

EU Financial Markets Law

Regulatory Framework of Securities Markets

Primary Market: Definition of Securities,
Registration, Public Offer of Securities,
Prospectus

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Introduction

- Public offer of Securities
- Prospectus requirements
- Post-listing Disclosure
- Liability for breaches

Introduction

- Private vs Public enforcement – clearly evident in pre- and post-listing disclosure requirement rules
 - Information asymmetry intrinsic to capital markets
 - Possible civil claims for false representations should suffice
 - Prospectus requirements *ad absurdum*

Prospectus Directive

- Rules on pre- and post-listing disclosure in VPTS and also Nasdaq OMX Tallinn rules
- The source for obligations again stems from EU law
 - Prospectus directive
 - Transparency Directive

Prospectus Directive

Prospectus directive:

- Single passport regime (*passporting*)
- Definition of notion of public offer of securities
- Publication requirements pre-listing
- Enhancement of investor protection

Prospectus Directive

Following principles ought to be respected (preamble, recital 43):

- Need to provide investors with a **wide range of competing investments** and a level of disclosure and protection tailored to their circumstances
- Need to **encourage innovation** in financial markets if they are to be dynamic and efficient
- Importance of **reducing the cost** of and **increasing access** to capital
- Balance of costs and benefits to market participants on a long-term basis (**SMEs and small investors**) in any implementing measures

Prospectus Directive

Following principles ought to be respected (preamble, recital 43):

- Need to foster **the international competitiveness of EU financial markets** without prejudice to a much-needed extension of international cooperation
- Need to achieve a **level playing field** for all market participants by establishing EU-wide regulations every time it is appropriate
- Need **to respect differences in national markets** where these do not unduly impinge on the coherence of the single market

Prospectus Directive

- Prospectus Directive (2003/6/EC)
- Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC
- New amendments regarding the contents of the prospectus and publishing requirements in 2011 and 2012 – see http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm for further information

Public offer

- Participants to the securities markets (VPTS § 4-7):
 - Issuer
 - Offeror
 - Investor

Public offer

Offer of securities (VPTS § 11):

- Communication to persons in any form and by any means
- Sufficient information on the terms of the offer and the securities to be offered enabling the investor to decide to purchase or subscribe to these securities

Public offer

- Offer is deemed to be public except following circumstances:
 - addressed solely to qualified investors
 - addressed to fewer than 99 persons per MS
 - addressed to investors who acquire securities for a total consideration of at least 50 000 EUR per investor, for each separate offer
 - an offer of securities with the nominal value or book value of at least 50 000 EUR
 - an issue or offer of securities with a total consideration of less than 100 000 EUR in a period of 12 months

Public offer

Qualified investor (VPTS § 6):

- Credit institution
- Investment firm
- Fund manager or an investment fund
- Insurance undertaking
- Or other person under supervision of FSA in Estonia or other MS
- a financial institution of Estonia or a foreign state whose only business activity is investment in securities

Public offer

Qualified investor (VPTS § 6):

- SME entered into the list of FSA (more than 250 employees, turnover of under 50 MEUR)
- States
- International organisations (IMF, ECB, EIB)
- A natural person if registered by FSA

Public offer

A natural person considered as a qualified investor shall meet at least two of the following requirements (VPTS § 6(4)):

- the investor has carried out transactions of a significant size on securities markets at an average frequency of, at least, 10 per quarter over the previous four quarters;
- the volume of the securities portfolio of the investor exceeds 500 000 EUR;
- the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment;
- Registered with the FSA.

Public offer

Following offers are also considered as public offers:

- Any subsequent resale of securities considered initially not as a public offer
- The placement of securities through financial intermediaries is also deemed to be a public offer of securities if none of the conditions provided previously regarding the circumstances not to consider the offer as public are met for the final placement.

Public offer

Issue of securities (VPTS § 13):

- a pool of securities of the same type issued on the basis of a single decision by the issuer
- issue of securities on the basis of a single decision but at different times (as a series; considered as one issue)

Public offer

Issue structure:

- Shares: existing shares offered vs issue of new shares
- Bonds: bonds issued directly to public or through an investment firm
- Investment funds: direct offer vs fund-of-funds structures

Prospectus

- In the case of public offer a prospectus must be drafted subject to VPTS and Prospectus Regulation rules
- If not public offer, then similar listing particulars shall be issued
- Listing in primary market vs prospectus not identical

Prospectus

- Prospectus Directive underline only principal requirements to the prospectus
- The exact requirements on parts and content are stipulated in the Prospectus Regulation:
 - Schedules
 - Building blocks
 - Additional information going beyond the statutory requirements allowed

Prospectus

- Schedule – a list of minimum information requirements adapted to the particular nature of the different types of issuers and/or the different types of securities involved
- Building block – a list of additional information requirements depending on the type of instrument and/or transaction for which a prospectus is drawn up
- See further -
http://www.esma.europa.eu/system/files/Implementing_Measure_Prospectus_Directive.pdf
- A combination of various schedules and building blocks is inevitable

Prospectus

General requirements (VPTS § 14¹ and Prospectus Regulation preamble):

- Must contain all information
- Information must be presented in an easily analysable and comprehensible form
- Must always include a summary

Prospectus

General requirements (VPTS § 14¹ and Prospectus Regulation preamble):

- Voluntary disclosure of profit forecasts should be presented in a consistent and comparable manner and accompanied by a statement prepared by independent accountants or auditors
- Can refer to previous documents registered with the FSA

Prospectus

- The ultimate underlying principle is that the information should be sufficient for an investor to make an informed assessment by the investor on following issues:
 - Assets and liabilities
 - Financial position
 - Profit and loss
 - future prospects of the issuer and the guarantor (if applicable)
 - Rights attaching to the securities offered

Prospectus

- Taking account the specific nature of the requirements already mentioned before such decision is rather challenging
- As a result the requirement of summary has been introduced

Prospectus

Prospectus summary (see mainly VPTS § 14 (3)):

- Drafted in the language in which the prospectus was originally drawn up
- In a brief manner and in non-technical language
- Must convey the essential characteristics and risks associated with:
 - Securities
 - Issuer
 - Guarantor (if any)

Prospectus

Prospectus summary (see mainly VPTS § 14 (3)):

- Must contain a clear warning on following:
 - the summary should be read as an introduction to the prospectus and any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor;
 - where a claim relating to the information contained in a prospectus is brought before a court, the plaintiff investor might, under the national legislation of the home Contracting State or host Contracting State, have to bear the costs of translating the prospectus before the legal proceedings are initiated;
 - no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

Prospectus

Parts of prospectus (VTPS § 14¹):

- Consisting of one document
- Consisting of separate documents
 - Registration document which contains information on the issuer
 - Securities note which contains information concerning the securities to be offered to the public
 - Summary
 - Duplication of information should be avoided as to large extent as possible

Making prospectus public

Rules on advertisements:

- A notice in a daily newspaper must be published (see Prospectus Regulation art 31 for further details)
- A notice of an offer and any other advertising pertaining to the offer disclosed orally or in writing, including information not disclosed for advertising purposes, may not be incorrect or misleading in character and may only contain information to be found in the prospectus

Prospectus Registration

- Prospectus must be registered with the (local) FSA
- Additional rules on listing apply – see Nasdaq OMX Tallinn Listing rules clauses 13.2ff - http://www.nasdaqomxbaltic.com/files/tallinn/oig_usaktid/alates18082008/NN-09-05-2011-eng-clean.pdf

Prospectus Registration

- Application to FSA
 - Application
 - Prospectus
 - Copy of Articles of Association of the issuer (if applicable)
- Issuer from other MS than the application can be made by the FSA of the respective MS
- FSA can decide to transfer the registration to another FSA

Prospectus Registration

- FSA resolution within 10 days
- FSA can refuse to register
 - the conditions of the offer are contrary to legislation in force or the articles of association of the issuer;
 - the prospectus does not meet the requirements established by legislation and the deficiencies are significant;
 - the offeror does not, upon application, submit all the documents prescribed by legislation or the documents are contradictory with regard to each other

Passporting

- One single approval of the prospectus (namely the approval by the home MS) is “valid for public offer or admission to trading in any number of host Member States” (art 17 of the prospectus directive)
- Notification of the home FSA needed
- FSA will draw up a certificate to be issued to other FSAs: attesting that the prospectus has been drawn up according to relevant requirements
- Translation of the summary needed, the prospectus itself can be also drafted in English (Estonian FSA may require a summary to be published in Estonian)

Prospectus liability

- Requirements for civil liability:
 - Information proves different from actual circumstances or omission of facts
 - Facts must be significant for the purpose of assessing the value of the securities
 - Also applies to the summary of a separate prospectus, including any translation thereof, but only if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.
 - Misrepresentation may be caused by third persons but is not relevant regarding possible liability

Prospectus liability

- Requirements for civil liability:
 - Owner of the security can claim damages
 - Limitation period of five years as of the beginning of the offer of the relevant security on the basis of a prospectus
 - Damage - by acquiring the security from the person that sustained the damage for the price that the latter paid to acquire the offered security
 - The liability only arises when the issuer or offeror knew or should have known of the misrepresentation.
 - Liability excluded if the person that sustained the damage was aware, at the moment of acquiring the security, that the prospectus which was the basis for the offer was incomplete or contained inaccurate information

Post-listing disclosure

- Rules stipulated in:
 - VPTS, largely based on the Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (**Transparency Directive**)
 - Nasdaq OMX Tallinn Requirements for Issuers - <http://www.nasdaqomxbaltic.com/files/tallinn/oigusaktid/alates18082008/NE-09-05-11-eng-clean.pdf>

Post-listing disclosure

- Existing Directive 2004/109/EC will be substituted by new directive 2013/50/eu (22.10.2013).

Post-listing disclosure

- Annual reports
 - Within 4 months after the end of financial year
 - Annual financial report must be public for a period not less than 5 years
 - Annual financial report shall consist of the audited annual accounts, management report and declaration by the management.

Post-listing disclosure

- Half-yearly reports
 - Issuer of debt securities or shares
 - Concerning the first six months of the financial year
 - Without delay but not later than within two months after the end of such period
 - Available to the public for a period of not less than five years
 - Interim management report shall set out, as a minimum, the significant events which took place during the first six months of the financial year and their effect to the abridged accounts, and contain a description of the main risks and ambiguities of the remaining six months of the financial year

Post-listing disclosure

- Interim management statements
 - Issuer of shares
 - interim management statements during the first six-months' period of the financial year
 - information from the beginning of the relevant six-months period until the date of disclosure of the interim management statement
 - an explanation concerning the significant events and transactions which took place during the relevant period and the effect thereof on the financial situation of the issuer and the enterprises controlled thereby, and a general description of the financial situation and results of the issuer and the enterprises controlled thereby during the relevant period.

Post-listing disclosure

- Ad hoc disclosure
 - Change in ownership structure (more than 10%)
 - Changes which occur in the rights represented by different classes of securities or any changes in the total number of voting rights and the size of the capital
 - Issue of new debt obligations and above all, concerning the information related to any guarantee or security related thereto

You have been approached by a private investor Mr Hans who has invested some 267 000 euros into a bond issue organized by investment firm called Guilt Ltd. No prospectus was published as only certain number of investors had been approached. Mr Hans indicates that his old friend Mr Goodadvice recommended the bonds. Mr Goodadvice and Mr Hans had worked on similar projects before. In the investment instruments Guilt Ltd as issuer promised investors, in 2007, that by purchasing land in Armenia, the money invested would produce a 70 per cent yield. After that, the investors lost all sight of their money.

Mr Hans has read a fresh analysis from local Forbes stating that 'Looking at the Guilt Ltd Armenian scheme in hindsight, it would probably be discarded at once. The idea was to purchase 147 hectares of land in vicinity of Yerevan, build an entire residential district and exit the business in a couple of years, with huge profit. In 2007, however, no-one doubted. Due to the fact, obviously, of Guilt Ltd CEO being a respected banker, founder of Svenska bank local branch.'

Mr Hans is asking Your advice what to do. Please draw up arguments for Mr Hans to issue a claim letter to Mr Goodadvice and also Gulit Ltd.



Thank You!

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