

Regulatory framework

OVERVIEW

- The current UK listing regime has been heavily influenced and shaped by EU legislation originally enacted as part of the Commission's Financial Services Action Plan (FSAP). The FSAP, published in 1999, sought progress towards a single EU financial services market with no obstacles to cross-border activity and a sound supervisory structure.
- The key FSAP Directives that are still in force are the Prospectus Directive (PD) and the Transparency Directive (TD). These Directives were implemented in the UK primarily through Part 6 of the Financial Services and Markets Act 2000 (FSMA), which empowered the FSA (the predecessor to the FCA and the competent authority at the time) to make the Listing, Prospectus, Disclosure and Transparency Rules.
- The Market Abuse Directive (MAD) also formed a key part of the FSAP and was implemented in the UK primarily through Parts 6 and 8 of the FSMA. MAD was completely replaced by the Market Abuse Regulation (MAR) with effect from 3 July 2016. MAR is directly applicable across member states and therefore did not need to be implemented through UK legislation. However, the UK government and the FCA amended the parts of the FSMA and the LPDT Rules which implemented the previous market abuse regime under MAD, to remove overlapping and inconsistencies and to reflect the creation of the new directly applicable rules. In particular, the provisions in FSMA relating to market abuse have been repealed and the Disclosure Rules have become the 'Disclosure Guidance', with signposts to a number of MAR provisions.
- In some cases, the FSAP Directives have attempted to break down barriers and create a single market by using 'maximum harmonisation', meaning that Member States cannot impose more stringent requirements. This is the case with the Prospectus Directive. At other times the FSAP Directives have sought to achieve the same objective through common minimum standards, leaving Member States free to impose more onerous requirements. This is the case with certain aspects of the Transparency Directive.
- Both the PD and the TD have already been reviewed and amended. The PD is being replaced by a directly applicable new Prospectus Regulation, which was published in the Official Journal in June 2017 and will be fully in force from July 2019, to improve and simplify the prospectus regime in the EU. Upon implementation, the new regulation would repeal and replace entirely the PD and its implementing measures, including the PD Regulation.

- Following the reform of the structure of financial services regulation in the UK in 2013, the FSA was abolished and replaced by the FCA which now supervises the listing regime and takes enforcement action for breaches of the LPDT Rules and MAR.
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1. The Financial Services Action Plan

It is important to appreciate how much of the current UK regulatory environment is (and has been over recent years) driven by European goals for a single market in financial services. Historically, the EU's various financial markets remained relatively segmented, with business and retail consumers being deprived of direct access to cross-border financial institutions. This was largely due to the ambiguities and inflexibilities caused by the range of different European regulatory structures, legal systems, trade barriers, taxation and cultural approaches. While steps had been taken to create a single market for financial services, in practice these tended to set 'minimum standards' so a wide variety of practices developed in different member states with little or no consistency across the EU. Increasingly, however, the EU is changing its approach by implementing legislation which is based on 'maximum harmonisation', including directly applicable Regulations, to create more consistency across the EU.

With the introduction of the Euro, and the increase in the financial products available to the enhanced numbers of participants entering the European money markets, there was a renewed impetus to create a single market for financial services and to ensure a more level playing field for all market participants.

The Financial Services Action Plan (FSAP) was a set of proposals put forward by the European Commission in May 1999, at the request of the Council of Ministers. The FSAP set out key objectives in creating a single market for financial services, which included the creation of a single EU wholesale market, open and secure retail markets and state-of-the-art prudential rules and supervision.

1.1 Strategic objectives of the FSAP

The Commission set out in the FSAP a programme for rapid progress towards a single financial services market. The FSAP contained strategic objectives and the actions that the Commission believed needed to be taken to achieve those objectives.

The Commission identified three key strategic objectives:

- *A single EU wholesale market* – to make it easier to issue and trade securities across the EU;
- *Open and secure retail markets* – to create open and secure retail markets by removing obstacles which hamper cross-border activity; and
- *State-of-the-art prudential rules and supervision* – to create sound supervisory structures.

1.2 The European legislative process for financial services legislation

There is a four-level approach to financial services legislation. The European Commission, Parliament and Council are responsible for ‘Level 1’ legislative acts (i.e. a directive or regulation). Directives then have to be implemented by individual member states, whereas regulations are directly applicable in member states.

The European Securities and Markets Authority (ESMA) is then asked to produce detailed implementing measures and technical standards, covering aspects of the Level 1 legislation where more detail is required. The European Commission then adopts these ‘Level 2’ measures, usually in the form of regulations.

ESMA is also responsible for publishing ‘Level 3’ guidance on the legislation (such as the ESMA Guidelines on Delay). While not directly legally binding, issuers are required to make every effort to comply with ESMA guidelines. ESMA also produces guidance in the form of Q&As on each of the regimes.

ESMA is also responsible for facilitating the exchange of information and agreement between national supervisory authorities, and where necessary, settling any disagreements, to ensure that securities regulators at a national level take a more coordinated approach.

Details of ESMA’s role, powers, decision-making process and standing committees are available on its website (www.esma.europa.eu).

Figure 1.1: The Legislative Process

Level 1	<ul style="list-style-type: none"> ■ Commission adopts formal proposal for Directive or Regulation ■ Council and European Parliament adopt legislative act
Level 2	<ul style="list-style-type: none"> ■ Commission requests ESMA advice on delegated and implementing acts ■ ESMA drafts technical standards and Commission adopts
Level 3	<p>ESMA:</p> <ul style="list-style-type: none"> ■ adopts guidelines and recommendations ■ carries out peer review ■ mediates and settles disagreements ■ takes action in emergency situations ■ facilitates delegation of tasks and responsibilities ■ cooperates with European Systemic Risk Board (ESRB) ■ monitors and assesses market developments ■ undertakes economic analyses ■ fosters investor protection

1.3 The Market Abuse Directive and the Market Abuse Regulation

MAD (Directive 2003/6/EC) covered both market manipulation and insider dealing and, prior to 3 July 2016, applied to all financial instruments admitted to trading on a regulated market in the EU. MAD required each member state to designate a single administrative regulatory and supervisory authority to ensure its provisions were applied, with the aim of harmonising each member state's approach to tackling insider trading and market manipulation using a common set of minimum responsibilities. MAD required price-sensitive information to be disseminated as soon as possible and prescribed the circumstances in which selective disclosure of such information could be made.

In 2009, the European Commission launched a full review of MAD and, in 2014, published a new regulation on insider dealing and market manipulation (the EU Market Abuse Regulation (596/2014) (MAR)) to completely replace MAD and also a new directive on criminal sanctions for insider dealing and market manipulation, the Criminal Sanctions for Market Abuse Directive (2014/57/EU) (CSMAD). The provisions of MAR and the detailed implementing and delegated regulations under it came into force on 3 July 2016 and have direct effect in member states so did not need to be implemented through the enactment of domestic legislation. However, member states did need to amend and repeal the provisions in their national legislation which applied the previous market abuse regime under the MAD. In the UK, the Disclosure Rules for listed companies were repealed in this area and the provisions of MAR have, in effect, taken their place. The Disclosure Rules have become the 'Disclosure Guidance' with signposts to some (but not all) MAR provisions and some of the guidance previously contained in the rules has been retained. Since the UK already has a separate criminal regime for insider dealing and misstatements, which goes beyond that in CSMAD, it has opted out of CSMAD.

The provisions in MAR include an extension of the market abuse regime to a wider range of trading platforms and financial instruments, express prohibition of the manipulation of benchmarks, such as LIBOR, greater harmonisation of sanctions and significant new procedural requirements in a number of areas.

MAR is discussed in more detail in Chapter 5.

1.4 The Prospectus Directive and the PD Regulation

The PD (Directive 2003/71/EC) regulates the prospectus to be published when a company's securities are to be offered to the public or admitted to trading on a regulated market in the EEA. The PD harmonises the requirements to draw up, scrutinise and distribute prospectuses across the EU and removes cross-border barriers on raising capital, by creating a single 'passport' for issuers.

All prospectuses must meet specific disclosure standards and be approved by the competent authority in the issuer's home member state. Once the relevant competent authority has approved the prospectus it is then available for use throughout the EEA without, in theory, the issuer having to publish any further information or seek additional approval from the competent authority in any other member state. The concepts of home member state and host member state are discussed in section 1.7.

The PD Regulation (EC) No. 809/2004, published on 29 April 2004, prescribes the detailed content requirements of a prospectus through a number of different 'building blocks' of disclosure. The regulation has direct impact in each member state with effect from July 2005.

The Prospectus Directive was the subject of a review (required by the terms of the original directive) and the PD Amending Directive (Directive 2010/73/EU) came into force on 31 December 2010 with member states having until 1 July 2012 to implement the required changes.

In 2014, EU Regulation 382/2014 supplemented the Prospectus Directive with regard to the publication of supplementary prospectuses and specifies situations when a supplementary prospectus must be published. The Prospectus RTS Regulation came into force on 5 May 2014 and is directly applicable in all member states.

Further changes were made to the Prospectus Directive via the 'Omnibus II' Directive which was published in 2014 (2014/51/EU). This includes detailed amendments in relation to the approval and publication process for prospectuses, and certain issues relating to content and the dissemination of advertisements. It required ESMA to develop regulatory technical standards (RTS) to be approved by the Commission in relation to these. The Omnibus II Implementing Regulation supplementing the Directive entered into force on 24 March 2016 and has direct effect in all member states.

The European Commission, Council and Parliament have agreed a new regulation to implement the findings of a review of the prospectus regime in Europe, which was undertaken as part of its initiative to accomplish a capital markets union. The changes are designed to simplify the prospectus regime to facilitate capital raising in the EU, while maintaining consumer and investor protection. The New Prospectus Regulation was published in the Official Journal on 30 June 2017. The new regulation will repeal and replace entirely the Prospectus Directive and its implementing measures, including the PD Regulation. Most of the new Regulation will only come into force two years later (i.e. in July 2019). However, certain aspects will come into force sooner. See Chapter 4 for further detail.