reference. There will be points to consider around the practical application of this change for issuers wishing to utilise it, and there are pending questions to the European Securities and Markets Authority (ESMA) the answers to which may have an impact.

Small changes have also been made to the documents identified as being suitable for incorporation by reference. These include the addition of “sustainability reporting” as a type of management report that can be incorporated and, possibly more significantly for some issuers, the removal of documents approved under the Prospectus Directive. Whilst this may have been removed as a “tidy-up” change (given the PR replaced the Prospectus Directive in 2019), its deletion could have consequences for issuers wanting to tap existing notes where the terms and conditions were set out in a prospectus approved under the Prospectus Directive, as incorporation of the original terms and conditions is necessary to facilitate tap issues.

- The Amending Regulation introduces a provision into the PR that explicitly states that prospectuses shall not contain risk factors that are generic, that serve only as disclaimers, or that do not give a sufficiently clear picture of specific risks. This effectively codifies the existing ESMA guidelines on risk factors published in October 2019. The Amending Regulation also introduces a subtle change

to the materiality ordering requirement for risk factors. Risk factor disclosure is already likely to meet this so a general change in approach is not envisaged.

- The Amending Regulation inserts a new provision that supplements cannot be used to introduce new types of security for which the necessary information has not been included in the base prospectus, unless this is necessary to comply with capital requirements under Union law. The aim of this is to foster regulatory convergence and seems to represent the codification of the approach of certain competent authorities. ESMA has been tasked with producing guidelines on what constitutes a new type of security for these purposes (expected in draft in the first quarter of 2025). It will be important for issuers that ESMA strikes the right balance and is not overly restrictive around the use of supplements.
- The Amending Regulation amends some of the exemptions from the prospectus requirement, particularly for tap issues. For example, it will increase the cap in the existing exemption for securities fungible with securities already admitted to trading on the same regulated market from 20% to 30%. It also introduces new exemptions for tap issues that could be used where the issue size exceeds the 30% limit, where the notes being tapped have been admitted to trading for at least the prior 18 months (subject to the preparation of a short-form disclosure document). Certain other modifications have been made to existing exemptions primarily aimed at making these marginally wider, effectively facilitating issues without a prospectus. Bearing in mind that debt issuance is frequently documented under programmes, and issuance under those is straightforward using final terms, wider exemptions are unlikely to change practice significantly for programme issuers. Certain exemptions might be of some utility for issuers who issue debt using standalone prospectuses, to the extent there are no other considerations driving the need for a prospectus (such as a preference to provide a curated and up-to-date disclosure package).
- The Amending Regulation introduces some limited changes to provisions applicable to retail offers. The withdrawal right period for investors (for instance, in connection with publication of a supplement to a retail prospectus) is being extended from two to three working days. This reflects the (now lapsed) previous temporary changes to the rules introduced as part of the Commission's Covid recovery package.

There are other changes in application from December 4, 2024 in the areas of use of languages, equivalence and the universal registration document.

Are any of the March 5, 2026 changes relevant to debt securities?

The changes that will apply from March 5, 2026 relate to alleviated prospectus regimes. The PR's simplified disclosure regime for secondary issuances is replaced by an EU follow-on prospectus concept, available where an issuer has securities already admitted to trading on a regulated market or SME growth market for 18 months. Further details on content of the follow-on prospectus are expected and will require analysis before it is possible to gauge whether this will be more popular than the simplified prospectus it replaces.

What changes come into play further down the track, on June 5, 2026?

These changes are more significant and will require extensive Level 2 work by ESMA and the Commission.

Proposals in respect of some of these changes are covered by ESMA's consultation published on October 28, 2024 on draft technical advice concerning the Prospectus Regulation (the ESMA Consultation), which includes draft amendments to the existing delegated regulation (EU) 2019/980 on format, content, scrutiny and approval of the prospectus (the PR Delegated Regulation). These include:

- Prospectuses will be required to follow a standardised format and sequence, subject to a derogation for securities offered in a third country where an offering document is prepared under the law, rule or practice of that country. Based on the proposals included in the ESMA Consultation, ESMA seek to adopt a pragmatic approach, which is likely to be welcome as far-reaching changes would prove burdensome for issuers.
- Streamlining changes are also being introduced, such that financial information included in a non-equity prospectus will only be required for the last financial year (and not the last two as under the current regime). Furthermore, some combining of the currently separate retail and wholesale non-equity disclosure annexes into a single framework is being considered. The complete picture on what prospectuses will look like once the new regime is fully in application will not be available for a while as further ESMA and Commission workstreams are anticipated.
- The Amending Regulation gives the Commission the power to introduce a disclosure annex into the PR Delegated Regulation to be followed for debt securities advertised as taking into account environmental, social and governance (ESG) factors or pursuing ESG objectives. The ESMA Consultation includes a draft of this annex, which would operate as a building block to be followed in addition to the non-equity annexes when drawing up a prospectus. It builds on ESMA's public statement on sustainability disclosures from summer 2023. Other changes serve to acknowledge the EU Green Bond Regulation and the European Green Bond (EuGB) label under it, such as those requiring prospectuses to incorporate by reference relevant information from an issuer's factsheet under that regulation. ESMA are clearly thinking about how prospectus disclosure should fit together with EUGB requirements, including in the context of programmes.
- The Amending Regulation will amend the summary requirements for retail prospectuses, including to allow the inclusion of charts, graphs and tables, and to allow a small increase in the page limit if there are guarantors. Also, a statement warning that the issuer has identified environmental issues as a material risk factor will need to be included in the introductory section, if applicable.

The Amending Regulation provides grandfathering for prospectuses approved until June 4, 2026. Our understanding is that this means that programme issuers will not have to comply with the new rules due to apply from June 5, 2026 for the remainder of their validity, e.g. if a base prospectus is approved on June 4, 2026 the issuer will not need to comply with the new rules until June 2027.

U.K. prospectus regime: Potential changes and comparison with EU prospectus regime

The U.K.'s prospectus regime is currently based on the PR, which was retained in U.K. law after Brexit as the U.K. Prospectus Regulation (the U.K. PR). The U.K. has been reviewing its prospectus regime as

part of its wider efforts to reform its capital markets and enhance its attractiveness as a listing venue. As part of this, the U.K. PR will be replaced by the Public Offers and Admission to Trading Regulations 2024 (the POATRs), with all detailed requirements relating to admission to trading to be covered in Financial Conduct Authority (FCA) admission rules. The FCA published a consultation paper (FCA CP 24/12) which closed in October 2024, setting out detailed proposals. A second consultation paper (covering retail bonds and related points) is expected in January 2025. Final FCA rules are expected towards the end of the first half of 2025, with application anticipated at the end of 2025 or early in 2026.

In relation to debt securities, the FCA proposes to stick broadly with current U.K. PR requirements, but expected changes include:

- The FCA is planning to streamline disclosure requirements by introducing a single disclosure framework for debt securities as the FCA considers that the current distinction between retail and wholesale disclosure regimes has been one of the factors holding back the development of a retail bond market in the U.K. The expectation is that the FCA will base its single framework on the existing wholesale disclosure requirements with further disclosure alleviations for "seasoned" U.K. listed corporates issuing simple, standardised, unsubordinated, unsecured corporate bonds to a wide range of retail and wholesale investors. The FCA is expected to consult on the details of its single framework and these proposed alleviations in its second consultation paper due early next year. At this stage (and as a point of difference from the EU), it seems strict format and sequencing requirements for prospectuses are not planned.
- Unlike the EU, the FCA does not propose to introduce any mandatory sustainability disclosure requirements for prospectuses, other than a requirement that an issuer states whether the bonds have been marketed as green, social or sustainable and/or issued under an ESG framework. Instead, the FCA proposes to introduce voluntary disclosure considerations intended to guide issuers to provide relevant disclosures.
- Similarly to the EU, the FCA proposes to permit future financial information to be incorporated by reference without the need to publish a supplement.
- An area of potential significant divergence is in relation to supplements. The FCA are proposing more flexibility which would allow the use of a supplement to amend conditions in a base prospectus in such a way that amounts to the introduction of new products by way of a supplement. There are likely to be conditions attached to this (e.g., this may not be available for introducing asset-backed securities or securities linked to an underlying asset), but the flexibility being proposed by the FCA will be welcomed by issuers.

Whilst the proposed new rules do not reference the current regime's exemption from withdrawal rights for supplements to a wholesale prospectus prepared only for admission to trading on a regulated market, we anticipate that the current approach will continue to apply under the new regime.

- Like the EU, the FCA are looking at increasing the cap applicable to tap exemptions, although they are proposing a higher percentage limit of 75%. Changes to other exemptions from the requirement for a prospectus are being considered, including deletion of the exemption for non-profit making bodies, and expansion of the list of exempted securities to include instruments of Islamic finance benefitting from the credit support of a sovereign, which would facilitate the issuance of Islamic finance instruments.

- The FCA proposes an alleviated liability regime for protected forward-looking statements (PFLS), intended to encourage issuers to provide more forward-looking information to investors, subject to conditions and safeguards. There are limited circumstances in which the PFLS regime may be used by debt issuers (relevance is expected to be greater in the equity capital markets space). It nonetheless represents a noteworthy difference from the EU regime which does not provide similar protections, although change may be on the horizon. In the EU, the Amending Regulation requires the Commission to look at prospectus liability and ESMA recently published a Call for Evidence in connection with this. Questions in ESMA's Call for Evidence address different aspects of prospectus liability, including whether safe-harbour provisions for forward looking statements (such as those in the U.S., or those planned for the U.K.) should be introduced at an EU level.
- In a further difference from the EU PR (which applies to regulated market admissions), the FCA proposes requirements for Primary MTFs that do not meet the "qualified investor condition". For example, an MTF admission prospectus will be required, although the market operator will set the detailed content for this. Primary MTF requirements are not expected to impact London's International Securities Market (ISM) due to the qualified investor condition.

For more information and assistance, please contact our global financial markets team.

In addition, partners [Amanda Thomas](#) (London), [Cristiano Tommasi](#) (Rome), and [Paul Péporté](#) (Luxembourg) and counsel [Jennifer Cresswell](#) (London) from our global financial markets practice discuss changes to the EU and U.K. prospectus regimes and the similarities and differences between them on our Market Horizons podcast: All aboard: Changes coming to the EU and U.K. prospectus regimes – a debt capital markets perspective.

Related Content

- [Market Horizons podcast: The fork in the road – divergence of the EU and UK prospectus regimes](#)
- [Market Horizons podcast: The fork in the road – divergence of the EU and UK prospectus regimes \(Part 2\)](#)
- [Italy: "EU Listing Act" podcast](#)
- [Issuers of financial securities: upcoming regulations](#)

Footnotes

[1] See the section on the U.K. prospectus regime for a point on the U.K. changes relating to admission to trading on multilateral trading facilities that operate as primary markets (Primary MTFs).