Content

The Market Newsletter addresses topical matters concerning interpretations and regulation as well as supervisory findings relating to listed companies' disclosure obligation, financial reporting enforcement, securities trading and insider issues. Articles other than those pertaining to IFRS enforcement will appear mainly in English. The newsletter is published by the Financial Supervisory Authority's Capital Markets Supervision.

New prospectus regulations

Prospectus Regulation and national regulations

The new Prospectus Regulation (2017/1129)[1] of the European Parliament and the Council fully entered into force on 21 July 2019[2]. The Prospectus Regulation and the lower-level regulations issued pursuant of it completely replaced, in practice, the national prospectus regulations, except for the threshold at which a prospectus is mandatory. With the entry into force of the Prospectus Regulation, chapters 4 and 5 of the Securities Market Act relating to prospectuses were repealed and, among other things, the obligation to prepare a national prospectus was abolished. Chapter 3 of the current Securities Markets Act provides for the obligation to prepare a prospectus in accordance with the Prospectus Regulation, a national prospectus threshold, a national key information document and the submission of prospectus marketing material to the Financial Supervisory Authority (FIN-FSA).

The threshold at which a prospectus is mandatory may vary in the EEA between EUR 1 million and EUR 8 million ('Member State option'). Under chapter 3, section 2 of the Securities Market Act, a prospectus need not be published if securities are offered up to a maximum sum of EUR 8 million (in the EEA during a 12-month period) and the offering is not subject to notification in accordance with the Prospectus Regulation. In Finland, a new threshold at which a prospectus is mandatory entered into force on 1 January 2019. At the same time, a national requirement to prepare a basic information document for offers of securities with a total consideration during the preceding 12-month period of at least EUR 1 million, but not exceeding EUR 8 million, entered into effect. The content of the basic information document is laid down in a decree of the Ministry of Finance (1281/2018).

The general principles of the Securities Market Act continue to apply to all offers of securities made in Finland. These are laid down in chapter 1, sections 2–4 of the Securities Market Act.

Article 1 of the Prospectus Regulation provides for numerous exemptions from the obligation to publish a prospectus in connection with the offer or listing of securities. A summary of the most common exemptions can be found on the FIN-FSA website, Offering of securities and prospectuses.

[1] *Regulation (EU) 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.*
[2] *Certain exceptions to the obligation to provide a prospectus under the Prospectus Regulation had already entered into force.*

Lower-level regulations issued pursuant to the Prospectus Regulation

The minimum information requirements of a prospectus are included in the new Commission Delegated Regulation 2019/980[3]. As in the old Prospectus Regulation, it contains information requirements applicable to different issuance situations, issuers and securities (Annexes to the Regulation), which are combined to form the minimum content of a prospectus. The Delegated Regulation also lays down the order in which the required information should be disclosed. A prospectus shall always consist of the applicable registration document and securities note as well as additional information items such as pro forma or guarantee information, if applicable. Generally, a prospectus summary should also be prepared.

The required content of the summary is contained in Article 7 of the Prospectus Regulation. In addition, the disclosure of the key financial information in the summary should take into consideration the provisions of the Commission Delegated Regulation (2019/979)[4] with regard to regulatory technical standards. The regulatory technical standards also regulate the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and notification to another EEA state.

A significant change in prospectus requirements concerns the content and presentation of risk factors. Under the Prospectus Regulation, the risk factors featured in a prospectus should be limited to risks which are material and specific to the issuer and its securities and are corroborated by the content of the prospectus. The risk factors should also be presented in a limited number of categories, and in each category the most material risk factors should be mentioned first, based on the probability of their occurrence and the expected magnitude of their negative impact. For each risk factor, it should be clearly explained how it will affect the issuer or the security.

A summary of prospectus regulations together with links can be found on the FIN-FSA website.

The FIN-FSA website also has links to guidelines issued by the European Securities and Markets Authority (ESMA) and to Q&A documents on prospectus-related topics. ESMA has stated that the interpretations and guidelines issued during the Prospectus Directive will, where applicable, continue to be valid. In addition, interpretations concerning the new Prospectus Regulation have already been published. In relation to the new regulation, ESMA has issued guidance to competent authorities on which aspects with regard to prospectus risk factors should be specifically addressed in connection with prospectus review. It is also beneficial for the persons responsible for the prospectus to consider the guidelines in question when preparing prospectus.

Language of the prospectus

The language of a prospectus is no longer provided for in the Securities Market Act but in Article 27 of the Prospectus Regulation. Where an offer of securities to the public is made or admission to trading on a regulated market is sought only in the home Member State, the prospectus shall be drawn up in a language accepted by the competent authority of the home Member State. The FIN-FSA has not adopted any new language policies in respect of this; the FIN-FSA considers that, as a rule, a prospectus should be prepared in Finnish or Swedish. The approval of English-language prospectuses is

[3] *Commission Delegated Regulation (EU) 2019/980, supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004.*

[4] *Commission Delegated Regulation (EU) 2019/979 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council with regard to regulatory technical standards on key financial information in the summary of a prospectus, the publication and classification of prospectuses, advertisements for securities, supplements to a prospectus, and the notification portal, and repealing Commission Delegated Regulation (EU) No 382/2014 and Commission Delegated Regulation (EU) 2016/301.*

subject to case-by-case consideration and the policies outlined in FIN-FSA Guidelines and Regulations 6/2013 (chapter 6.2.4).

New prospectus types and disclosure regime

Prospectus Regulation allows, under certain conditions, the preparation of new types of alleviated prospectus. These include a simplified prospectus for secondary issuances (secondary market prospectus) and an EU Growth prospectus replacing the previous alleviated prospectus requirements for rights issues and SMEs. An entirely new possibility is to prepare an annual universal registration document, within which the annual financial report may also be published. A universal registration document approved for two successive years will enable a faster prospectus approval process the following year.

A secondary market prospectus is provided for in Article 14 of the Prospectus Regulation. The simplified disclosure regime may be used by entities whose securities have been admitted to trading on a regulated market (stock exchange list) or on an EU growth market continuously for at least the last 18 months and who offer or issue securities fungible with existing securities which have been previously listed. An entity which has listed shares may also use the prospectus in issuances of non-equity securities.

Content requirements of secondary market prospectus

- Registration document: Delegated Regulation 2019/980, Annex 3 (equity securities) or Annex 8 (non-equity securities)
- Securities note: Delegated Regulation 2019/980, Annex 12 (equity securities) or Annex 16 (non-equity securities)
- Order of disclosure of information: Delegated Regulation 2019/980, Article 24
- Summary (if applicable): Prospectus Regulation, Article 7 and Delegated Regulation 2019/979, Articles 1–9.

An **EU Growth prospectus** is provided for in Article 15 of the Prospectus Regulation. An EU Growth prospectus may be used in the case of an offer of securities, for example by issuers that are SMEs or by issuers whose securities are traded or are to be traded on an EU growth market provided that they have no securities admitted to trading on a regulated market. The First North multilateral trading facility, maintained by the Helsinki Stock Exchange, has been registered as a growth market for small and medium-sized companies within the meaning of EU regulations as of 1 September 2019. The EU Growth prospectus and its summary are in a more standardised format than other prospectuses.

Content requirements of EU Growth prospectus

- Registration document: Delegated Regulation 2019/980, Annex 24 (equity securities) or Annex 25 (non-equity securities)
- Securities note: Delegated Regulation 2019/980, Annex 26 (equity securities) or Annex 27 (non-equity securities)
- Order of disclosure of information: Delegated Regulation 2019/980, Article 32
- Summary: Delegated Regulation 2019/980, Article 33 and Annex 23.

The prospectus to be used **for listing and offering securities to the public**, when other prospectus options are not applicable, consists of the following content requirements

- Registration document: Delegated Regulation, Annex 1 (equity securities) or Annex 6 (non-equity securities)

- Securities note: Delegated Regulation, Annex 11 (equity securities) or Annex 14 (non-equity securities)
- Order of disclosure of information: Delegated Regulation 2019/980, Article 24
- Summary: Prospectus Regulation, Article 7 and Delegated Regulation 2019/979, Articles 1–9.

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Benchmarks Regulation transitional period is ending. Are you ready?

The Benchmarks Regulation[5], which provides for the administration, contributors and use of indices (for example reference rates, foreign exchange rates as well as equity and commodity indices, see in more detail below), has been applied since 1 January 2018. With certain exceptions, however, EU index providers (hereinafter also “benchmark administrator” or “administrator") have, under the Regulation’s transitional provisions, until the end of 2019 to apply for authorisation or registration. The transitional period applicable to benchmarks provided by administrators located in third countries will also expire at the end of the year. Certain changes to these transitional provisions are pending, however. This article discusses the end of the transition periods and, in particular, its impacts on benchmark users.

What are benchmarks?

Benchmarks subject to the Benchmarks Regulation comprise indices

- by reference to which the amount payable under a financial instrument[6] or a financial contract[7], or the value of a financial instrument, is determined, or
- used to measure the performance of an investment fund (including an alternative investment fund) with the purpose of tracking the return of such index or of defining the asset allocation of a portfolio or of computing the performance fees.

According to the Regulation, an index is any figure

- that is published or made available to the public and
- which is regularly determined
    - entirely or partially by the application of a formula or any other method of calculation, or by an assessment.
    - on the basis of the value of one or more underlying assets or prices, including estimated prices, actual or estimated interest rates, quotes and committed quotes, or other values or surveys.

Transitional provisions of the Regulation

Under Article 51(1) of the Benchmark Regulation, benchmark administrators providing a benchmark on 30 June 2016 shall apply for authorisation or registration in accordance with the Regulation at the latest by 1 January 2020. According to ESMA’s interpretation, this same transitional period shall also be

[5] Regulation (EU) 2016/1011 of the European Parliament and of the Council, of 8 June 2016, on indices used as benchmarks in financial instruments and financial contracts or to measure the performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014.

[6] Financial instruments refer to instruments defined in the Investment Services Act (747/2012), for which a request for admission to trading on a trading venue referred to in the Act on Trading in Financial Instruments has been made or which is traded on a trading venue or via a systematic internaliser.

[7] Financial contracts refer only to consumer credit contracts.

applied to administrators who started to provide benchmarks between 30 June 2016 and 1 January 2018, but not to new benchmarks provided by them after 1 January 2018[8]. Whether the Regulation requires a benchmark administrator to be authorised or registered depends on whether or not the administrator is a supervised entity under the Regulation and on the extent to which the benchmark is used and the type of benchmark[9].

There are various procedures in the Benchmark Regulation on how benchmarks provided by administrators located in *third countries* are approved for use in the EU[10]. Article 51(5) of the Regulation states that if a benchmark provided by an administrator located in a third country has not been approved under the Regulation for use in the EU before 1 January 2020, supervised entities may use the benchmark after 1 January 2018 only for financial instruments, financial contracts and in measurements of the performance of an investment fund in which a reference to such benchmark has been added prior to 1 January 2020.

A proposed change to these transitional provisions is pending, however. According to the proposal, an extra two years to seek authorisation would be granted to administrators of benchmarks designated as critical by the Commission. Only certain widely used reference rates, such as EURIBOR and EONIA, are critical benchmarks, however[11]. The proposed change also includes an extra two years for the approval of benchmarks provided by administrators located in third countries. The EU institutions reached political agreement on extending the transitional periods last spring[12]. At the time of writing, however, the changes to the Regulation have not yet been published in the Official Journal of the EU, and therefore it is not exactly known when the extension of the transitional periods will be confirmed. In any case, the transitional period for *benchmarks other than critical benchmarks* and for benchmarks provided by administrators located in third countries will end on 1 January 2020.

Use of benchmarks prohibited for supervised entities if administrator is not in ESMA register

The ending of the transitional period is also relevant for benchmark users. Under Article 29(1) of the Benchmark Regulation, a supervised entity may use a benchmark or a combination of benchmarks provided by an administrator located in a Member State of the EU if a benchmark or a combination of benchmarks is provided by an administrator included in the register[13] maintained by ESMA. ESMA may only enter an administrator in its register if the administrator has been granted authorisation by the competent authority of the Member State where the administrator is located or the administrator has registered with the competent authority (see above). This paragraph of the Article therefore contains, in practice, a prohibition on supervised entities from using those benchmarks provided by administrators located in the EU whose administrators are not authorised as required by the Regulation or who are not registered in accordance with the Regulation.

According to the definition stated in Article 3(1)(17) of the Regulation, *supervised entities* to which the prohibition applies include credit institutions and other consumer credit providers, investment firms, life, non-life and reinsurance undertakings, investment funds and their fund management companies, alternative investment fund managers and institutions for occupational retirement provision.

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[8] *Q&A 9.2, ESMA Questions and Answers On the Benchmarks Regulation (BMR), Version 14 https://www.esma.europa.eu/sites/default/files/library/esma70-145-114_qas_on_bmr.pdf.*

[9] *For more detail see https://www.finanssivalvonta.fi/en/regulation/regulatory-framework/benchmarks-regulation/.*

[10] *For more detail see https://www.finanssivalvonta.fi/en/regulation/regulatory-framework/benchmarks-regulation/.*

[11] *Commission Implementing Regulation (EU) 2019/482 of 22 March 2019 amending Commission Implementing Regulation (EU) 2016/1368 establishing a list of critical benchmarks used in financial markets pursuant to Regulation (EU) 2016/1011 of the European Parliament and of the Council.*

[12] *https://europa.eu/rapid/press-release_IP-19-1418_en.htm.*

[13] *Under Article 51(5) of the Regulation, supervised entities have been able to continue using the benchmarks of European administrators to which the transitional period discussed in this Article has been applied.*

According to the definition stated in Article 3(1)(7) of the Regulation, *use of a benchmark,* to which the prohibition applies, means

- issuance of a financial instrument which references an index or a combination of indices
- determination of the amount payable under a financial instrument or a financial contract by referencing an index or a combination of indices
- being a party to a financial contract which references an index or a combination of indices
- providing a consumer credit borrowing rate calculated as a spread or mark-up over an index or a combination of indices and that is solely used as a reference in a financial contract to which the creditor is a party
- measuring the performance of an investment fund (including an alternative investment fund) through an index or a combination of indices for the purpose of tracking the return of such index or combination of indices, of defining the asset allocation of a portfolio, or of computing the performance fees[14].

It is also appropriate to emphasise that this prohibition also applies to financial instruments issued and financial contracts entered into before 1 January 2020 as well as to the use of an index that began before 1 January 2020 for measuring the performance of an investment fund[15]. It is therefore recommended at this stage that all supervised entities should comprehensively survey at least

- whether they use an index that is a benchmark within the scope of the Benchmark Regulation, and if so
- whether its administrator is from an EU Member State, and if so
- whether its administrator is in the ESMA register and if not, why not.

Under section 40 of the Act on the Financial Supervisory Authority (878/2008), an administrative penalty payment may be imposed on anyone who wilfully or negligently fails to comply with or violates the provisions of Article 29 of the Benchmark Regulation on the use of benchmarks.

Other obligations concerning the use of benchmarks

In addition to the prohibition of Article 29 of the Benchmark Regulation, the Regulation contains certain other obligations concerning the use of benchmarks that have been applied since 1 January 2018.

Under Article 28 (2) of the Benchmark Regulation, supervised entities using benchmarks must also publish a *continuity plan* for the actions to be taken in the event of changes to or the cessation of benchmarks used by them[16]. Cessation in this context also includes a situation in which a benchmark can no longer be used after a transitional period because its administrator has not been authorised or registered under the Regulation. ESMA's Benchmark Regulation Q&A contains more detailed interpretations on what a continuity plan should cover and contain[17]. In addition, under the same paragraph of the Article, supervised entities must refer to their continuity plans in their contractual relationships with their clients[18]. According to ESMA's interpretation, this requirement applies to

[14] *According to ESMA's interpretation, an index or combination of indices referenced solely to compare the performance of an investment fund should not, however, be considered as use of a benchmark. Q&A 5.6, ESMA Questions and Answers On the Benchmarks Regulation (BMR), Version 14.*
[15] *Under the transitional provision of Article 51(4) of the Benchmark Regulation, the competent authority of the Member State where the administrator is located may, however, specifically permit the use of a benchmark if ceasing or changing that benchmark to fulfil the requirements of the Regulation would result in a force majeure event, but even then no reference shall be added to such a benchmark after 1 January 2020.*
[16] *Under section 40 of the Act on the Financial Supervisory Authority (878/2008), an administrative penalty payment may be imposed on anyone who wilfully or negligently fails to comply with or violates the provisions of Article 28 of the Benchmark Regulation on changes to or the cessation of benchmarks.*
[17] *Q&A 8.2, ESMA Questions and Answers On the Benchmarks Regulation (BMR), Version 14.*
[18] *For what this requires in practice, see Q&A 8.3, ESMA Questions and Answers On the Benchmarks Regulation (BMR), Version 14.*

contractual relationships entered into after 1 January 2018, but supervised entities are also expected to update, as far as possible, their older contracts[19].

Article 29(2) of the Benchmark Regulation requires that when transferable securities or other investment products reference a benchmark, the prospectus to be published under the Prospectus Directive 2003/71/EC or the UCITS IV Directive 2009/65/EC shall also include clear and prominent information stating whether the benchmark is provided by an administrator included in the ESMA's register[20]. Unlike the prohibition discussed above, this requirement applies to the issuer and offeror of a security or other investment product or to the person asking for admission to trade on a regulated market, whether or not it is a supervised entity under the Regulation. Under Article 52 of the Regulation, this requirement applies only to securities prospectuses approved after 1 January 2018, but investment fund prospectuses approved before then had be updated to conform with the requirement as soon as possible and at the latest by 31 December 2018.

In addition, since 1 January 2018, information that must be provided under the Consumer Protection Act[21] on *consumer credit contracts* within the scope of the Benchmark Regulation has had to disclose the benchmark and the name of its administrator as well as the potential impact on the consumer of the use of the benchmark.

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Audit Committee Event 20 September 2019

An Audit Committee Event, organised by the FIN-FSA and the Finnish Patent and Registration Office (PRH), attracted a wide range of audit committee members and board professionals to the Pörssitalo Stock Exchange Building. This was the first time that the event had been organised. The EU audit reform has created a more solid foundation for audit committees to monitor financial reporting and auditing. The regulation resulted in new duties also for the authorities to monitor market quality and competition. While the PRH is responsible for monitoring PIEs[22], the FIN-FSA is the competent authority in assessing and monitoring the performance of audit committees.

The purpose of the Audit Committee Event was to promote dialogue between audit committees and the authorities and to increase awareness of the authorities' work. The results of an Audit Committee Survey were presented at the event. The results of the survey will be published in a more detailed report later this year. The keynote speaker was Annette Köhler from Germany, audit committee member/chair of various audit committees and Professor of Accounting, Auditing and Controlling, who presented her views on the role of audit committees and good practices.

The presentation material of the event is available on the FIN-FSA website.

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[19] *Q&A 5.6, ESMA Questions and Answers On the Benchmarks Regulation (BMR), Version 14.*
[20] *For more detail on the application of this requirement, see. Q&A 8.4, ESMA Questions and Answers On the Benchmarks Regulation (BMR), Version 14.*
[21] *Chapter 7, section 9 and chapter 7a, section 4 of the Consumer Protection Act.*
[22] *Public Interest Entities.*

FIN-FSA and PRH Audit Committee Event at Pörssitalo, 20 September 2019.
Photo: Paula Ojansuu.

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