

C L I F F O R D
C H A N C E



**THE PROSPECTUS REGULATION
AND DEBT PROSPECTUSES**

**A PD3 PRIMER
LEVELS 1, 2 AND 3 (AND OTHER MEASURES)**

1 MAY 2019 (REVISED 26 JUNE)

2019: TIMING AND STATUS OF PD3 MEASURES

Level 1 – Framework principles

- The remainder of Regulation (EU) 2017/1129 (commonly referred to as “PD3”) takes effect on 21 July 2019. It will repeal Directive [2003/71/EC](#), as amended (the “PD”) in full.
- PD3 is “direct effect” and therefore does not need to be implemented by Member States.

Level 2 – Commission technical implementing measures

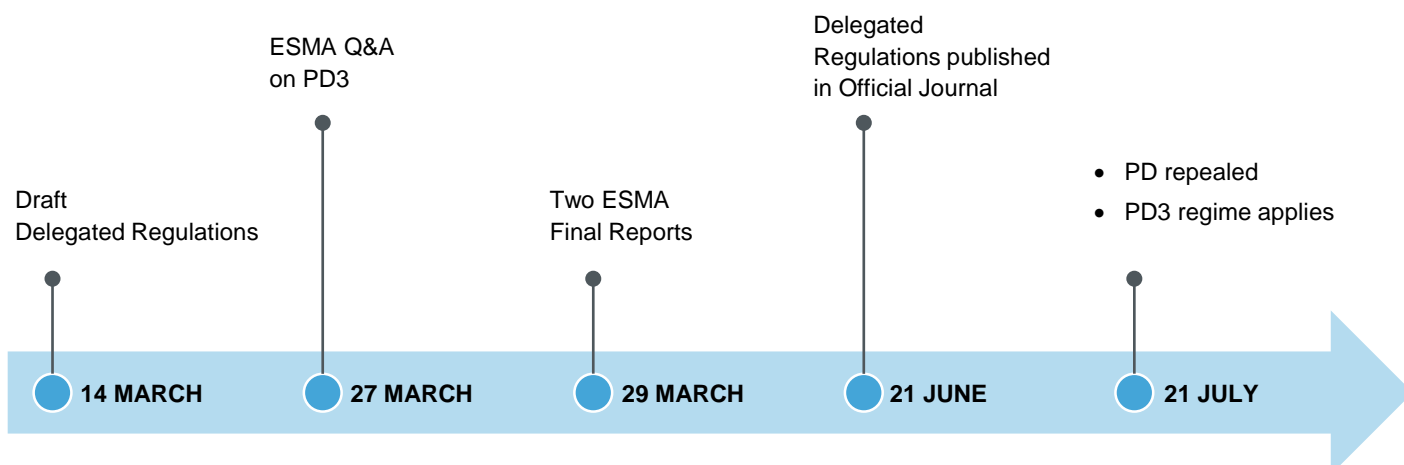
- Commission Delegated Regulation (EU) 2019/980, with Level 2 requirements (such as, prospectus content), was published in the Official Journal on 21 June 2019. It will repeal the current Level 2 Regulation [809/2004/EC](#) (on information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements) in full on 21 July.
- Commission Delegated Regulation (EU) 2019/979, with regard to Regulatory Technical Standards for key financial information in the summary of a prospectus, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication, was published in the Official Journal on 21 June 2019. It will repeal both Delegated Regulation [382/2014](#) (on prospectus supplements) and Delegated Regulation [2016/301](#) (on approval and publication of the prospectus and dissemination of advertisements) on 21 July.

Level 3 – Guidelines, etc.

- ESMA Final Report on Guidelines to competent authorities on risk factors was published on 29 March 2019.
- ESMA Final Report on Technical advice on Minimum Information Content for Prospectus Exemption was published on 29 March 2019. This relates to mergers, divisions or takeovers and also third country equivalence.
- ESMA Q&A on PD3 were published on 27 March 2019. These are fairly limited in scope and mainly focus on grandfathering and transition. The current ESMA Q&A on the PD are due to be revised in due course to reflect PD3 requirements, but are not yet available.

Miscellaneous

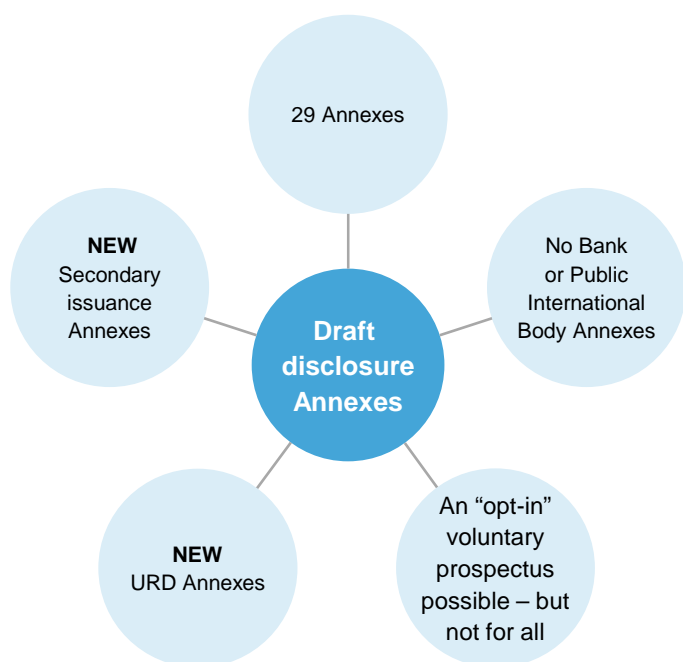
- **Grandfathering under PD3:** There will be “grandfathering” for PD prospectuses (but not registration statements) approved prior to 21 July 2019. See the 29 March 2019 ESMA Q&A.
- **Omnibus 3:** The contentious proposals to centralise certain prospectus approvals under ESMA were dropped and no longer appear in the [text adopted](#) in the European Parliament on 16 April 2019.
- **Green bonds:** “Green” disclosure requirements are expected in Q2 2019.
- **Brexit:** The UK has indicated that it will give effect to PD3 even in the event of a No-Deal Brexit prior to 21 July. See the [Financial Services \(Implementation of Legislation\) Bill](#).



PD3 – LEVEL 1 KEY FEATURES

Wholesale	<p>A “wholesale” distinction remains.</p> <p>A minimum denomination of Euro 100,000 (or equivalent) is a trigger for:</p> <ul style="list-style-type: none"> • an exemption from the need for a prospectus for an offer to the public; and • a different prospectus disclosure standard (and an exemption from a prospectus summary) when requesting admission to trading. <p>The “wholesale” disclosure will also be available for bonds admitted to trading on a restricted “professionals only” market or segment and no resale to non-qualified investors</p>
“Basics”	<ul style="list-style-type: none"> • “Approved prospectus” for public offer or admission to trading on EU regulated market. • Definition of “offer to the public” unchanged; “advertisement” now a “communication”, so likely to be construed more broadly. • Home Member State concept / criteria for selection stay same as in PD. • Passporting concept remains (as does the translation of summary requirement). • 12 month life span; Prospectus supplements and investor withdrawal rights remain. • Tri-partite prospectuses and base prospectuses are still available. • No additional prospectus required for resale if written consent to use.
Content	
Summary	<ul style="list-style-type: none"> • 7 pages, maximum (extra pages where range of securities or guarantors). • “<i>accurate, fair, clear and not misleading</i>”; “<i>read as an introduction to the prospectus</i>”. • Prescribed format in four sections; maximum of 15 risk factors. • Base Prospectuses only require issue-specific summaries (not a general one for programme). • “PRIIPs” (Reg (EU)1286/2014) “key information document “ (KID) can be used instead. • Host Member State can require translation.
Risk factors	<ul style="list-style-type: none"> • Presented in limited number of categories. • In each category, the most material risk factors shall be mentioned first.
Incorp. by ref.	<ul style="list-style-type: none"> • Broader categories will be permitted.
General disclosure	<ul style="list-style-type: none"> • “<i>necessary information which is material for ... making an informed assessment..</i>”. • “<i>Easily analysable, concise and comprehensible</i>”. • Recital 47 suggests no specific tax disclosure required, just a general warning.
Exemptions from prospectus: Public offer	<p>As well as the Euro 100,000 denomination, some exemptions in Article 1(4) include (among others):</p> <ul style="list-style-type: none"> • Addressed to investors who acquire for a total consideration of Euro 100,000; • “Qualified investors”; • Fewer than 150 persons per EEA state; • Employee share schemes (with proviso); • Securities offered in connection with a takeover by means of an exchange offer or allotted in connection with a merger or division (with proviso).
Exemptions from prospectus: Admission to trading	<p>Exemptions in Article 1(5) include (among others):</p> <ul style="list-style-type: none"> • Securities fungible with securities already admitted to trading on same regulated market, provided represent, over a period of 12 months, less than 20% of securities already admitted; • Shares resulting from conversion or exchange – subject to similar 20% cap, but with exceptions for some scenarios (<i>e.g. certain 2014/59/EU (BRRD) resolution steps</i>); • Employee share schemes; • Securities offered in connection with a takeover by means of an exchange offer or allotted in connection with a merger or division (with proviso); • Shares offered or allotted free of charge to existing shareholders.
New concepts	<ul style="list-style-type: none"> • Simplified (reduced) disclosure for SMEs and an “EU Growth” prospectus. • Simplified (reduced) disclosure for certain secondary issuance after 18 months’ admission. • “Universal registration document” with shorter approval times for frequent issuers and approval waiver available after filing for 2 consecutive years.

LEVELS 2 AND 3 – KEY FEATURES FOR DEBT



- **Approach:** Similar approach to the PD regime in that there are specific Annexes for registration documents and securities notes, by issuer and by product. There is also an Annex for “Consent” requirements, similar to PD, an Annex permitting (limited) additional disclosure in FTs and a list of specialist issuers, much like current Regulation 809/2004/EC.
- **Annexes:** There is no combination table (like the old PD Annex XVIII) indicating how the Annexes fit together, but there is guidance in operative provisions. Annexes are grouped into 5 broad categories:
 - Registration Documents;
 - Securities Notes;
 - Additional Information to be included in a prospectus (such as, on underlying shares or for asset-backed securities);
 - EU Growth Prospectus, and
 - Other categories of information.
- **New:** Key new Annexes, reflecting PD3 Level 1 additions, are Annexes for Universal Registration Documents (URDs) and for secondary issuance. A move away from debt MTN programmes to URDs is unlikely due to equity disclosure requirement. The potential utility of “simplified” secondary issue Annexes remains to be seen.

- **Wholesale prospectuses – Annexes 7 and 15:** Very similar requirements. The addition of a “use of proceeds” item may assist with green bonds on issuance. With the advent of “qualified investor only” market segments of regulated markets, lower denomination securities (less than Euro 100,000) may start to be issued with wholesale disclosure.
- **Retail prospectuses – Annexes 6 and 14:** Also very similar requirements. There is a requirement for “plain language” drafting for retail prospectuses.
- **Key areas of debate:** Likely to be around:
 - Risk factors (see next page)
 - For retail: new forms of summary (see next page)
 - Advertisements (see next page)

- **Blackline reference tools:** Clifford Chance has prepared blackline comparisons of the wholesale and retail registration document and securities note Annexes (Annexes 6, 7, 14 and 15) for clients, showing changes from the PD requirements. Speak to your usual Clifford Chance contact.



FOCUS AREAS

- **Content:** Level 1 mandates four categories for Summaries:
 - a. an introduction, containing warnings;
 - b. key information on the issuer;
 - c. key information on the securities;
 - d. key information on the offer of securities to the public and/or the admission to trading on a regulated market.
- **Length:** Level 1 also mandates a maximum length for the summary (7 pages) and states that a KID (key information document) in the case of a PRIIP can serve as the summary.
- **Base prospectuses:** Helpfully, the concept of programme summaries has been dropped. Issue-specific summaries will be required, to be annexed to the Final Terms. Individual issue-specific summaries will not need to be approved case-by-case (just as a “skeleton” *pro forma* in the base prospectus).
- **Format:** Level 2 measures do not prescribe a specific format for the summary itself, but the draft RTS mandates key financial information to be included in summaries.

- **Scope:** Level 2 provides little comfort on interpretation of advertisements under PD3. In fact, ESMA indicated during the consultation process that, whilst it is beyond ESMA’s remit to interpret “*communication*”, bilateral conversations might well be caught under PD3.
- **Dual limb test:** For practitioners, though, the fact that both limbs of the definition must be satisfied (that is, “(i) relating to a specific offer of securities to the public or to an admission to trading on a regulated market” and “(ii) aiming to specifically promote the potential subscription or acquisition of securities”) should assist.
- **Requirements:** Where communications are advertisements, Level 2 mandates specific content requirements (e.g. stating that it is an advertisement). It also replicates the PD requirement to supplement advertisements.
- **Grandfathering:** The PD3 advertisement regime will apply to securities issued under grandfathered prospectuses (see ESMA’s March 2019 Q&A).



- **Mandatory supplements:** Level 2 measures indicate when a prospectus supplement is mandatory. These are very similar to the PD mandatory requirements.
- **Withdrawal rights:** The technical issue of withdrawal rights and wholesale securities remains at Level 1, but a helpful view on supplements and withdrawal rights for wholesale debt was expressed by ESMA in its 17 July 2018 Final Report, stating that withdrawal rights only apply to an offer of securities to the public and not to “admission only” supplements.
- **Grandfathering:** ESMA also indicates in the March 2019 Q&A that it will be possible to supplement a grandfathered prospectus. (As a practical matter, the UK FCA in its January 2019 consultation CP19/6 reminds users that its Handbook will be available to view in pre-21 July 2019 format via the “show timeline” facility.)

- **Level 2 and 3:** Level 2 Annexes do not expand on Level 1 requirements, but ESMA’s Final Report on Guidelines contains 12 Guidelines for competent authorities when reviewing risk factors. These are likely to be helpful for issuers when drafting (such as, in relation to specificity and headings).
- **Categories and materiality:** A key area of debate is likely to be determining, in each category, which risk factors are most material.
 - **Categories:** To avoid unlimited categories and sub-categories, the ESMA draft Guidelines suggest that a (flexible) limit of 10 categories and sub-categories would be proportionate for a “standard, single-issuer, single-product” prospectus;
 - **Materiality:** The draft Guidelines state that materiality is to be determined by the issuer in accordance with Article 16 of PD3.
- **Risk factors and summaries:** Level 1 limits the number of risk factors in a summary to fifteen (15), but there is no strict limit on the number of risk factors to be included in the prospectus.

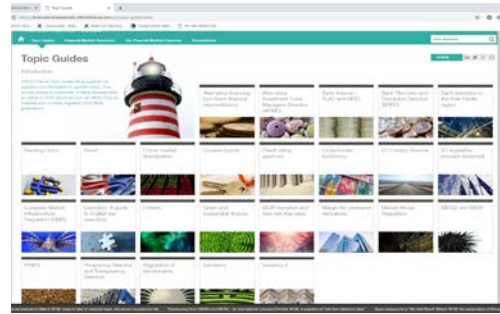
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CONTACTS AND RESOURCES

For further information, speak with the contacts listed on our [Prospectus Directive and Transparency Directive Topic Guide](#) or to your usual Clifford Chance contact.

In addition, resources are available via the Clifford Chance [Financial Markets Toolkit](#), including on the:

- Clifford Chance [Prospectus Directive and Transparency Directive](#) Topic Guide; and
- Clifford Chance [EU Legislative Process Explained](#) Topic Guide.



USEFUL LINKS

Level 1

PD3 - Regulation (EU) 2017/1129 – [Official Journal dated 30 June 2017](#).

Level 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 (published in the Official Journal on [21 June 2019](#))
- 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 (published in the Official Journal on [21 June 2019](#))
- European Commission mandate to ESMA on Level 2 measures (updated [18 June 2018](#)).

Level 3

- ESMA Final Report: Guidelines on Risk Factors, [29 March 2019](#).
- ESMA Final Report: Technical advice on Minimum Information Content for Prospectus Exemption, [29 March 2019](#).
- ESMA Q&A on PD3: ESMA/2019/ESMA31-62-1258 – Version 1, [27 March 2019](#).

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