

EU Listing Act – Changes to the EU Prospectus Regulation

2 January 2025

The Regulation (EU) 2024/2809, which was published on 14 November 2024, also known as the EU Listing Act (the "EU Listing Act") is introducing several changes to Regulation (EU) 2017/1129 ("EU Prospectus Regulation") to streamline access to capital markets while reinforcing investor protection. Some of the changes are already effective since 4 December 2024.

Key changes for Austrian debt issuers (effective since 4 December 2024):

- Incorporation by reference into a base prospectus of annual or interim financial information published after the approval date of the base prospectus without the need of a supplement,
- No generic risk factors or risk factors that serve as mere disclaimers;
- Reintroduction of certain provisions regarding supplements concerning obligations for financial intermediaries as well as withdrawal rights for investors.
- (No) introduction of new types of securities via a supplement.
- Extended exemptions for non-equity securities offers by credit institutions.

1 Incorporation by reference of financial information

A noteworthy change is the introduction of a mechanism for the incorporation of future annual or interim financial information into a base prospectus that is still valid. Pursuant to Article 19 (1b) EU Prospectus Regulation, this mechanism enables issuers to incorporate new annual financial information or interim financial information without the need for publishing a supplement to a base prospectus.

However, such future financial information will not be incorporated by reference automatically; a base prospectus will need a statement for automatic incorporation by reference. The detailed procedure for this remains to be agreed with the Austrian Financial Market Authority ("FMA"). Further, it must be agreed whether such statement for automatic incorporation by reference of future financial information may be included in a supplement or if an update of the base prospectus would be required.

Nevertheless, it is important to emphasise that this change is not compulsory. Issuers have the discretion to choose whether to follow the automatic incorporation by reference or to adhere to the traditional approach of publishing a supplement in relation to financial information.

In our view, in specific situations, such as prior to benchmark issuances, the traditional approach of publishing a supplement could be favourable for issuers. This is particularly relevant when the prospectus needs to include information beyond what's in the incorporated parts of the financial statements, such as APMs, updates in relation to risk factors or disclosure in relation to the issuer and so on. Such information might not automatically trigger the need to publish a "regular" supplement. Supplements could also be necessary to align the disclosure included in a base prospectus with a deal-related investor presentation.

In case of automatic incorporation by reference, issuers must exercise caution in deciding which parts of annual or interim financial statements should be automatically incorporated as financial statements (i) are often prepared for diverse audiences and purposes and (ii) include information that would not be typically incorporated in a base prospectus (i.e. non-financial reports or management reports). Therefore, a statement for automatic incorporation

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by reference must be carefully drafted to ensure that only relevant and pre-selected content is incorporated against the background of prospectus liability.

2 Risk factors

The newly introduced provisions of the EU Prospectus Regulation aim to make risk factors concise and impactful. The EU Prospectus Regulation stipulates that a prospectus shall not contain risk factors that are generic, that only serve as disclaimers, or that do not give a sufficiently clear picture of the specific risk factors of which investors should be aware. It remains to be seen whether these changes will significantly alter current market practice in Austria.

Previously, issuers had to mention the most material risk factor in each category first. According to the new rules, all risk factors within each category must be listed in order of materiality.

3 Amendments to supplements

The amendments to supplements consist largely of a reintroduction of former amendments that came into force as a response to the COVID-19 pandemic, but have expired on 31 December 2022.

Notable is the extension of the withdrawal period for investors from two to three working days.

The amendments to the EU Prospectus Regulation also take over the former temporary amendments which clarified the obligation of financial intermediaries to inform investors about any supplement which is published to the prospectus. It states that this obligation only applies in regard to those investors who agreed to purchase through that respective financial intermediary. These financial intermediaries are required to notify the respective investors of their withdrawal rights by the end of the first working day following the publication of the supplement at the latest. The EU Listing Act not only makes these provisions permanent but also requires that the information be provided via "electronic means". If an individual investor does not agree to be contacted via "electronic means", the financial intermediaries must still warn them to monitor the issuer's or intermediary's website until the closing of the offer period or delivery of the securities to check whether any supplement has been published.

4 (No) New types of securities via a supplement

A new provision prohibits the introduction of new security types via a supplement that were not already included in the original base prospectus. This aligns with existing supervisory practices of the Austrian Financial Market Authority (FMA), as outlined in its circular on prospectus supervision. As an exception, an introduction is allowed in order to comply with capital requirements under European Union law or national law transposing European Union law. In the course of the next 18-months the European Securities and Markets Authority ("ESMA") shall develop guidelines to specify the circumstances in which a supplement is to be considered to introduce a new type of security that is not already described in a base prospectus.

5 Exemptions for non-equity securities offers by credit institutions

Another reintroduction of a provision initially introduced by the Capital Markets Recovery Package in 2021 is the increase of the threshold for non-equity securities issued by credit institutions on a continuous or repeated basis over 12 months, the threshold for which is raised from EUR 75 million to EUR 150 million.

6 Further upcoming changes

The EU Listing Act also provides for further changes in provisions of the EU Prospectus Regulations, which will only enter into force beginning 4 December 2024. These, *inter alia*, include:

- requirements for a prospectus to be in a standardised format in regard to the content, which will be further specified by the delegated acts made by the European Commission within the next 18 months;

- requirements for a prospectus and summaries in regard to technical standards, which will be further specified by the European Commission concerning the template and layout as well as supplemented by guidelines which ESMA will develop concerning their comprehensibility and use of plain language; and
- mandate of the European Commission to adopt delegated acts that define the ESG-related information to be included in any prospectus for non-equity securities which are marketed as taking into account ESG factors or pursuing ESG objectives.

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