

# Primary Market Technical Note

## Exemptions from the requirement to produce a prospectus

The information in this note is designed to help issuers and practitioners interpret our Listing Rules, Prospectus Regulation Rules, Disclosure Guidance and Transparency Rules, and related legislation. The guidance notes provide answers to the most common queries we receive and represent FCA guidance as defined in section 139A FSMA.

Prospectus Regulation  
 Art. 1 (3);  
 P-Reg-Art. 1 (4);  
 P-Reg-Art. 1 (5);

There are various exemptions from the requirement to produce a prospectus in relation to public offers or an admission to trading on a regulated market. It is worth noting that, where transferable securities are being offered to the public and being admitted to trading on a regulated market, only a single prospectus would be required. However, if an exemption from the requirement to produce a prospectus only applied to the admission, the issuer would still have to produce a prospectus relating to the public offer if none of the relevant exemptions applied to such an offer.

### a) 20% exemption

Under the Prospectus Regulation (P-Reg), issuers who are admitting securities fungible with securities already admitted to trading on the same regulated market that represent less than 20% of the number of securities already admitted to trading on the same regulated market, are exempt from the requirement to produce a prospectus (which relates only to admission to trading on a regulated market but not to public offers). The 20% limit is applied over a rolling 12-month period. As such, any securities admitted over the previous 12 months not covered by any other exemption, would count towards the 20%, except as provided otherwise by the Prospectus Regulation.

Whether these admissions relate to one or more transactions is irrelevant.

In calculating the 20%, we will discount any securities that have benefited from applying another exemption from the requirement to produce a prospectus except as provided otherwise by the P-Prospectus Regulation. So, for example, shares admitted under the employee share exemption would be disregarded for the calculation of the 20% limit.

For example: A company has 160 shares in issue and then issues a further 40 shares to employees (covered by the relevant admission to trading exemption) after three months. A further issue of 20 shares is placed with institutions (so covered by a public offer exemption) six months later. The calculation determining whether the 20% exemption is applied 20/200, i.e. the number of shares for which admission has been sought over the last 12 months for which no other exemption applied, divided by the total already admitted.

This transaction would be covered by the 20% exemption. We can ignore the employee shares in the numerator as they are covered by another exemption.

The company makes a further placement of 20 shares one month later to raise funds for acquiring A. The calculation is now 40/220, i.e. this latest issue is still covered by the 20% exemption. The numerator includes all shares issued in the relevant time period not benefiting from an exemption, and the denominator is increased as a result of previous issues. A further placement of nine shares occurs one month later as the company raises funds for the unconnected acquisition of B. The calculation is now 49/240, which is more than 20%, so a prospectus will be required in this final case.

## b) Employee share schemes

### Quantification of the €8m threshold

We have noted that there is some uncertainty in the market about whether the €8m threshold for offers to fall outside the obligation to publish a prospectus, set out in section 86(1)(e) of FSMA should be calculated for the UK only or on an aggregate basis across all the relevant EU States, where a simultaneous offer of securities is made across several EU States. P Reg Art. 3 states in relation to the €8m threshold that this applies to the total consideration of each such offer in the Union. As a consequence, the threshold does not apply to the UK only, but across member states.

### Private companies

We have been asked whether an offer of shares in a private company constitutes an offer to the public and will necessitate a prospectus, especially in light of the restriction in section 755 of the Companies Act 2006. Our view is that this will depend on whether the shares of that company are transferable securities within the meaning of the Prospectus Regulation. The Prospectus Regulation generally contemplates that shares (whether in public or private companies) that are capable of being negotiated on the capital markets should fall within the Prospectus Regulation's scope.

### Individual schemes

We have received specific requests on whether particular plans or schemes fall under the scope of the Prospectus Regulation and whether a prospectus needs to be published for such schemes. ~~In line with our policy not to provide legal advice on matters,~~ we do not consider it appropriate or indeed possible for us to provide advice on each individual scheme. We believe it is up to the issuer and its advisers to consider, for any particular scheme, whether an offer of transferable securities has been made to the public and whether they are exempt from producing a prospectus.

### c) Takeover documents

One of the exemptions from the requirement to produce a prospectus is in connection with takeovers and mergers or divisions (Prospectus Regulation Art. 1 (4) (f) and (g) and P-Reg-Art. 1 (5) (e) and (f)). Where equity securities are offered in connection with a takeover or merger, there is no requirement to produce a prospectus, if a document is made available to the public in accordance with the arrangements set out in Prospectus Regulation Art. 21 (2) (the exemption document), and:

- In relation to takeovers:
  - The equity securities are fungible with existing securities already admitted to trading on a regulated market prior to the takeover, and the takeover is not considered to be a reverse acquisition transaction; or
  - The exemption document has been approved by the FCA.
- In relation to mergers or divisions:
  - The transaction is not considered to be a reverse acquisition transaction; and
  - The equity securities of the acquiring entity have already been admitted to trading on a regulated market prior to the transaction or the equity securities of the entities subject to the division have already been admitted to trading on a regulated market prior to the transaction.

Consequently, where applicable, issuers will have to submit their application for approval of an exemption document to the FCA. For more information on the application process, please contact the Listing Transactions department at 020 7066 8348.

Until HM Treasury makes regulations specifying the minimum contents of the exemption document under Article 1(7) of the Prospectus Regulation, when approving exemption documents, we will have regard to the relevant published EU regulations relating to the content of exemption documents under the EU version of the Prospectus Regulation. This is currently Commission Delegated Regulation (EU) 2021/528 of 16 December 2020.

Importantly, there is no obligation to publish supplementary prospectuses for exemption documents. This means that withdrawal rights, as provided for under section 87G of FSMA Article 23(2) of the Prospectus Regulation, will not apply.

Further, whereas a prospectus benefits from the passporting provisions under the P-Reg, there are no similar provisions for exemption documents.

A takeover that involves the offer of transferable securities, such as loan notes, to target shareholders will require a prospectus to be produced, unless an exemption applies.

#### **d) Subdivision or consolidation**

Where the exemptions in Prospectus Regulation Art 1(4)(e) or Art 1(5)(d) apply, a prospectus is not required by issuers in a redenomination. Issuers may wish to seek legal advice on whether the exemptions apply in these circumstances. In such a case we have agreed with the Recognised Investment Exchange (RIE) that no new admission application will be required going forward. The Issuer or its advisers must submit an IM – Amendment to the Official List case via the ESS Portal, specifying the number of reclassified securities and their ISINs (please go to the FCA Listing Applications page for more information on ESS and links to the User Guide explaining how to register – <https://www.fca.org.uk/markets/ukla/listing-applications>) at least 48 hours prior to the requested listing hearing date. The submission should also set out the proposed timetable and be accompanied by the circular or other document, detailing to shareholders the proposed arrangements. The Issuer or its advisers must ensure that the relevant team at the RIE is also notified.

#### **e) Issues of non-equity securities by credit institutions – the €75 million exemption**

There is an exemption from the requirement for a prospectus where a credit institution issues non-equity securities in a continuous or repeated manner for a total aggregated consideration in the United Kingdom of less than €75 million calculated over a period of 12 months (Article 1(4)(j) and 1(5)(i) Prospectus Regulation, PRR 1.2.3 and 1.2.4 UK).

In applying the exemption, all types of non-equity securities that fall within the exemption should be added together. For example, if a credit institution issues plain fixed rate debt securities of €70 million and floating rate debt securities of €10 million within a 12 month period, the exemption threshold would be breached and the issuer would be obliged to draw up a prospectus for the second issue.

Non-equity securities include redeemable debt securities where the issuer has the right to redeem the security before maturity, provided that the securities are not subordinated, convertible or exchangeable, do not give a right to subscribe for or acquire other types of securities and are not linked to a derivative instrument.

In our view the fact that the issuer has entered into a derivative contract in order to cover its risk does not of itself mean that non-equity securities are not within the exemption. We consider that securities are linked to a derivative instrument if this affects the rights of the investor, which is not the case where the issuer has taken out a derivative for its own benefit.

## **f) The €8 million and €100,000 exemptions**

The following exemptions apply to the obligation to publish a prospectus where there is a public offer:

- An offer of securities addressed to investors who acquire securities for a total consideration of at least €100,000 per investor, for each separate offer (Article 1(4) (d) Prospectus Regulation)
- The total consideration for the transferable securities being offered in the United Kingdom cannot exceed € 8 million (section 86(1)(e) FSMA)

In cases of offers of warrants (and other derivative securities), for the purposes of these exemptions, we consider that it is reasonable to take the view that 'total consideration' means the consideration for the warrants and does not include the strike price for the underlying securities.