

## **EN GARDE! OMNIBUS 3 PROPOSAL SUGGESTS MAJOR CENTRALISING CHANGES TO NEW PROSPECTUS REGULATION**

The latest development in the EU prospectus regime feels like the scoring in an Olympic fencing match. In a word, baffling.

The ink is barely dry on the new Prospectus Regulation published in the Official Journal of the European Union on 30 June 2017, following an extensive Consultation and Trilogue process. ESMA, meanwhile, is currently consulting on Level 2 measures - including scrutiny and approval criteria to be followed by national competent authorities (NCAs).

And yet, the Omnibus Regulation proposal (Omnibus 3), published today, suggests significant changes to some key elements of Prospectus Regulation (EU) 2017/1129.

### **CENTRALISED SCRUTINY AND APPROVAL**

Notably, ESMA (and not NCAs) will be the approving authority for certain types of prospectuses from 2019. These include:

A. Prospectuses drawn up by EU entities:

- relating to the admission to trading on a regulated market of non-equity securities which are to be traded only on a regulated market, or a specific segment thereof, to which only qualified investors can have access;

or

- for asset-backed securities.

B. Prospectuses drawn up by EU:

- property companies;
- mineral companies;
- scientific research based companies; and
- shipping companies.

C. Prospectuses drawn up by third country issuers in accordance with Article 28 of the Prospectus Regulation. (Article 2(m)(iii) in the definition of Home Member State (HMS), which would have applied to third country issuers, is deleted; the HMS for third country issuers becomes, effectively, ESMA.)

#### **Key issues**

- Omnibus 3 proposes centralised approval and scrutiny by ESMA of a number of types of prospectuses

The use of the term "asset backed securities" in the Omnibus 3 proposal is different from and (based on the proposed definition in level 2 legislation) broader than the concept of a "securitisation instrument" introduced by the securitisation regulation. The centralised approval mechanism is therefore likely to apply not only to securitisation instruments but also other capital markets instruments that are asset-backed but do not meet the EU definition of a "securitisation", such as repackaging bonds and certain aircraft finance bonds.

## REFERENCE TOOL: BLACKLINE

To give you a better grasp of the changes to the Prospectus Regulation, we have prepared a [blackline](#) illustrating the proposed Omnibus 3 changes to Prospectus Regulation (EU) 2017/1129.

## TIMING

These suggested changes would take effect in July 2019, when most of the Prospectus Regulation comes into force.

The next step is for the proposals to be discussed by the European Parliament and the Council.

## RATIONALE

Finally, note that the Prospectus Regulation is not the only recent Regulation to be impacted by such centralisation. The 283 pages in the Omnibus 3 proposal also include changes to MiFID2, the Benchmark Regulation and others.

The reason for such centralisation – not only for prospectuses, but in other areas, too - is clearly stated in the proposal: "*... to reap the full potential of internationally integrated financial markets while ensuring that cross-border risks between the EU and the rest of the world can be monitored and managed effectively. The ESAs have a key role to play in this regard....*".

In the context of the Prospectus Regulation, specifically, the rationale given for this change is to avoid regulatory arbitrage between competent authorities and to acknowledge the complexity of many of these products.

## USEFUL LINKS

- [Omnibus 3 proposal](#) - 20 September 2017
- [European Commission Press Release](#) - 20 September 2017
- Accompanying [Q&A](#) – 20 September 2017
- [Prospectus Regulation \(EU\) 2017/1129](#)
- [Clifford Chance Financial Markets Toolkit](#)
- [Clifford Chance Prospectus Directive and Transparency Directive Topic Guide](#)

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