FMA

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FMA CIRCULAR
PROSPECTUS SUPERVISION

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This circular does not constitute a legal regulation. It is intended to serve as guidance and reflects the FMA's legal interpretation. No rights and obligations extending over and above the provisions of the law can be derived from circulars.

1. INTRODUCTION

This circular is intended to inform about the specific requirements, that from the FMA's legal perspective are directly derived from the relevant provisions of the Capital Market Act 2019 (KMG 2019; Kapitalmarktgesetz) published in Federal Legal Gazette I No. 62/2019, the Stock Exchange Act 2018 (BörseG 2018; Börsegesetz 2018) published in Federal Law Gazette I No. 107/2017 and Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 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, OJ L 168, 30.06.2017, p. 12–82 (hereinafter referred to as "The Prospectus Regulation") as well as the delegated acts issued derived from it (Delegated Regulation (EU) 2019/979[1], Delegated Regulation (EU) 2019/980[2] as well as Delegated Regulation (EU) 2021/528[3]). Furthermore, ESMA has published the following soft law instruments in relation to prospectus supervision law:

- Guidelines on Disclosure Requirements under the Prospectus Regulation (ESMA32-382-1138)[4]
- Guidelines on risk factors under the Prospectus Regulation (ESMA31-62-1293)[5]
- Questions and Answers on the Prospectus Regulation (ESMA31-62-1258)[6]
- ESMA Update of the CESR recommendations (ESMA/2013/319)[7]
- ESMA Guidelines on Alternative Performance Measures (APMs) (ESMA/2015/1415)[8]
- Questions and Answers, ESMA Guidelines on Alternative Performance Measures (ESMA32-51-370)[9]

This circular illustrates experience obtained from supervisory practices in recent years as well as the FMA's enforcement practice. The legal basis remains unaffected by this publication. No rights and obligations extending over and above the provisions of the law can be derived from this circular.

Up-to-date information about the prospectus approval procedure as well as other publications/disclosures by the Capital Market Prospectuses Team can be found on the FMA website under Supervision > Capital Markets > Prospectuses; https://www.fma.gv.at/en/capital-markets/prospectus-supervision/).

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[1] 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, OJ L 166, 21.06.2019, p. 1-25.

[2] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 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, OJ L 166, 21.06.2019, p. 26-176.

[3] Commission Delegated Regulation (EU) 2021/528 of 16 December 2020 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the minimum information content of the document to be published for a prospectus exemption in connection with a takeover by means of an exchange offer, a merger or a division, OJ L 106, 26.03.2021, p. 32–46.

[4] https://www.esma.europa.eu/sites/default/files/library/esma32-382-1138_guidelines_on_disclosure_requirements_under_the_prospectus_regulation.pdf.

[5] https://www.esma.europa.eu/sites/default/files/library/esma31-62-1293_guidelines_on_risk_factors_under_the_prospectus_regulation.pdf.

[6] https://www.esma.europa.eu/sites/default/files/library/esma31-62-1258_prospectus_regulation_qas.pdf.

[7] https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-319.pdf; Please note that ESMA issued a Public Statement in September 2020 in which it stated that the CESR Recommendations will also (apparently) be addressed in Guidelines in the future. Until that happens, CESR recommendations will remain applicable. The FMA will published any changes in this regard on its website: see the ESMA Public Statement from 30th September 2020 (ESMA31-62-1491): https://www.esma.europa.eu/sites/default/files/library/esma31-62-1491_public_statement_qa_update_prospectus.pdf.

[8] https://www.esma.europa.eu/sites/default/files/library/2015/10/2015-esma-1415en.pdf.

[9] https://www.esma.europa.eu/sites/default/files/library/esma32-51-370_qas_on_esma_guidelines_on_apms.pdf.

This Circular replaces the previous FMA Circular on Issues under Prospectus Law published on 04.12.2012 and the FMA Guide on Implementation of the Changes in the Prospectus Regime published on 04.12.2012.

From the outset, it should be noted that the checking of prospectuses by the FMA only covers the criteria of completeness (in terms of their containing all the minimum requirements set out in accordance with the Prospectus Regulation), coherence and comprehensibility of the information contained in the prospectus. The FMA neither conducts a check about their correctness, nor does it check that the individual prospectus in hand contains all significant information in relation to the individual case in hand.

2. PRINCIPLES OF PROSPECTUS LAW

The central concept of prospectus law is to make a document available that contains all the material information that an interested investor requires to reach their investment decision. The party responsible for the prospectus (as a rule: the issuer) assumes full liability for the correctness and material completeness of this document.

2.1. TYPES OF PROSPECTUS

Different names are used to differentiate between various types of prospectus.

Prospectuses for publicly offering **securities** as well as the admission to trading of securities on a regulated market are approved by the FMA, in cases where it is the competent authority of the issuer's home member state.

In this case, where there is a smaller issue volume, the possibility exists to prepare a simplified prospectus under Annex D of the KMG 2019 (known as a "Schedule D Prospectus"). From an issue volume of EUR 5 mn within a 12-month time frame, the prospectus is required to be prepared in accordance with the Prospectus Regulation and follows the respective Annexes of Delegated Regulation (EU) 2019/980. For more detailed information about the types of prospectus, see Chapter 3.1.

Prospectuses for the public offering of **investments** are subject to the KMG 2019, and are not approved or checked by the FMA, but by eligible prospectus auditors instead.

In the case of securities and investments falling under the scope of application of the Alternative Financing Act (AltFG; Alternativfinanzierungsgesetz) based on their issue volume, an **information document under the AltFG**[10] is to be prepared as necessary. How, such a document does not constitute a document that is checked or approved by the FMA.

Prospectuses for the public offering of **investment funds**, **real estate funds** as well as **alternative investment funds** (AIFs) are subject to the InvFG 2011[11], ImmoInvFG[12], AIFMG[13] as well as various additional legal rules, and are not explicitly addressed hereafter. It should be noted that KMG 2019 and AIFMG exist alongside one another, and that a business model may therefore also fall into both legal regimes. The onus is on the issuer to determine their respective applicability and to take appropriate measures accordingly.

In addition to these main types of document, prospectus law also recognises **documents** that constitute a case for exemption from the obligation to publish a prospectus during takeovers by means of an exchange offer, allotments of securities in conjunction with mergers or divisions or dividend distributions in the form of shares and employee-share schemes. Such documents' contents have been defined in Delegated Regulation (EU) 2021/528 and the MVSV 2019[14]. The issuer is also required to publish these documents. For further information regarding this, see Chapters 2.7.4 to 2.7.6.

A detailed overview about the thresholds and the respective applicable kinds/types of prospectus can be found on the FMA website www.fma.gv.at under > Supervision > Capital Markets > Prospectuses > Approval Procedures > Documents > Information Obligations and Obligation to Produce a Prospectus (https://www.fma.gv.at/download.php?d=3723).

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[10] The Alternative Financing Act (AltFG; Alternativfinanzierungsgesetz), published in Federal Law Gazette I no. 114/2015 as amended.

[11] Investment funds pursuant to the Investment Funds Act 2011(InvFG 2011; Investmentfondsgesetz 2011), published in Federal Law Gazette I No. 77/2011.

[12] Real Estate Investment Fund Act (ImmoInvFG; Immobilien-Investmentfondsgesetz) published in Federal Law Gazette I no. 80/2003.

[13] Alternative Investment Fund Managers Act (AIFMG; Alternative Investmentfonds Manager-Gesetz), published in Federal Law Gazette I No. 135/2013.

[14] Regulation of the Financial Market Authority (FMA) on the minimum contents of documents replacing prospectuses, about the publication of prospectuses in newspapers and the applicable language regime 2019 (MVSV 2019; Mindestinhalts-, Veröffentlichungs- und Sprachenverordnung 2019), published in Federal Law Gazette II No. 22/2019.

2.2. THE TERM “SECURITIES”

The term securities under capital market law defined in Article 4 (1) (44) MiFID II[15] is generally also relevant for prospectus law.[16] The term covers securities that are tradeable on a capital market. Constructions of a similar nature to shares as well as ones similar to bonds are plausible. Only money-market instruments with a maturity of less than twelve months, unlike in MiFID II, do not fall under the term “securities” under prospectus law.

The **securitisation or embodiment** of a claim under company or obligation law is decisive for its classification under supervisory law. As a rule, securities are embodied in global certificates, however a classical securitisation is not absolutely necessary.[17] For debt securities and investment certificates, the DepotG[18] also stipulates the possibility of a digital global certificate.

Furthermore, the **tradability** of the security is material. In addition to basic existence of a capital market, the **transferability** and **standardisation** of the security form the conditions for sufficient tradability. The securities are designed identically in large quantities and are substitutable between one another (standardisation). The transferability in the capital market must at least be possible in principle, although a listing is not a mandatory condition. Regulated markets and multilateral trading facilities (MTFs and OTFs) shall in any case be considered as capital markets.[19]

The following different classes of securities exist under prospectus law:

a. *Equity securities*:
   Equity securities consist of all types of shares (common or preferred shares, registered shares, bearer shares, shares with a nominal amount or individual shares) as well as interim certificates, participation certificates, securitised participation certificates and various other securities designed in a similar way to shares.
   Furthermore, equity-linked bonds, convertible bond and convertible notes are also included as equity securities, provided that the issuers of such securities are also the issuers of the underlying equity securities (such as shares, participation certificates).
b. *Non-equity securities*:
   non-equity securities: all securities that are not equity securities; These include, for example, all debt securities, certificates [20] as well as derivative instruments as well as various other securities designed in a similar way to bonds.

The term securities explicitly excludes payment instruments such as bills of exchange and cheques, as well as money-market instruments. Money-market instruments are understood as the classes of instruments that are usually traded on the money market like treasury bills, certificates of deposit and commercial papers with a maturity of less than 12 months. Under this premise, securities with a maturity of less than 12 months can be considered as being transferable securities, provided that they possess different characteristics to money-market instruments.

Similarly, registered securities (recta securities) do not constitute securities under the capital market law definition, since their transfer by assignment contradicts the necessary tradability. From the FMA’s perspective, registered bonds transferred by endorsement may (provided they also fulfil the other

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[15] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173, 12.6.2014, p. 349–496.
[16] The literature cited in this chapter, largely pre-dates the Prospectus Regulation and MiFID II’s entry into force but may still be used as a basis for interpretation, since the legal situation has not changed substantially in the intervening period.
[17] See also FMA FinTech Navigator, ICO https://www.fma.gv.at/en/fintech-point-of-contact-sandbox/fintech-navigator/initial-coin-offerings/; cf. also *Oberndorfer*, Prospektpflicht (2014) 96f mwN; *Kalss/Oppitz/Zollner*, Kapitalmarktrecht[2] (2015) Article 11 MN 15.
[18] Federal Act of 22 October 1969 on the Custody and Purchasing of Securities (DepotG; Depotgesetz) published in Federal Law Gazette No. 424/1969.
[19] See the FMA FinTech Navigator, ICO https://www.fma.gv.at/kontaktstelle-fintech-sandbox/fintechnavigator/initial-coin-offering/; cf. *Oberndorfer*, Prospektpflicht (2014) 91ff as well as 186f.
[20] exception: depositary receipts constitute equity securities.

requirements of a transferable security) constitute securities under capital market law and may therefore be included in a securities prospectus.[21]

2.3. THE TERM INVESTMENT

Under Article 1 para. 1 no. 3 KMG 2019 investments are

a. **Asset rights** (such as exposure rights),
b. that do **not constitute securities under capital market law**,
c. that originate from the direct or indirect **investment of capital of several investors**,
d. on their joint account and joint risk or on their joint account and joint risk with the issuer (**risk-sharing group/risk pooling**),
e. With the management of the invested capital not being allowed to be conducted by the investor themselves (**third-party management**).

The term investment [22] is defined in a very broad manner and as such the term **capital** in the KMG 2019 is not restricted to moneys or legal payment instruments, but additionally covers assets that are similar to money or payment instruments, where they are used in a comparable manner for the purpose of bundling of capital or financing purposes. As a rule, these include crypto-assets or precious metals, but not services, or processing and labour services. The material issue in this case is that the investor is afforded rights and/or obligations (such as the prospect of interest payments, profit shares).

The assessment of the existence of a **risk-sharing group** – pooling of the persons involved – requires particular attention in administrative practice and must occur from the perspective that the purpose of the KMG is intended for creating as comprehensive investor protection as possible.[23]

If investors' profit or loss stands in direct relation to the economic success of the investment as a whole, this constitutes a risk-sharing group. However, investors' direct participation in the undertaking's profit or loss is not essential. For the legislator, the issue was far more one that the group (of investments) has an expected profit in mind. In the case of a risk-sharing group, the economic performance of the investment is directly related to the success of the investors.[24]

Where the investor's return depends to a decisive extent on the economic performance of the issue and where a risk of a total loss therefore exists, as is the case, for example, with qualified subordinated loans, and where additionally the investor's termination options are severely restricted, then it must be assumed that risk is pooled.[25]

The term 'investment' does not include pure remuneration without pooling of risk (e.g. remuneration for the provision of capital as in the case of a loan or purchasing an insurance policy). Similarly, it is not sufficient for the reasoning of a pooling of risk if the investors bear the pure insolvency risk of the debtor.[26]

The standardised structure of the investment constitutes a further characteristic of pooling of risk.

Third-party management is assumed to occur, if the investors are unable to exert any serious influence on the management of the invested capital.

Ultimately the actual (intended) actions of an offeror, which must be determined from an economic perspective, are decisive. In particular, this economic perspective must be based on the issuer's/offeror's

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[21] cf. *Oberndorfer*, Prospektpflicht (2014) 92f.
[22] The literature and case law quoted in this chapter originates from the time of the previous KMG but can still be used as a basis for interpretation.
[23] see OGH 12.07.2016, 4 Ob 47/16i; as well as OGH 27.03.2012, 4 Ob 184/11d; as well as OGH 28.06.2018, 6 Ob 87/18k.
[24] cf. *Oberndorfer*, Prospektpflicht (2014) 127 citing further literature; as well as *Pittl/Steiner*, Wann handelt es sich bei nachrangingen Darlehen um eine Veranlagung iSd KMG? ZFR 2014/103, 159 (161f); see also the explanatory remarks to the government bill (ErlRV) no. 147 in the supplements to the stenographic protocols of the National Council (BlgNR) for the 18th legislative period in relation to Art I § 1.
[25] See OGH 12.07.2016, 4 Ob 47/16i; as well as *Pittl/Steiner*, ZFR 2014/103, 159 (161f).
[26] *Lorenz* in *Zib/Russ/Lorenz*, Kapitalmarktgesetz Commentary (2008) Article 1 MN 33.

behaviour towards investors. As a result, various legal constructions under Austrian and foreign law must be considered, that may be subsumed under the term 'investment'.

Typical forms of investments include participations in public limited partnerships, silent partnerships, closed-end real estate funds and qualified subordinated loans. See further details regarding subordinated loans in the Document "Information about subordinated loans" – on the FMA Website > Supervision > Prospectuses > Legal interpretation aids > Downloads > Information about subordinated loans (https://www.fma.gv.at/download.php?d=2852).

2.4. PROSPECTUS AUDITORS

The FMA neither checks nor approves prospectuses and supplements for investments, nor are they filed with the FMA. Prospectuses and supplements checked by prospectus auditors (typically certified external auditors) must be electronically and physically filed at the OeKB, and as a minimum published on the website of the issuer or offeror. Under Article 8 para. 3 KMG 2019 the FMA (prospektaufsicht@fma.gv.at) is to be notified in advance (ex-ante notification obligation), about how the publication is occurring and about where the prospectus is to be found.

In substantive terms, the checking regime for investment prospectuses is more extensive than those for securities prospectuses and includes the checking of samples of documents required to be supplied for both accuracy and completeness.[27]

The investment prospectus regime is not harmonised throughout Europe, meaning that such prospectuses are unable to be used in the notification for public offerings in other Member States. Public offerings of investments are required to be scrutinised in accordance with the respective applicable regulations of the individual country in question.

In accordance with Article 7 para. 2 KMG 2019, the FMA maintains and publishes a list of suitable certified external auditors and external auditing companies for auditing prospectuses on its website. The Chamber of Professional Accountants and Tax Advisors proposes suitable candidates to the FMA for this list. Irrespective of this, the issuer is responsible for selecting the prospectus auditor.

2.5. PUBLIC OFFERING

A public offering exists in making information available to a public that suffices for an investor to be able to make a decision to buy or subscribe to securities or investments.[28]

Communication regarding the public offering may occur in any form and in any way or manner. This may include, among other channels, advertising materials of any kind, websites, webinars, contributions on social media, information in apps/chats, adverts of television, e-mails, adverts in newspapers, information events (lectures, trade fair stands) as well as face-to-face contacts or contacts by telephone. In so doing, the communication must contain sufficient information to be able to make a decision to buy. This is in any case met, where it definitely contains the material elements of the contract or where they are contained in a determinable manner. This means that the product, the price, the issuer or the offeror or the subscription option (the essentialia negotii) are generally determinable. The allocation must also take into account the overall impression, and therefore partially required to be made on a case-by-case basis. Where doubts exist in attempts to circumvent this, the general assumption is that there is sufficient information.[29]

A specific opportunity to subscribe is not a condition of a public offering. Information about how the securities/investments offered may be acquired suffices.[30]

In addition to the mere notification, it prevailing view assumes that an **intention to sell** (possibly also in the future) is recognisable. Such an intention is assumed, for example, if a specific reference to a

[27] see Article 7 para. 1 KMG 2019.
[28] see Article 2 point d of the Prospectus Regulation regarding securities and in Article 1 para. 1 no. 1 KMG 2019 for investments.
[29] cf. *Zivny,* Kapitalmarktgesetz[2] (2016) Article 1 MN 6f citing further literature.
[30] see also *Oberndorfer*, Die Prospektpflicht nach dem KMG (2014) 38f.

subscription or purchase opportunity is included (such as contact details) or if corresponding formulations that promote selling are included. The objective impression of an intention to sell suffices.[31]

Public is to be understood as a plural number of persons; however, a fixed delineation in terms of the number (quantitative component) does not appear to make sense. According to the general rules of evidence, the burden of proof lies with the provider who invokes the exception that the offering was made to fewer than 150 persons, and therefore that use was made of the exception pursuant to Article 1 (4) point b of the Prospectus Regulation or Article 3 para. 1 no. 5 KMG 2019.

General groups, such as “only shareholders” are covered by the concept of “the public”. In any case, the concept of the public is deemed as met if communication occurs to an undefined group of persons, such as by way of information on websites or adverts in newspapers.

The **market location principle** should be applied regarding the question about whether the public offering is (also) taking place in Austria. Certain indications must exist, such as targeted advertising in the Austrian market (also from abroad), contact persons in Austria, sales events, a description about Austrian tax law or Austrian settlement and paying agents, to be able to assume a public offering (also) in Austria.[32] The definition of the target audience is decisive especially in the case Internet offers through websites, social media or similar channels.

Disclaimers may serve the purpose of restricting the circle of addresses, i.e. a disclaimer may state the countries in which a public offering is taking place. The issuer or provider must in any case also take “appropriate precautions” to ensure that Austrian investors are not able to purchase the securities. This means that the offeror will ensure on an individual basis under such precautions that subscription offers by Austrian investors are not processed.[33]

In principle, effective disclaimers are required to be clearly and unambiguously formulated and considered to be taken seriously.[34] Legally ineffective disclaimers would be for example stating that an offering on the Internet is intended for less than 150 persons while the website is freely accessible for everyone, or an explanation that it is not a public offering despite a text that promotes sales (e.g. “Buy shares”).

The obligation to publish a prospectus applies both for public offerings in the primary and secondary markets, as well as for placement by **financial intermediaries**. Where for example several financial intermediaries are engaged to address up to 149 persons each, this cumulatively constitutes a public offering subject to the obligation to produce a prospectus, since whether an offer is made on own account or on the account of others may not play a role.

The assessment of whether a public offering exists, must be assessed independently from exemption provisions. This is because the provisions regarding the exemption only address the obligation to publish a prospectus, but not the public offering per se.

2.5.1. DELINEATION

Merely making entries in trading or order systems, publishing bid and offer prices (i.e. activities that are only part of exchange trading)[35], legally required publications (e.g. merely publishing the approved prospectus, final terms or a supplement or the publication of PRIIP-KIDs) and activities in relation to a market maker function shall be considered as **non-public offerings**.

Where lists of information about securities are published on the credit institution’s website solely for providing information to existing investors, this does not constitute a public offering provided that:

- only information about the ISIN, the title of the securities and the prices are disclosed; and

[31] For more detail, see *Oberndorfer*, Prospektpflicht (2014) 37f.
[32] cf. OGH 20.01.2015, 4 Ob 164/14t.
[33] cf. OGH 20.01.2015, 4 Ob 164/14t.
[34] cf. OGH 20.01.2015, 4 Ob 164/14t citing further literature.
[35] cf. explanatory remarks to the government bill (ErlRV) no. 969 in the supplements to the stenographic protocols of the National Council (BlgNR) for the 22nd legislative period. Regarding Article 2 § 1 paras. 1 to 4 KMG in the version published in Federal Law Gazette No. 625/1991 as well as recital 14 of the Prospectus Regulation

- the information is for secondary market investors; and
- a disclaimer to this effect is published (i.e. indicating that it is not a public offering); and
- no advertising measures are taken that could trigger a public offering.

There is also no obligation to publish a prospectus for a public offering for the repurchasing of securities.

The activity of a public offering is also not met, if a client contacts the credit institution and expresses a wish to place an order in relation to a specific security, or where the client mentions certain securities during the course of investment advice at their own initiative, without having been prompted to do so by the credit institution.

Majority-based decisions, in which outvoted persons are required to yield to the majority (such as, for example, in relation to decisions at a company's general meeting) or the automatic allocation following a court decision (such as in the case of insolvency proceedings) shall not be classified as public offerings.[36] To generalise, it is possible to deduce that a public offering only exists if each individual addressee has an individual decision-making option and therefore has a right to reject the allocation.

2.6. SUPPLEMENT

Supplements to the (investment or securities) prospectus are to be prepared pursuant to Article 6 KMG 2019 or Article 23 of the Prospectus Regulation, to inform investors without delay about every new material circumstance or every material mistake or inaccuracy in relation to the details contained in the prospectus. The obligation to produce a supplement exists for the time between the approval of the prospectus and the offer period expiring or, if later, the opening of trading on a regulated market.

Information that are suitable in an abstract manner to influence the valuation of the securities or investment in question are relevant in relation to the obligation to produce a supplement. The basis for this relevance test is based on an average investor and their decision-making horizon. Providing complete information about the securities and their issuers serves the purpose of investor protection. A supplement should therefore also include all material information regarding the situations that have respectively led to the supplement being prepared.

Article 19 of Delegated Regulation (EU) 2019/979 contains an illustrative list of circumstances that in any case trigger the obligation to produce a supplement, which differ by the type of securities and/or issuers. The inverse argument, that an unmentioned circumstance does not require a supplement, is not able to be derived from this.

Information that is subject to the obligation to produce a supplement may in particular be the publication of audited annual financial statements, the publication or amending on profit forecasts, changes in control relationships, public takeover bids by third parties, amendments to the declaration about the working capital statement, the application for authorisation for trading on a regulated market or notification in a Member State as well as increases in the aggregated volume of the offering.

If a material reassessment of risks e.g. regarding the probability of realisation and the scope of the impact is required, then this shall also be required to be published in a supplement.

Similarly, amendments to laws directly influencing the offered securities, and which constitute a material new circumstance, therefore also lead to an obligation to produce a supplement.

The inclusion of new products as well as to modification of material parameters of the products to be issued (e.g. modifying the type of interest [such as fixed/variable], changing the type of security or investment, ...) necessitate the preparation of a new prospectus.[37]

In contrast to supplements to investment prospectuses, which are required to be published without delay prior to scrutiny by the prospectus auditor and to be filed with the OeKB, supplements of securities prospectuses are only required to be published following approval by the FMA.

[36] See Recital 22 of the Prospectus Regulation.
[37] Cf. also Recital 36 of the Prospectus Regulation.

In addition, it should be noted that for issuers of securities listed on a regular market, irrespective of whether a supplement exists, it will be necessary to review the existence of inside information subject to a disclosure obligation by way of an ad hoc report.

2.7. SCOPE OF APPLICATION AND EXEMPTIONS FROM THE OBLIGATION TO PUBLISH A PROSPECTUS

If the conditions of a public offering are met or an application made for admittance to a regulated market, then there is generally an obligation to publish a prospectus. An exemption from the obligation to publish a prospectus may however arise from Article 1 (4) or (5) of the Prospectus Regulation or Article 3 KMG 2019. The offeror is responsible for the assessment about whether one of the circumstances for an exemption applies in relation to a specific circumstance.

Chapter 15 of the ESMA Questions and Answers on the Prospectus Regulation (ESMA31-62-1258) contains the relevant aid to interpretation to the provisions on exemptions regarding securities.

Selected exemptions from the obligation to publish a prospectus for a public offering or the application for approval for a regulated market are addressed below:

2.7.1. PUBLIC EXEMPTION (ARTICLE 1 (4) POINT B OF THE PROSPECTUS REGULATION OR ARTICLE 3 PARA. 1 NO. 5 KMG 2019)

As mentioned above, the concept of “the public” is material for the existence of a public offering. It should be understood as a plural number of people, although a fixed delineation in terms of numbers is not made as a rule, although public offerings to fewer than 150 persons per Member State are exempted from the obligation to publish a prospectus. The burden of proof that the offering is made to fewer than 150 persons lies with the offeror.

2.7.2. INVESTMENT FUNDS UNDER THE INVESTMENT FUNDS ACT 2011 (INVFG 2011) AND THE REAL ESTATE INVESTMENT FUND ACT (IMMOINVFG) AS WELL AS OPEN-ENDED AIFS (ARTICLE 1 (2) POINT A OF THE PROSPECTUS REGULATION OR ARTICLE 3 PARA. 1 NO. 1 KMG 2019)

The offering of unit certificates of Investment funds under InvFG 2011, unit certificates under ImmoInvFG as well as all open-ended AIFs pursuant to Article 1 (2) of Delegated Regulation (EU) 694/2014 is excluded from the scope of application of prospectus law. Closed-ended AIF(s) do not fall under the exception.

2.7.3. CONTINUOUS ISSUES BY CREDIT INSTITUTIONS (ARTICLE 1 (4) POINT J OR ARTICLE 1 (5) POINT I OF THE PROSPECTUS REGULATION)

Non-equity securities that do not fall under this exception are not allowed to make interest payments or repayments that are dependent on a derivative. Products that relate to one or more underlying asset(s) are not covered by the exception. Bonds with variable interest, whose only structural characteristic is being linked to a money market interest rate (e.g. EURIBOR, LIBOR) or reference interest rate (such as the average government bond yield weighted by outstanding amounts (UDRB; Umlaufgewichtete Durchschnittsrendite für Bundesanleihen) that an average investor is familiar with, may be subsumed under this exception.

This exception related merely to the derivative components in relation to payments resulting from the securities. If securities are designed in such a manner, that the issuer is afforded an early termination right, then it is not a derivative component. Such a security may therefore fall under this exception.

2.7.4. TAKEOVER BY MEANS OF AN EXCHANGE OFFER (ARTICLE 1 (4) POINT F OR ARTICLE 1 (5) POINT E OF THE PROSPECTUS REGULATION)

This includes public offerings as well as the application for approval of equity securities, offered or allocated in connection with a takeover by means of an exchange offer.

Under Article 1 (6a) of the Prospectus Regulation, the pre-conditions for an exception from the obligation to publish a prospectus are that the transaction does not constitute a reverse acquisition under IFRS 3, B19[38] and that the issuer has already issued approved equity securities, through which the offered equity securities are fungible.

The content of the document to be prepared when invoking this exception can be found in Delegated Regulation (EU) 2021/528. The document must be published in the same way as a prospectus.

2.7.5. MERGER AND DIVISION (ARTICLE 1 (4) POINT G OR ARTICLE 1 (5) POINT F OF THE PROSPECTUS REGULATION)

Public offerings as well as the application for approval of equity securities are covers that are offered or allocated during a merger or division.

Under Article 1 (6a) of the Prospectus Regulation, the pre-conditions for an exception from the obligation to publish a prospectus are that the transaction does not constitute a reverse acquisition under B19 IFRS and that either the equity securities of the acquiring entity (in the case of a merger) or the equity securities of the entity to be de-merged (division) are already admitted to trading on a regulated market prior to the transaction.

The content of the document to be prepared when making use of this exception can be found in Delegated Regulation (EU) 2021/528. The document must be published in the same way as a prospectus.

2.7.6. DIVIDENDS IN THE FORM OF SHARES AND EMPLOYEE-SHARE SCHEMES (ARTICLE 1 (4) POINTS H AND I OR ARTICLE 1 (5) POINTS G AND H OF THE PROSPECTUS REGULATION)

If dividends are paid out in the form of shares or securities offered within the scope of employee share schemes, then information must also be made available in a document. The content of these documents is based on the Regulation on Minimum Contents, Publication and Language Regime 2019 (MVSV 2019; Mindestinhalts-, Veröffentlichungs- und Sprachenverordnung 2019).

2.7.7. WHOLESALE INVESTMENTS (ARTICLE 1 (4) POINT D OF THE PROSPECTUS REGULATION OR ARTICLE 3 PARA. 1 NO. 2 KMG 2019)

This exception only covers public offerings for which every individual investor is required to invest at least EUR 100,000 at the time of making the investment. Since this minimum investment amount is decisive for it being classified as an offering that is exempt from the requiring a prospectus, this threshold must also be clearly referred to in the offering (as well as in advertisements).

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[38] IFRS 3, Paragraph B19 of Commission Regulation (EC) No. 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, OJ L 320, 29.11.2008, pp. 1-481.

2.7.8. PLACEMENT BY FINANCIAL INTERMEDIARIES (ARTICLE 5 OF THE PROSPECTUS REGULATION)

In the event of any subsequent resale and/or a final placement of securities by financial intermediaries, no further prospectus shall be required to be published where a valid prospectus exists as defined in Article 12 of the Prospectus Regulation, and where the issuer or the person responsible for the preparation of the prospectus has agreed to its use in a written agreement. This information is included in the prospectus.

There are three conceivable variations in terms of design in the prospectus:

a. consent has not been given for using the prospectus,
b. consent of its usage is granted to one or more financial intermediaries, or
c. general consent is granted for usage by an undetermined group of financial intermediaries.

Furthermore, under such a construction the retail cascade should be observed, that the prospectus must be appended by the issuer or by the person responsible for preparing the prospectus to include any necessary supplements pursuant to Article 23 of the Prospectus Regulation (obligation to update the prospectus), in order to form a legal basis for the publishing offering by financial intermediaries.

2.7.9. SECURITIES THAT HAVE ALREADY BEEN APPROVED (ARTICLE 1 (5) POINT J OF THE PROSPECTUS REGULATION)

Securities that have already been admitted to trading on another regulated market for longer than 18 months are not subject to the obligation to publish a prospectus, provided inter alia that a document is published that in substantive terms corresponds to a prospectus summary pursuant to Article 7 of the Prospectus Regulation.

2.7.10. VOLUNTARILY PREPARING A PROSPECTUS (OPTING-IN)

Preparation of an EU voluntary prospectus is only possible in selected instances. An “opting-in” prospectus is subject to the same rights and obligations arising from the Prospectus Regulation and the KMG 2019 as a regularly prepared prospectus. A prospectus prepared voluntarily may only be approved by the FMA pursuant to Article 4 of the Prospectus Regulation, where one of the following exceptions from the obligation to publish a prospectus exists:

- the total consideration of the public offering of the issuance within a twelve-month period is below EUR 5 million (Article 1 (3) in conjunction with Article 3 (2) of the Prospectus Regulation in conjunction with Article 12 para. 2 KMG 2019)
- a public offering takes place, or an application is made for admission to a regulated market that is not subject to the obligation to produce a prospectus pursuant to Article 1 (4) or (5) of the Prospectus Regulation.

With regard to the types of securities that are not subject to provisions of the Prospectus Regulation pursuant to Article 1 (2) of the said Regulation, it is not possible to prepare a voluntary prospectus.

2.8. ADVERTISEMENTS

The **principles** defined in Article 4 paras. 2 to 5 KMG 2019 or Article 22 (2) to (5) of the Prospectus Regulation are to be observed in the case of advertisements under prospectus law.

Advertisements as defined in Article 22 of the Prospectus Regulation (securities) or Article 4 KMG 2019 (investments) mean announcements relating to a specific public offering of securities/investments or the admission to trading on a regulated market of securities, that focus on promoting, subscribing to, or acquiring securities or investments.

A **broad understanding of the term** advertisements should therefore be assumed. Advertisements are be understood as where a document, medium, a remark (whether written or spoken) or similar contains

a statement that has an advertising-like character. Advertisement may therefore occur through many channels, e.g. on a website, in an advertising brochure, at a webinar, in social media postings, through information in apps/chats, or on television or radio, or in newspapers.[39]

Advertisements under prospectus law must have a proven **connection to the public offering**. The connection must be clear from the content and the timing of the advertisement.[40] Advertisements must therefore refer in one way or the other to a specific offering and in terms of timing must relate to a current or forthcoming public offering. The scope of application does not cover (historic) offerings that have already ended.[41]

General advertisement that does not focus on a specific issuance, such as advertisements generally relating to the issuer's business activities, or advertisements for a bank's general issuance activity are not covered by the advertisement rules under prospectus law.

Advertisement itself may however constitute a public offering if it fulfils the corresponding elements of an activity. In this instance disseminating an advertisement triggers the obligation to publish a prospectus.

2.8.1. ADVERTISING CONTENT AND REFERENCES TO THE PROSPECTUS

Where an advertisement about an offering subject to the obligation to publish a prospectus is disseminated by electronic means, the advertisement must clearly state the Internet page on which the prospectus is made available, also stating the hyperlink to the prospectus as well as the relevant final terms. Where the advertisement is not disseminated by electronic means, then precise information must be made available about where the prospectus is/will be available and about the offering.[42] Furthermore, in the case of advertisements in written form, the word "Werbung" ("Advertisement") must be displayed in a prominent manner. In the case of advertisements in oral form, the purpose of the announcement must be stated at the start of the announcement.[43]

The competent authority for prospectus approval must be stated, as well as a reference that such an approval is not to be understood as an endorsement by the authority for the securities, and a recommendation included to potential investors to read the prospectus.[44]

The remark about the prospectus must be unambiguously and clearly recognisable as such and therefore also readable. If the remark, e.g. in an advert, is only brief and only displayed for insufficient time to be read and understood, it is considered not to meet the relevant provisions under prospectus law.[45]

However, mere reference to the prospectus alone does not suffice to eliminate an advertisement's potential ability to otherwise mislead (such as, in the sense that the entire content of the brochure must notionally be "considered" when perceiving advertising statements as such).[46]

2.8.2. PROHIBITION OF MISLEADING AND INCORRECT INFORMATION, FREEDOM FROM CONTRADICTION

Advertising must be clearly recognisable as such, and furthermore shall **not be misleading or incorrect** and shall also **not contradict**[47] the information stated in the prospectus.

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[39] cf. *Zib* in *Zib/Russ/Lorenz*, Kapitalmarktgesetz Kommentar (2008) Article 4 MN 3.
[40] See in this regard Supreme Administrative Court (VwGH) 10.09.2010, 2009/17/0143.
[41] See in this regard Supreme Court of Justice (OGH) 20.01.2009, 4 Ob 188/08p.
[42] See Article 13 of Delegated Regulation (EU) 2019/979.
[43] See Article 14 (1) point a of Delegated Regulation (EU) 2019/979.
[44] See Article 14 (1) points c and d of Delegated Regulation (EU) 2019/979.
[45] See Judgement of the Federal Administrative Court (BVwG) 22.06.2018, W107 2151968-1.
[46] See in this regard Supreme Court of Justice (OGH) 20.01.2009, 4 Ob 188/08p.
[47] See also Article 16 (1) points a and b of Delegated Regulation (EU) 2019/979.

Prospectus law focuses on the prospective investing public being potentially mislead, which is why the presence of an objective ability to mislead already suffices. An advertisement is therefore already misleading, where it is objectively suitable to elicit misunderstandings. An individual investor does not actually need to be specifically misled.[48]

Even where an advertisement does not contain a (formal) contradiction to the information contained in the prospectus, it may still be misleading, if for example, risk information is concealed which, when viewed realistically, is of decisive significance regarding whether to invest. This means, under certain circumstances that any misleading information may be rectified by means of a clear clarifying risk warning, however, as previously stated, a formal reference to the prospective is insufficient.[49]

If advertisements are addressed to heterogeneous target groups, such advertisements are misleading where they only apply for one of the addressed target groups. In most cases, in practice, inexperienced retail investors are considered the benchmark. If the average retail investor is also being addressed, who may potentially be investing in securities or investments for the first time, then stricter standards of scrutiny must be applied to the advertisement's ability to mislead.[50]

The ability to mislead cannot also be relativised by subsequently sending contracts and/or sending the prospectus, and therefore cannot be subsequently overcome.[51]

In the scope of application of prospectus law, more specific standards under prospectus law take precedence over the general prohibition of misleading statements contained in Article 2 UWG[52]. Article 2 UWG as well as the Annex to the UWG shall only be referred to for checking whether a special business practice is misleading. Such recourse does not however mean that he requirements of the UWG must be met in the scope of application of prospectus law.[53]

Advertisements must ultimately be judged on their **overall impression**, which is not synonymous with their overall content, but which may, for example, be clouded by eye-catching emphasis, since certain points are explicitly highlighted as a particular benefit of the security or investment, and an incorrect overall impression may therefore arise. The specific opportunities arising from a capital investment shall not be allowed to be presented one-sidedly, without also stating clearly the associated risks.[54]

In this case, a sufficiently clear **explanatory risk warning** can eliminate its misleading character. However, case law requires such warnings to be designed in such a way that an average consumer not only clearly perceives the warning in the overall context of the advertisement, but also regards it as something to be taken seriously.[55]

This also applies for risk warnings, similarly to the reference to the prospectus, in that they are clearly and unambiguously recognisable as such and must also be legible.[56]

Additional reference is made to the corresponding provision about information documents in Article 49 WAG 2018[57], that are addressed to legal entities as defined in WAG 2018 as well as to the FMA Circular on Information Requirements including for marketing communications under WAG 2018 and Delegated Regulation (EU) 2017/565[58].

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[48] See in this regard OGH 20.01.2009, 4 Ob 188/08p; BVwG 22.06.2018, W107 2151968-1; VwGH 24.03.2014, 2010/17/0071 as well as BVwG 02.03.2020, W107 2176622-1.

[49] see case law OGH 20.01.2009, 4 Ob 188/08p; BVwG 22.06.2018, W107 2151968-1 and BVwG 02.03.2020, W107 2176622-1.

[50] See case law in this regard OGH 20.01.2009, OGH 4 Ob 188/08p as well as BVwG 22.06.2018, W107 2151968-1.

[51] In this case see also Federal Administrative Court (BVwG) 22.06.2018, W107 2151968-1.

[52] Unfair Competition Act 1984 (UWG; Bundesgesetz gegen den unlauteren Wettbewerb), published in Federal Law Gazette no. 448/1984.

[53] In this case see also Federal Administrative Court (BVwG) 22.06.2018, W107 2151968-1.

[54] See in this regard OGH 20.01.2009, 4 Ob 188/08p; BVwG 22.06.2018, W107 2151968-1; VwGH 24.03.2014, 2010/17/0071 as well as BVwG 02.03.2020, W107 2176622-1; see also Article 16 (1) point c of Delegated Regulation (EU) 2019/979.

[55] See in this regard OGH 20.01.2009, 4 Ob 188/08p; BVwG 22.06.2018, W107 2151968-1; VwGH 24.03.2014, 2010/17/0071 as well as BVwG 02.03.2020, W107 2176622-1.

[56] See Judgement of the Federal Administrative Court (BVwG) 22.06.2018, W107 2151968-1.

[57] Securities Supervision Act 2018 (WAG 2018; Wertpapieraufsichtsgesetz 2018), Federal Law Gazette I No. 107/2017.

[58] https://www.fma.gv.at/download.php?d=5474.

2.8.3. PRACTICAL EXAMPLES:

Example 1: “Guarantee (Garantie), Capital Protection (Kapitalschutz)”

Experiences in recent years have shown that the legal constructions used for legitimising advertising claims like “full capital protection” (“100 % Kapitalschutz”), guaranteed product (“Garantieprodukt“), or similar can vary strongly (from tri-partite abstract guarantees through to the mere legal obligation of issuers of debt securities to repay the nominal value upon maturity). It is generally advisable when making claims about guarantees in advertisements to include an explanatory note about who the guarantor is, or what the capital guarantee results from, to avoid misleading statements.

Example 2: “Product complexity” (Produktkomplexität)

The more complex the product design is, e.g. regarding cash flows, the more descriptive explanations ought to be included in advertising materials, to avoid a misleading statement (especially when also addressing inexperienced retail investors). For example, this is the case, when the maximum possible interest rate is highlighted in an eye-catching manner in the advertisement, but where the promised interest rate is subject to conditions.

Example 3: “Scrutinised by the supervisory authority”

In cases where the prospectus has also been approved by the FMA, or where the advertising entity or the offeror is subject to supervision by the FMA, it is misleading to use the name of the supervisory authority in the publicity in such a ways that could give the circle of addressees the impression that the supervisory authority has approved or even endorsed the security or the investment. Even the term “Prospekt geprüft” (prospectus scrutinised), in conjunction with other promotional statements, may create a false impression for consumers unfamiliar with the law that an investment is subject to a special official checking process rather than the mere scrutinising of the prospectus.[59]

Example 4: “Grundbuchsgesichert” (secured in the land register), “grundbücherlich eingetragen” (registered in the land register)

From the reference to “bücherliche Sicherheit”, the targeted consumer assumes that their invested money is fully covered. Advertising an investment as being “grundbuchsgesichert” is therefore misleading, if security by the land register is not ensured in all cases or not in the first rank, and such restrictions are not able to be inferred from the promotional statement that emphasises security.

Example 5: “Fixed-rate interest”, “planned fixed-rate interest of x %”

Buzzword-like formulations like “planned fixed-rate interest of x %” or “fixed-rate interest” in any case give the potential investor the impression that it is a loan with a set interest rate. Such statements that do not contain sufficient clarifying remarks that are made in relation to a qualified subordinated loans are deemed to be misleading.[60]

[59] See Article 44 (8) of Delegated Regulation (EU) 2017/565 to MiFID II.
[60] In this case also Federal Administrative Court (BVwG) 22.06.2018, W107 2151968-1.

3. FORMAT AND CONTENT OF SECURITIES PROSPECTUSES

This chapter contains a few remarks regarding the practical format of securities prospectuses and is intended to provide a fundamental overview about the different types of prospectuses as well as the most important contents of prospectuses. Investment prospectuses are not addressed in this chapter, as the FMA does not check them.

3.1. AN OVERVIEW OF THE TYPES OF PROSPECTUS

The issuer can choose between different types of prospectuses for issuances of securities. The decision about the type of prospectus to choose depends on the different types of securities, issuers, offerings and approvals and varies accordingly.

3.1.1. SINGLE-PART PROSPECTUS (STANDARD PROSPECTUS)

The single-part prospectus may be used for issuance of equity securities and non-equity securities and serves as an information basis for a single issuance.

As a rule, single-part prospectuses are prepared by issuers that issue securities for financing their business activities, but whose main business activity is not issuance business (e.g. A capital increase of a stock company; issuance of a corporate bond).

3.1.2. BASE PROSPECTUS

The base prospectus may only be used for issuance of non-equity securities, including all kinds of warrants It simplifies the issuance activity of frequent issuers (e.g. credit institutions) and enables multiple issuances, as non-equity securities can be issued during the 12-month validity period of the prospectus in a continuous or repeated manner, or as part of an offering programme.

The base prospectus contains a securities note for several types of securities in addition to the issuer's note. At the time of the base prospectus being approved, it is incomplete in that the information about the securities that were still unknown at the time of the approval are determined in the final terms for the respective security (e.g. ISIN offer price, interest rate, etc.). During the course of the approval procedure, only a sample for the final terms is scrutinised.

For these purposes, the information in the securities note is therefore split into the categories A, B and C. While category A information is required to be contained in the base prospectus, category B information must be contained as a rule with only individual details being stated later in the final terms, while category C information must only be included in the final terms, in the case that they have not yet been fixed at the time of the approval.[61]

The summary that is in any case necessary for the base prospectus does not form part of the approval procedure, but instead is drawn up for each individual issuance, and attached later to the final terms.

3.1.3. MULTI-PART PROSPECTUS

A prospectus/base prospectus may also be drawn up in the form of several individual documents, with such individual documents comprising the registration form (i.e. the issuer's note), the securities note and as appropriate a summary.

The idea behind the multi-part prospectus is for an issuer to initially allow a registration form to be approved, and then only in the event of a planned public offering or an admission to trading on a

[61] See Article 26 of Delegated Regulation (EU) 2019/980.

regulated market to draw up an appropriate securities note and as applicable summary, and to then submit them for approval.

3.1.4. UNIVERSAL REGISTRATION DOCUMENT

Universal registration documents may be used for the issuance of non-equity securities and equity securities alike.

The advantages afforded by a universal registration document may be used by issuers whose securities are listed on a regulated market or an MTF.

The universal registration document may be filed annually at the FMA once it has been approved by the FMA during two consecutive financial years. The issuer is granted frequent issuer status and has the right to an accelerated approval procedure (the authority's deadline for reaching a decision is shortened to 5 working days).

If the universal registration document is ultimately used as component of a prospectus, then it is to be approved together with the prospectus components that are submitted for approval (securities note and as applicable summary).

3.1.5. SIMPLIFIED DISCLOSURE REGIME FOR CERTAIN ISSUERS/SECURITIES

To be able to take the specificities of the broadest range of issuers and securities into account, the Prospectus Regulation also stipulates simplified rules on disclosure. A simplified prospectus may be drawn up for wholesale investor prospectuses, simplified prospectus for secondary issuances, and EU Growth prospectuses. The provisions under the Prospectus Regulation are to be applied in the same manner for such prospectuses (e.g. publications, supplements notifications etc.).

3.1.5.1 WHOLESALE INVESTOR PROSPECTUS

A listing prospectus for non-equity securities with a minimum denomination per unit of EUR 100,000 may be drawn up as a simplified prospectus with reduced disclosure obligations. The precondition is that the non-equity securities are only intended to be traded on a single regulated market or a single segment of a regulated market, that only qualified investors have access to.

3.1.5.2 SIMPLIFIED PROSPECTUS FOR SECONDARY ISSUANCES

If securities are admitted to a regulated market, ongoing disclosure obligations exist that justify a simplified prospectus as being sufficient for such issuers. The application of simplified disclosure obligations for issuances of secondary markets is as a rule possible (depending on the type of securities) for 18 months following the securities' initial admission to the regulated market or SME growth market.

3.1.5.3 EU GROWTH PROSPECTUS

The EU growth prospectus may generally be drawn up by small- and medium-sized enterprises (SMEs) or issuers applying for admission of the securities to an SME growth market, or which are already listed on one. The opportunity to use this kind of simplified prospectus is not open to issuers whose securities are already admitted to a regulated market.

The EU growth prospectus follows a standardised format, and contains a special summary, a special securities note and a special registration form and may be drawn up in the form of a single-part or multi-part prospectus and as a base prospectus.

3.1.5.4 SCHEDULE D PROSPECTUS

A Schedule D securities prospectus may be submitted to the FMA for approval, if the public offering of securities does not exceed a total consideration of EUR 5 million within a 12-month period.

It is a simplified prospectus, that follows Annex D of the KMG and is only valid for public offerings in Austria. It is therefore not possible to notify it in other EU/EEA Member States or for it to be admitted to a regulated market.

3.2. REPORTS TO THE NEW-ISSUE CALENDAR (THE OEKB'S ONLINE NOTIFICATION OFFICE)

Under Article 21 (5) of the Prospectus Regulation, the FMA is obliged to deliver issuance-related information (defined in greater detail in Delegated Regulation (EU) 2019/979) to ESMA in related to issuances on the basis of prospectuses approved by the FMA.

Under Article 13 para. 3 KMG 2019 the FMA delegated the receiving and processing of this issuance-related data to the OeKB's online notification office, which uses the data from the New-Issue Calendar.

In addition to the reports pursuant to Article 24 KMG 2019 (which only cover initial domestic offerings)[62] issuers are also required on the basis of the FMA's notification of 12.08.2021 in accordance with Article 32 of the Prospectus Regulation to also make the following reports to the New-Issue Calendar:

- securities that are publicly offered exclusively in another EEA state,
- second or subsequent offerings of securities in Austria, and
- listing approvals that are not accompanied by an initial domestic offering

The final terms about offerings that made using a base prospectus, are considered to have been filed with the FMA as soon as they have been uploaded to the notification office during the notification.

Registered notifiers of the New-Issue Calendar can find more detailed information on the notification office's landing page.

3.3. LANGUAGE

Prospectuses in Austria are required to be written in **German or English**. The main sections of the prospectus are required to all be written in the same language, although the translation of individual chapters (e.g. the summary, bond terms and conditions) is possible and made therefore be included in English and German.

If the prospectus is notified in one or more Member States, then it must be drawn up in a language that is (collectively) recognised in these Member States, and must be approved by the FMA, or to be translated into the recognised language(s) of the respective Member State, with the former being the usual administrative practice at the FMA.

In the case of base prospectuses, the issue-specific summary and the final terms are to be drafted in the same language as the base prospectus. However, Member States also have the possibility to request the issue-specific summary for base prospectuses in their respective official language.[63]

The languages that are recognised in the respective Member States were published by ESMA in an Information Note (ESMA32-384-5080)[64].

3.4. COMPREHENSIBILITY

A securities prospectus is an information document for investors, for which reason **formulations of a promotional nature** should be avoided. Formulations of a promotional nature contain a high degree of semantic vagueness and may lead to comprehensibility being impaired or give rise to contradictions.

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[62] See Article 24 para. 2 KMG 2019 regarding the exceptions.
[63] See Article 27 of the Prospectus Regulation.
[64] see https://www.esma.europa.eu/sites/default/files/library/esma32-384-5080_language_document.pdf.

This must especially be considered in light of securities prospectuses also constitute a legal liability document of the person responsible for the prospectus.

To avoid impairing its comprehensibility, the document must be drawn up in as compact a form as possible avoiding **repetitions** of individual longer passages of text wherever possible. To avoid such redundancies, it is possible, for example, to use references within the prospectus. However, it must be noted that Article 7 (11) of the Prospectus Regulation does not permit references to other parts of the prospectus in the summary.

The prospectus should contain a suitably located **Index of Abbreviations**, which briefly explains all terms, product designations, technical terms, company designations in the case of groups of companies as well as other core terms. Especially in the case of base prospectuses, such an index helps the investor to navigate between the final terms and the base prospectus as well as any supplements. The defined terms are subsequently to be used consistently throughout the entire prospectus.

When scrutinising the comprehensibility, the FMA shall in addition also primarily check that the structure of the prospectus allows the investors to understand its content, and that the prospectus is written in as simple language as possible.[65]

3.5. VALIDITY PERIOD AND PUBLICATION OF THE PROSPECTUS

From the date of approval of the prospectus by the authority, the prospectus is generally valid for a period of **twelve months**[66] for public offerings or applications for admission to trading on regulated markets. During this time, any supplements required should be produced.

In the case of multi-part prospectuses, the validity period begins with the approval of the securities note. This means that the end of the validity period of a universal registration document approved before the securities note does not have any impact on the prospectus' validity.

Public offerings of tap issuances issued in the form of a base prospectus may also remain valid once the base prospectus upon which the tap issuance is based has expired, provided that a succeeding base prospectus has been approved and published at the latest on the final day of the validity period of the base prospectus in question.[67] Where a gap exists between the (old) base prospectus and the succeeding base prospectus, then the issuance must be suspended, and may be recommenced under the succeeding base prospectus, provided that the issuance is covered by the scope of the succeeding base prospectus.

The prospectus **is required to be made available on a website**[68] following its approval and prior to or at the latest at the start of the public offering or the admission to trading. The prospectus, supplements and documents included by means of references must be made available free of charge and without requiring a registration in a section of this website that is easy to find.

In the case of initial public offerings (IPOs) (the public offering of shares that have been admitted to trading on a regulated market for the first time), the prospectus is required to be made available to the public at least six working days before the end of the offer.

Prospectuses, supplements, documents included by means of references and final terms are required to be made publicly accessible in electronic form for **at least ten years**[69] following the publication of the prospectus.

3.6. CONTENTS OF PROSPECTUSES

The structure of a prospectus should be designed in such a way that the reader is able to receive a quick overview of the most important chapters or the most important information, and in such a way that

[65] See Article 37 of Delegated Regulation (EU) 2019/980.
[66] See Article 12 of the Prospectus Regulation.
[67] See Article 8 (11) of the Prospectus Regulation.
[68] See Article 21 of the Prospectus Regulation.
[69] See Article 21 (7) of the Prospectus Regulation.

the document can be navigated easily. The prospectus components vary depending on the type of security and/or issuer, but with few exceptions cover[70]:

- table of contents
- general description of the offering programme (in the case of base prospectuses)
- summary (as applicable)
- risk factors
- remaining details, that are required in the annexes to be used (i.e. Issuer and securities note).

There should not be any deviation in terms of the order of these component parts of the prospectus, although it is possible and usual to extend a cover note.[71]

The details for the issuer note as well as the securities note arise from the applicable Annexes of Delegated Regulation (EU) 2019/980. Where the order of Annexes of the prospectus deviates from the stipulated order then a list containing cross-references (known as a Cross Reference List or CRL)[72] must be made available to the FMA, from which it is apparent to which points in the Annexes such information relates.

3.6.1. TITLE PAGE (KNOWN AS A "COVER NOTE")

From the FMA's perspective, the following information should be part of the title page, while also ensuring that the title page is not too densely filled, and covers the material information for the issuance:

- name of issuer
- type of prospectus
- activity for which prospectus is being drawn up (public offering/admission to trading on a regulated market)
- material identification features of the security (such as ISIN, volume of offering, interest rate)
- maximum issue size and whether there are options to increase it
- date of approval
- information as necessary about the countries in which the prospectus has been notified
- a prominent warning that states the date from when a prospectus' validity lapses (Article 21 (8) Prospectus Regulation)

3.6.2. SUMMARY

The summary is a useful source of information for retail investors, as it concentrates on the most material key information. Prospectus summaries have a uniform structure, and are short, simple and easy to understand for investors. For this reason, summaries are only not required where the minimum denomination per unit is EUR 100,000 or where only qualified investors have access to trade this security[73].

The summary should be a short supporting document, which is why seven A4 pages is stipulated as a maximum length.[74] Under various constellations, such as in the case of a PRIIP-KID being included as a section in the summary[75], the number of pages may be increased.

In the case of base prospectuses, the summary is not approved by the FMA, but is only drawn up subsequently on an issuance-specific basis, and attached to the final terms.[76] An issue-specific

[70] See Article 24 of Delegated Regulation (EU) 2019/980.
[71] See Point 14.9 ESMA Questions and Answers on the Prospectus Regulation (ESMA Q&A), ESMA/2019/ESMA31-62-1258.
[72] See Article 24 (5) or Article 25 (6) of Delegated Regulation (EU) 2019/980.
[73] See Article 7 (1) of the Prospectus Regulation.
[74] See Article 7 (3) Prospectus Regulation.
[75] See Article 7 (7) subpara. 3 Prospectus Regulation.
[76] See Article 8 (8) and following of the Prospectus Regulation

summary is not allowed to contain any information that is not already contained in the approved base prospectus, the final terms or any supplement that may have been published.[77]

The material financial information to be included in the summary are stipulated by Delegated Regulation (EU) 2019/979.

3.6.3. RISK FACTORS

The chapter on “risk factors” is an important component of every prospectus. Risk factors should ensure that investors are able to make a well-grounded assessment of the risks associated with the investment, and therefore are able to make an investment decision in full knowledge of the factual situation. For this reason, the prospectus shall only describe risks specific to the issuer and/or the securities that are of material significance in reaching a well-founded investment decision.

The FMA checks the risk factors in the prospectus based on the ESMA Guidelines on risk factors under the Prospectus Regulation (ESMA31-62-1293).

The risk factors must among other things fulfil the following requirements:

3.6.3.1 SPECIFICITY OF THE RISK FACTORS

A direct relationship between the risk factor and the issuer or security must be clearly recognisable. This connection should also be in line with the details stated elsewhere in the prospectus, so that the risk factors confirm the overall picture portrayed in the prospectus. General statements merely having the character of a disclaimer should therefore be avoided.

3.6.3.2 MATERIALITY OF THE RISK FACTORS

The materiality of the risk factor for the issuer or the security must be apparent from the description and must also disclose the potential negative effects. In addition to quantitative details about the depiction of materiality, risks may also be allocated using a scale of “low”, “medium”, and “high”

Caution should be exercised when weakening or relativising descriptions in order not to impair materiality. Such descriptions are only permissible to illustrate the probability of occurrence or the expected extent of the negative effects.

In terms of materiality, it should also be ensured that the overall picture given by the prospectus is coherent with the risk factors.

3.6.3.3 CATEGORISATION

For ease of guidance for investors, the chapter “risk factors” should be broken down into categories. In practice this generally covers:

- risks related to the issuer's business activities
- risks related to the legal and regulatory environment
- risks related to the rank of the securities
- risks related to the structuring of the securities

The most material risk factors in each category should be presented first.

3.6.3.4 TARGETED AND PRECISE RISK FACTORS

To increase the comprehensibility of prospectuses, it should be ensured that the scope of every risk factor is appropriate. A risk factor should present the specificity and materiality in a targeted and precise manner and should be presented in a succinct form.

[77] see Points 13.1 and 13.2 of ESMA Q&A, ESMA/2019/ESMA31-62-1258.

3.6.4. INFORMATION INCORPORATED BY REFERENCE

Certain information that is required under prospectus law, may also be incorporated into the prospectus by means of a reference, and thereby become a component of the prospectus. Article 19 of the Prospectus Regulation states an exhaustive list of such documents, although in practice the following documents are most frequently incorporated by reference:

- audit reports and financial statements
- interim financial information
- approved prospectuses from previous years
- articles of association

A hyperlink must be provided for all documents that are incorporated by reference, which has already been mentioned above, and must remain accessible for a period of ten years.

Where only parts of the linked documents are components of the prospectus, then the prospectus must include a statement to this effect (for further information, see Chapter 3.8 below).

3.6.5. FINAL TERMS

Base prospectuses contain what is known as a "final terms form". Such final terms only contain information about the securities, are filled out for every individual issuance, and are published on the website listed in the base prospectus[78].

3.7. FINANCIAL INFORMATION

As a rule, in the case of equity securities prospectuses, historic financial information covering the previous three financial years is to be included, reduced to the last two financial years in the case of non-equity securities.

Most annexes for registration forms in the Prospectus Regulation stipulate that it is to be included in the case of issuers that publish interim financial information. Furthermore, intermediate information should also be included, if the registration form was drawn up more than nine months after the end of the most recently audited financial year.

Where the original audited financial information has not been drawn up in the same **language** as the prospectus, a translation of this financial information is not required (provided that this language is accepted in countries that are to be notified). A translation of the historical financial information may also be incorporated into the prospectus.[79]

3.7.1. PREPARATION OF INFORMATION FOR THE PURPOSES OF THE PROSPECTUS

Especially when annual financial statements are prepared in accordance with the UGB, certain components required by the Annexes of Delegated Regulation (EU) 2019/980, are not contained in regularly prepared annual financial statements. As a rule, these relate to the cashflow statement and/or the statement of changes in equity.

In such cases the information required must be prepared separately for the purposes of the prospectus and audited separately by the external auditor.[80]

[78] see Article 8 in conjunction with Article 21 of the Prospectus Regulation.
[79] see Point 5.1 ESMA Q&A, ESMA/2019/ESMA31-62-1258.
[80] see Guideline 17 of the ESMA Guidelines on disclosure requirements under the Prospectus Regulation (ESMA32-382-1138).

The Institute of Austrian Certified Public Accountants (IWP; Institut Österreichischer Wirtschaftsprüfer) has published a working aid which contains wording suggestions for the attestation of these specially prepared cashflow and/or changes in equity statements.[81]

3.7.2. ALTERNATIVE PERFORMANCE MEASURES (APM)

Alternative Performance Measures (APMs) are widespread, and from the issuer's perspective may constitute an important source of information for investors. From the issuer's perspective, communicating APMs may enable investors to obtain a better holistic picture of the company. However, companies have a great deal of freedom in the way that APMs are presented, which may result in risks for the target audience and obscure the entity's financial situation, and which might distract them regarding financial information on the basis of the accounting framework. For this reason, ESMA has published Guidelines on Alternative Performance Measures (ESMA/2015/1415) as well as Questions and Answers (ESMA32-51-370).

We refer to the ESMA Guidelines regarding the definition of the APMs. The APMs are usually derived from (or based on) the financial statements that are prepared in accordance with the relevant accounting framework; in most cases, amounts are deducted from or added to the figures presented in the financial statements. Examples of APMs include: "operating earnings", "earnings before interest, taxes, depreciation and amortisation (EBITDA)", "net debt", that denote adjustments to line items of statements of comprehensive income, balance sheets or statements of cash flow. The ESMA Guidelines on APMs do not apply to measures that are defined or specified by the applicable financial reporting framework, such as revenue, profit or loss or earnings per share.

The selection of the APMs used and their calculation is generally conducted at the company's discretion. To ensure the use and transparency for potential investors, the ESMA Guidelines on APMs therefore contain principles and rules for the presentation of APMs.

Detailed information about the interpretation and presentation of APMs in prospectuses can be found in the ESMA Guidelines on Alternative Performance Measures) ESMA/2015/1415, Questions and answers ESMA Guidelines on Alternative Performance Measures (APMs) ESMA32-51-370 as well as in Point 7.2 of the ESMA Q&A, ESMA/2019/ESMA31-62-1258.

3.7.3. PRO FORMA FINANCIAL INFORMATION

Pro forma financial information is supplementary financial information in equity securities prospectuses that is to be included in the prospectus where historical financial information is not sufficient to provide the investor with an adequately accurate picture about the issuer's financial situation and future prospects. Reasons include the issuer having a complex previous financial history or having entered into a significant financial obligation.

The benchmark for preparation of pro forma financial information is whether one (or several small) transaction(s) (1) has/have resulted in a *significant gross change* or (2) constitute/s a *significant financial commitment*.

A significant gross change is defined as a variation of more than 25% for one or more indicators of the size of the issuer's business[82], while a significant financial commitment is a binding agreement to undertake a transaction that is likely to give rise to a variation of more than 25 %[83]. As a rule, the total assets, income, or profit or loss are to be considered as indicators of size.

The pro forma financial information's content is defined in Annex 20 of Delegated Regulation (EU) 2019/980.

[81] see ISA 805, IWP-Arbeitshilfe: Vermerk über die Prüfung der Geldflussrechnung und der Eigenkapitalveränderungsrechnung iZm VO (EU) 2019/980 (03/2021), www.iwp.or.at/iwp-arbeitshilfen-zusammenstellung/.
[82] see Article 1 point e of Delegated Regulation (EU) 2019/980.
[83] see Article 18 (4) of Delegated Regulation (EU) 2019/980.

Detailed information about various interpretations in relation to this topic can be found the respective current version of the ESMA Guidelines on disclosure requirements under the Prospectus Regulation; Guidelines 18 to 26 (ESMA32-382-1138).

3.7.4. PROFIT FORECASTS AND ESTIMATES

A profit forecast is where a figure or a minimum or maximum figure for the likely profits or losses for the current or future financial years is given expressly or by implication, or where only data are provided that enable such a calculation. A profit estimate means a profit forecast for a financial year which has expired and for which results have not yet been published.[84]

Not only the stating a specific about (e.g. EBITDA) but providing information that the profit will be between X and Y, that the profit will be in line with the previous year, that profit will increase by 5 %, or even saying that there will be a profit or loss, shall be considered as a profit forecast or estimate.[85]

When preparing profit forecasts and estimates it is necessary to ensure that they are not misleading for investors, which is why these financial figures are required to fulfil particular requirements.

The assumptions upon which profit forecasts or estimates included in the prospectus are based must be stated. Such assumptions must be broken down into factors that are able to be influenced by the management, and those that are clearly outside the management's sphere of influence. Examples of factors that lie outside their sphere of influence include force majeure, currency fluctuations, new competitors, legislation and similar. As a rule, financial figures that are forecast or estimated can be influenced (at least indirectly).

ESMA has drawn up principles for the preparation of profit forecasts and estimates, under which the persons responsible for the prospectus should ensure that the figures are (i) understandable, (ii) reliable), (iii) comparable, and (iv) relevant.

The prospectus must include an unequivocal declaration in the prospectus that their comparability with historical financial information and the consistency with financial reporting standards is ensured. This declaration may be submitted by the issuer. It is not necessary to have a declaration by an external auditor.

Further information about this can be found in the respective current version of the ESMA Guidelines on disclosure requirements under the Prospectus Regulation in Guidelines 10 to 13 (ESMA32-382-1138).

3.7.5. CHANGE OF ACCOUNTING STANDARDS / BRIDGE APPROACH

The most recent audited historic financial information (including comparable information for the preceding year) is to be prepared and presented in such a form or in accordance with accounting standards consistent with those to be applied in the issuer's next financial statement.

In the case of equity securities (including financial information for the last three financial years) then the bridge approach should be applied in such cases. Under that approach, the first financial year is included in the prospectus under the old accounting standards. The second financial year is included using the old and the new accounting standards, while for the most recent financial year the financial information is only included in the prospectus in accordance with the new accounting standards.

Further information about this can be found in the respective current version of the ESMA Guidelines on disclosure requirements under the Prospectus Regulation in Guidelines 14 to 16 (ESMA32-382-1138).

[84] See Article 1 points c and d of Delegated Regulation (EU) 2019/980.
[85] For detailed statements about this see Point 7.3 ESMA Q&A, ESMA/2019/ESMA31-62-1258.

3.7.6. CAPITALISATION AND INDEBTEDNESS (WORKING CAPITAL STATEMENT)

Equity securities prospectuses must contain an overview about the capitalisation and indebtedness of the issuer. This should consist of data that is prepared specially for the purposes of the prospectus, which are not required to be separately scrutinised by an external auditor. The cut-off point for the figures shall be allowed to be a maximum of 90 days prior to the date of the securities note.

The table is to be broken down into short-term and long-term liabilities (respectively for guaranteed, secured as well as non-guaranteed/non-secured liabilities) as well as details about the equity capital (share capital, statutory and other reserves).

Detailed information about this can be found in the latest version of the ESMA Guidelines on disclosure requirements under the Prospectus Regulation Guidelines 38 and 39 (ESMA32-382-1138).

3.8. REMARKS IN THE PROSPECTUS

Under prospectus law a range of remarks are to be included, almost without exception in all kinds of prospectuses. This sub-chapter contains a brief overview about the various remarks.

The prospectus must contain a *declaration*[86] in an appropriate place that

- the (part of the) prospectus was approved by the FMA as the competent authority,
- the FMA only approves the prospectus only in accordance with the criteria of completeness, comprehensibility and consistency, and
- the approval should neither be considered as confirmation of the quality of the securities nor as an endorsement of the issuer by the FMA.

In addition, the prospectus must contain a *prominent warning*[87] that states,

- from when the prospectus is no longer valid, and that
- the obligation to supplement a prospectus in the event of significant new factors, material mistakes or material inaccuracies does not apply when a prospectus is no longer valid.

A further *warning*[88] is to be included in securities notes regarding the **taxation** of the securities, that states that

- the tax legislation of the investor's Member State and the jurisdiction of incorporation of the issuer could impact the securities' returns.

Where a prospectus contains **hyperlinks to websites** that do not lead to information that is incorporated by reference, then a *statement*[89] must be included,

- that the information on the website is not part of the prospectus and has not been scrutinised or approved by the competent authority.

In the case of **documents incorporated by reference**, where the entire document is not a prospectus component, then a *statement*[90] must be included,

- that the non-incorporated parts are either not relevant for the investor or covered elsewhere in the prospectus.

The **summary** is split into four sections, with the first section as applicable containing the *warnings*[91] that

[86] see Section 1 of the respective applicable Annex of Delegated Regulation (EU) 2019/980.
[87] see Article 21 (8) Prospectus Regulation.
[88] see Section 1, 2, 3 or 4 of the respectively applicable Annex to Delegated Regulation (EU) 2019/980.
[89] see Article 10 (1) of Delegated Regulation (EU) 2019/979.
[90] see Article 19 (1) subpara. 3 Prospectus Regulation.
[91] see Article 7 (5) subpara. 2 Prospectus Regulation.

- the summary should be read as an introduction to the prospectus;
- any decision to invest in the securities should be based on a consideration of the prospectus as a whole by the investor;
- all or part of the invested capital could be lost or more than the invested capital and the extent of such potential loss;
- in the event of court proceedings that translation costs for the prospectus may possibly have to be paid by the investor;
- under civil law, only the persons who have submitted and transmitted the information in the summary, shall be liable for it, and even then, only under certain conditions.

Where the key information about the securities in the summary is replaced by a **PRIIPs key information document** in accordance with Regulation (EU) 1286/2014, it must also be stated that:

- "You are about to purchase a product that is not simple and may be difficult to understand."[92]

A *clear and prominent statement*[93] shall be inserted in the **final terms** of base prospectuses, indicating:

- that the final terms have been prepared for the purpose of the Prospectus Regulation and must be read in conjunction with the base prospectus and any supplements in order to obtain all the relevant information.
- where the base prospectus and any supplements have been published, and that
- a summary of the individual issue is annexed to the final terms.

For **base prospectuses**, where a public offering is extended beyond the validity period of a base prospectus, then an approved succeeding base prospectus must by published in a timely manner. In such cases, the final terms shall contain a *prominent warning*[94] containing details about

- the last day of validity of the previous base prospectus, and
- where the succeeding base prospectus is published.

Where a **supplement** is published to (part of) a prospectus, then the supplement must contain a *prominent statement* [95] that

- explains for whom a right of withdrawal applies,
- states the time frame (from/to date), during which the right of withdrawal may be exercised and
- whom investors may contact should they wish to exercise their right of withdrawal.

If claims are made in prospectuses by **credit institutions or insurance undertakings** about the **eligibility under supervisory law** of a security that is to be issued (e.g. Additional Tier 1, Tier 1, Tier 2, etc.), then the approval of the prospectus by the FMA does not constitute an approval of the content of this statement. This should be included in the following *clarification*:

- "The FMA approval procedure does not contain an assessment of the eligibility under supervisory law as [Tier 1 capital, Tier 2 capital, eligible liabilities etc.]; the possibility therefore exists that the instrument is not able to be considered as [Tier 1 capital, Tier 2 capital, eligible liabilities etc.]."

[92] see Article 7 (7) subpara. 2 Prospectus Regulation in conjunction with Article 8 (3) point b of Regulation (EU) 1286/2014.
[93] see Article 8 (5) Prospectus Regulation.
[94] see Article 8 (11) of the Prospectus Regulation.
[95] see Article 23 subpara. 2 of the Prospectus Regulation.

3.9. SECTOR/PRODUCT SPECIFICITIES

The information to be included in the prospectus may be very individual both regarding the issuer and the sector in which it is active, as well as in relation to the securities.

3.9.1. SPECIFIC CATEGORIES OF ISSUERS ("SPECIALIST ISSUERS")

If prospectuses are submitted for approval by specialist issuers in certain industries/categories, then the FMA may demand that additional information is included pursuant to Article 39 in conjunction with Annex 29 of Delegated Regulation (EU) 2019/980. This category of issuers covers

- property companies
- mineral companies
- investment companies
- scientific research-based companies
- start-up companies
- shipping companies

The additional information that may be demanded by the FMA is based on the ESMA Update of the CESR recommendations (ESMA/2013/319) published by ESMA.

Please note that ESMA stated in a Public Statement in September 2020 that the CESR recommendations with regard to specialist issuers will (apparently) also be addressed in Guidelines in the future. Until then, CESR recommendations will remain applicable. The FMA will publish any changes in this regard on its website.[96]

3.9.2. SUSTAINABLE INVESTMENTS

When issuing green bonds, sustainable bonds or social bonds, the proceeds from the issues are generally invested in green, sustainable or social projects.

Due to the various uncertainties that prevail in this new area of law, the FMA in any case establishing a risk factor in this regard.

It is explicitly advised that the FMA does not conduct any checks during the approval procedure under prospectus law in relation to investment criteria or policies and the approval of a prospectus that contains sustainable investments does not constitute a qualitative endorsement of a project.

3.9.3. STATING OF RATINGS

If a rating has been issued for an issuer or a security, then it is required to be stated in the prospectus. Pursuant to Article 4 (1) of Regulation (EC) 1060/2009 (CRA-Regulation) [97] clear and prominent information must additionally be included about whether the rating was issued by a credit rating agency established in the EU that was registered under the CRA-Regulation.[98]

3.9.4. BENCHMARKS AS AN UNDERLYING ASSET (UNDERLYING)

Where a security uses an underlying asset as a benchmark for interest payments or repayments, then these may be either third-party benchmarks or proprietary benchmarks by the issuer (generally credit

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[96] See ESMA Public Statement, 30th September 2020 (ESMA31-62-1491), available to download from: https://www.esma.europa.eu/sites/default/files/library/esma31-62-1491_public_statement_qa_update_prospectus.pdf.

[97] Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies (Text with EEA relevance), OJ L 302, 17.11.2009, p. 1–31.

[98] See also Point 14:13 ESMA Q&As, ESMA/2019/ESMA31-62-1258.

institutions). In any case, it must be ensured that a description of the respective index is included[99], which generally must be explained in greater detail in the case of proprietary benchmarks.

In the case of benchmarks, the prospectus must furthermore state[100],

a. whether the benchmark is provided by an administrator, and
b. whether the administrator is listed in the ESMA Register including stating that the lack of an entry is a negative fact.

Explicit reference is made that the Prospectus Regulation exists in addition to Directive 2011/61/EU ("AIFMD") and Regulation (EU) 2016/1011 ("Benchmark Regulation")[101], and therefore that under certain circumstances not only the Prospectus Regulation, the KMG 2019 as well as the Alternative Investment Fund Managers Act (AIFMG; Alternatives Investmentfonds Manager-Gesetz) and the Benchmark Regulation might apply.

Any review to determine whether the particular issue or business model might represent an Alternative Investment Fund (AIF) is, however, carried out independently of prospectus approval. The onus is on the issuer to determine whether the issue falls under the AIFMG and to take any appropriate measures.

[99] see also Article 20 in conjunction with Annex 17 of Delegated Regulation (EU) 2019/980 as well as e.g. Point 4.8 of Annex 14 of Delegated Regulation (EU) 2019/980.
[100] see Article 29 of the Benchmark Regulation.
[101] 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, OJ L 171, 29.6.2016, p. 1–65.