

December 2019

Issuing Structured Products into the EU

MAYER | BROWN

Brexit Update

Brexit Timeline

Recent Developments



Brexit Timeline

Parliament and Politics



4 September 2019

Benn Act blocks path to no-deal



4 September 2019

No Parliamentary majority remains



19 October 2019

Brexit Super Saturday



19 October 2019

PM complies with Benn Act



4 September 2019

Conservative rebels lose the whip



17 October 2019

Revised deal



19 October 2019

Parliament approves revised withdrawal agreement but delays approval pending legislation



22 October 2019

Parliament approves European Union (Withdrawal Agreement) Bill second reading but rejects programme motion

Legislation paused pending attempt to secure General Election

Election: Brexit outcomes

Scenario 1 – Conservatives win outright

- PM Johnson's current Withdrawal Agreement comes into play

Scenario 2 – Conservative led coalition or alliance

- No deal Brexit?

Scenario 3 – Labour led coalition or alliance

- Extension and new Referendum

EU Prospectus Regulation



A g e n d a

- Background (Part I): EU Capital Markets access pre- and post Brexit; Purposes of the EU Prospectus Regulation
- EU Prospectus Regulation (“PR”) at a glance (Part II)
- Focus on important topics for structured products prospectuses (Part III)

PART I:

Background

PART I: BACKGROUND

PRINCIPAL STRUCTURE OF EU MARKET ACCESS

- Approved prospectus provides market access to the single market in the EU via a “EU passport”
- Passport Regime allows issuers to notify a prospectus approved by one National Competent Authority (NCA) to any or all other EU state(s)
- Such passporting / notification enables an issuer to offer securities to the public / list on a regulated market in the EU based on one approval by one NCA
- Example: Approval of a prospectus by the German NCA (BaFin); offer in France, Luxembourg, Spain, Norway, etc.
- **Special case Switzerland:** Access to Switzerland via recognition of EU approved prospectuses in Switzerland will be possible based on the Swiss prospectus law
- **Special case Brexit:** No UK/EU recognition system foreseen: Following Brexit an approval in the EU under EU laws is required for EU offers and an additional approval in the UK under so called “onshored” EU laws is required for offerings in the UK.

PART I: BACKGROUND

PRINCIPAL STRUCTURE OF EU MARKET ACCESS



PART I: BACKGROUND

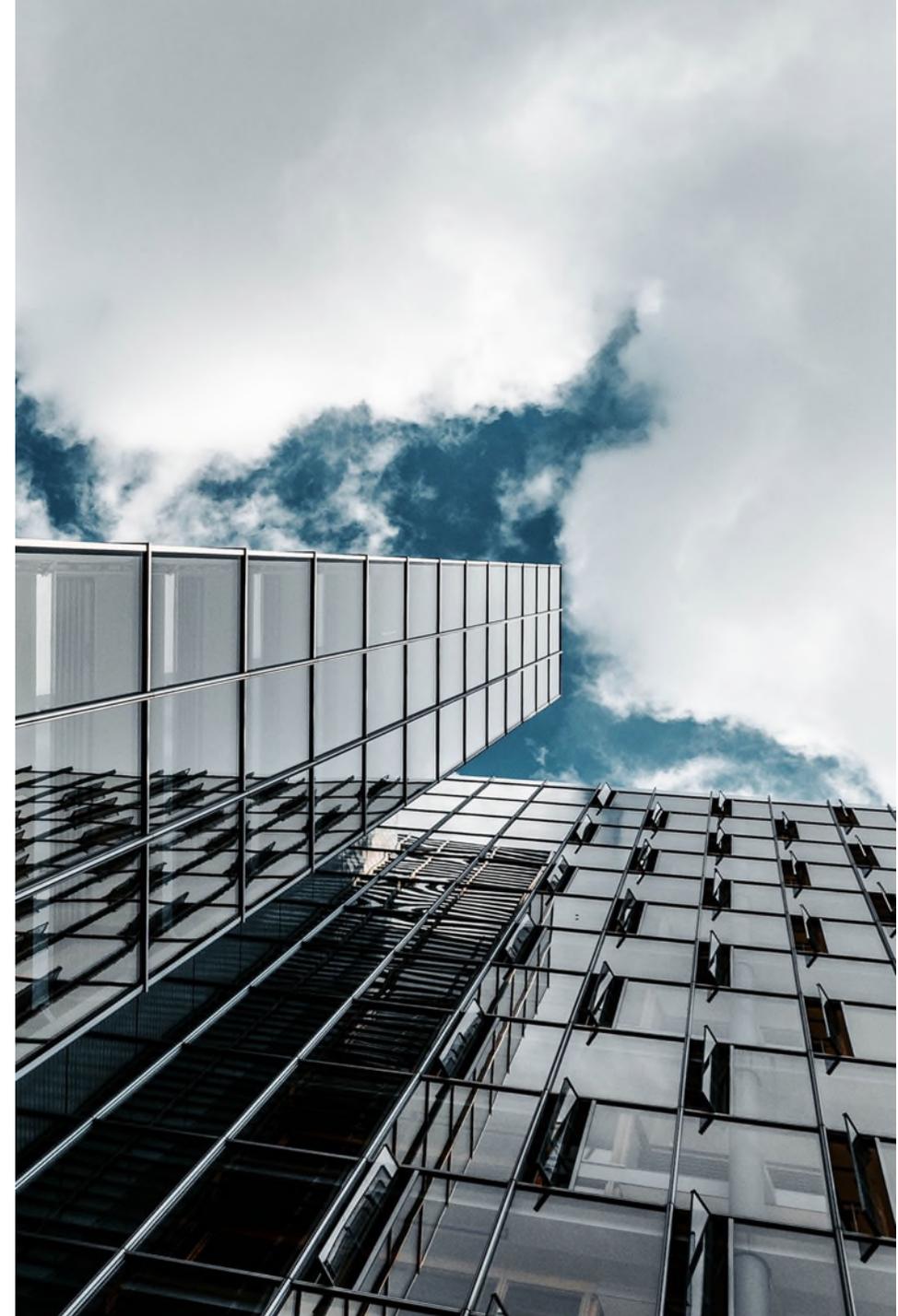
CONSEQUENCES OF BREXIT



PART I: BACKGROUND

REASONING OF THE NEW PROSPECTUS REGULATION (PR)

- Part of legislative programme of Commission for Capital Markets Union (CMU)
- Ongoing commitment of Commission to simplify EU laws and make them more effective and efficient
- Decrease administrative burdens
- Enhance consumer and investor protection
- Aim to facilitate access to financial markets for companies, with the emphasis on small and medium-sized enterprises (SMEs)
- Broaden harmonisation across Europe by
 - Using a regulation instead of a directive as a legislative instrument (as a directive is directly applicable across the EU)
 - Eliminating the “smallest” national differences in the application of the regulation
 - **But:** Each member state has its own NCAs with an established approval practice. However, the aim is to develop a uniform approval practice under the PR across all NCAs
- Align prospectus laws with other disclosure regulations (e.g., Transparency Directive or PRIIPS Directive)





PART I: BACKGROUND

OVERVIEW OF THE LEGAL FRAMEWORK

Level I

- Prospectus Regulation (EU) 2017/1129 dated 14 June 2017 (with most provisions applicable as from 21 July 2019)

Level II

- Delegated Regulation (EU) 2019/980 (regarding the format, content, review and approval of a prospectus) (DelReg)
- Delegated Regulation (EU) 2019/979 (regarding regulatory technical standards (RTS) on key financial information in the summary, the publication of prospectuses, advertisements, supplements and the notification portal)

Level III

- ESMA Guidelines for the risk factors (ESMA 31-62-1293)
- ESMA Q&A on the Prospectus Regulation (ESMA 31-62-1258)
- ESMA Q&A on Prospectuses (ESMA 31-62-780) (as applicable to the new prospectus laws)

Additional Guidance

- BaFin Guidance on the review of prospectuses (*Merkblatt zur Prüfung von Wertpapierprospekten auf Verständlichkeit* (WA 51-Wp 7115-2019/0099))
- CSSF Circular 19/724 (Technical specifications regarding the submission of documents to the CSSF under Regulation (EU) 2017/1129 and the Law of 16 July 2019 on prospectuses for securities and presentation of the regulatory framework governing prospectuses)

PART II:

The New PR

PART II: THE NEW PR

OVERVIEW OF THE MOST IMPORTANT CHANGES

- Recalibration of prospectus formats: simplified prospectuses and a new EU growth prospectus
- Voluntary prospectuses
- Restructuring of the prospectus summary (limitation to seven pages and more comprehensive)
- New Universal Registration Document and status of frequent issuer
- Restructuring of the risk factors
- More options for the incorporation of specific information by reference in a prospectus
- Modernization of the publication of the prospectus (publication is required for making use of a prospectus)
- Modifications to some of the minimum content requirements for the relevant prospectus types (equity, debt, ABS, simplified prospectuses) on the EU delegated legislative level (so-called Level II regulations)





PART II: THE NEW PR PROSPECTUS REQUIREMENTS AND EXEMPTIONS

- EU approved Prospectus required for
 - Offers of securities to the public in the EEA; and/or
 - Admissions to trading on one or more EEA regulated markets
- “Offer of securities to the public” means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries
- Important prospectus exemptions in the practice:
 - Only private offers
 - Public offer is addressed solely to qualified investors
 - Public offers relating to securities with a minimum denomination of at least Euro 100,000 or a minimum purchase amount of EUR 100,000
 - Public offers addressed to fewer than 150 natural or legal persons per Member State
 - Securities to traded only on a regulated market (or segment thereof) to which only qualified investors have access
 - In Germany if the total consideration in the EU does not exceed EUR 8,000,000 over a period of 12 months (but a three page BaFin approved long securities information sheet is required in this case)

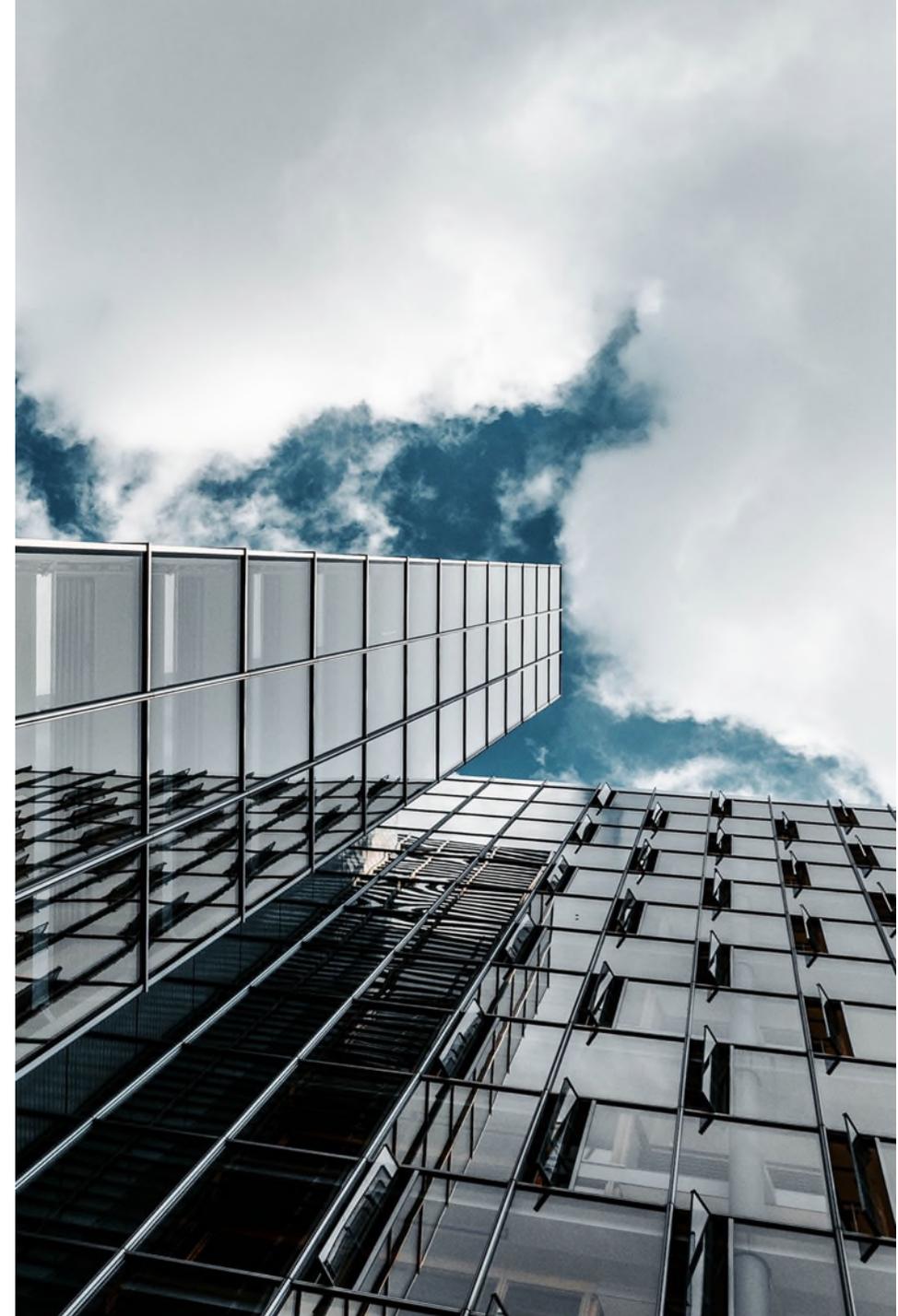
PART II: THE NEW PR

FORMATS FOR PROSPECTUSES AND REGISTRATION DOCUMENTS

- Wholesale prospectus* for non-equity securities, which is applicable in the following cases:**
 - Non-equity securities admitted to trading on a regulated market, to which only qualified investors can have access or
 - Non-equity securities with a denomination per unit of at least EUR 100,000
- Retail Prospectus*/**
- Simplified prospectus for secondary issuances**
- EU Growth Prospectus**
- Base prospectus for non-equity securities**

* *As a standalone or as a base prospectus*

** *As a single document or as tripartite prospectus comprised of (i) registration document, (ii) securities note and, if applicable, (iii) summary*





PART II: THE NEW PR FORMATS FOR REGISTRATION DOCUMENTS

- Registration Document
 - Different minimum content requirements for debt and equity issuers
 - Approval of NCA required
 - Can be supplemented by way of a supplement approved by NCA
 - Can be used in a prospectus either in the form of a tripartite prospectus or by way of incorporation by reference (however in this case another review by NCA is possible, in particular if different to the approving NCA)
- Universal Registration Document (URD)
 - Can be used for debt and equity issuances; however, minimum content requirement is based on equity disclosure standards
 - Frequent issuers may file the URD with the competent authority without prior approval; however, approval is required if used as part of a tripartite prospectus. In addition, in case of incorporation by reference into a prospectus a review by NCA is possible, in particular if different from the approving NCA)
 - Disclosure obligations under the Transparency Directive may be fulfilled by approval or filing of the URD

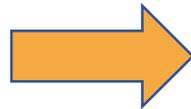
PART II: THE NEW PR

STRUCTURE AND CONTENT OF EU PROSPECTUSES

Regulatory Structure (based a tripartite prospectus angle):

- Summary (in case of retail offering)
- Registration Document (Issuer Description)
 - Risk Factors
 - Description of the Issuer*
- Securities Note (Description of the securities, including any guarantees and guarantors)
 - Risk Factors
 - Description of the Securities*
 - Description of the guarantor (as if an Issuer) and any guarantee*
 - Description of the offer/admission to trading*

* All based on the minimum content requirements set out in the Annexes to the DelReg.



Stand alone prospectus structure in practice:

- Summary (in case of retail offering)
- Risk Factors
 - Issuer Risk Factors
 - Securities Risk Factors (including Guarantor)
- Description of the Issuer*
- Description of the securities, including any guarantees and guarantors*
- Description of the offer/admission to trading*

*All based on the minimum content requirements set out in the Annexes to the DelReg.





PART II: THE NEW PR BASE PROSPECTUSES

- Base Prospectus
 - Common type of prospectus for frequent issuances, in particular for MTN programs and for structured products programs
 - Valid for one year from approval by the NCA
 - Contains the full issuer description and the description of various different products which may be issued thereunder
 - Securities and issue specific information (payout structure, interest, conditions of the offer) are described as options in the Base Prospectus)
 - Needs to be approved by NCA
- Final Terms
 - Determine which of the options in the Base Prospectus are applicable to the individual issue
 - Are filed with the NCA (but not approved)
- Summary (issue specific) in case of retail offers to be annexed to the Final Terms (but not approved by NCA)

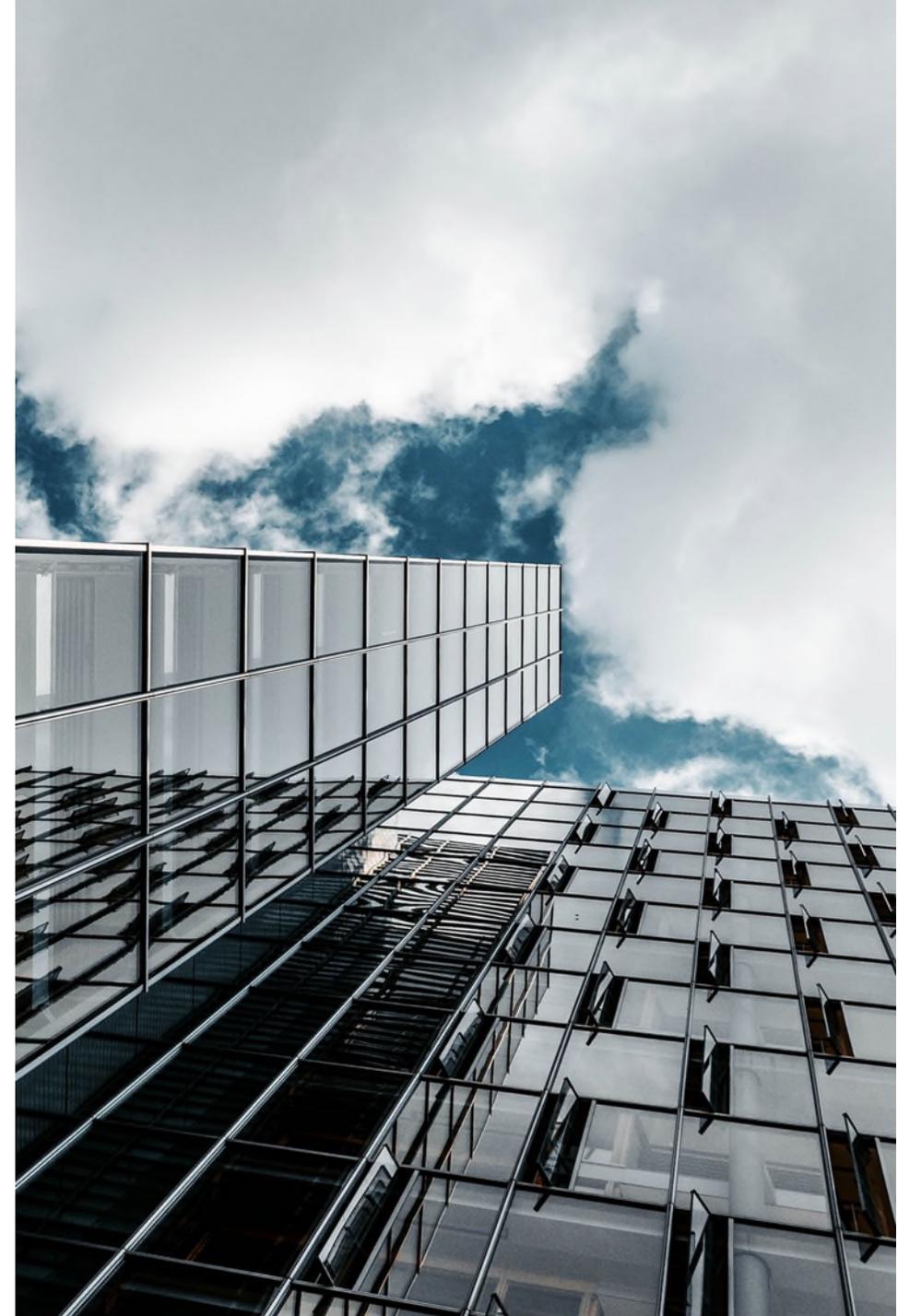
PART III:

Important Aspects under the New PR

PART III: NEW FOCUS UNDER THE PR ON RISKS FACTORS

IMPORTANT ASPECTS FOR BASE PROSPECTUSES UNDER THE NEW PR

- New section “description of the program” to explain the content and use of the base prospectus
- A base prospectus may be drawn up as a single document or as separate documents
- Transparency of structure/limitations of modularity/requirement that different securities in the base prospectus are clearly segregated and ideally numbered
- Plain language requirement for retail prospectuses
 - Plain language/short sentences should be used, if possible
 - How to use definitions? Is a glossary required?
 - How to describe complex legal aspects (like bail-in)?
 - Explanations of payout-formulas. Does it make sense to use examples/ payout scenarios to illustrate the payout?



PART III: NEW FOCUS UNDER THE PR ON RISKS FACTORS

GENERAL REQUIREMENTS

- The risk factors shall be limited to risks which are **specific** to the issuer and/or to the securities and which are **material** for taking an informed investment decision
- Assessment of the materiality of the risk factors should be based on the **probability of their occurrence** and the expected **magnitude** of their **negative impact**
- The assessment of the materiality may be disclosed by using a qualitative scale of low, medium or high
 - Some NVAs, however, require at least the application of any kind of materiality scale (as a substitute for low, medium or high)
- The risk factors shall be presented in a limited number of **categories** depending on their nature (general limit of 10, but a higher number can be used if this is based on a specific justification)
- In each category the **most material risk factors** shall be mentioned first (plural or singular?)
- Further requirements set out in the ESMA Guidelines which are addressed to NCAs

PART III: NEW FOCUS UNDER THE PR ON RISK FACTORS CATEGORIZATION

- Risk Factor Examples in the ESMA Risk Guidelines related to the **Issuer**
 - Risks related to the issuer's financial situation
 - Risks related to the issuer's business activities and industry
 - Legal and regulatory risks
 - Internal control risks
 - Environmental, social and governance risks
- Risk Factor Example in the ESMA Risk Guidelines related to the **Securities**
 - Risks related to the nature of the securities
 - Risks related to the underlying
 - Risks related to the guarantor and the guarantee
 - Risks related to the offer to the public and/or admission of the securities to trading on a regulated market
- Recommendation: Existing risk factors as a starting point for re-ordering in categories. Use of sub-categories helpful in case of base prospectuses



PART III: NEW FOCUS UNDER THE PR ON RISKS FACTORS

EXPERIENCE WITH NCAs

- Risk factors are so far the main focus by NCAs, however significant different approaches by NCAs currently and even within NCAs
- NCAs do not accept general references to risk of all “car manufacturers” / “banks”
- The most material risk factor is to be set out first and highlighted
- NCAs ask for the reasoning of categorization
- Administrative practice re. interpretation of the risk guidelines is still developing
- Disclaimer and mitigation language in risk factors must be eliminated
- Risks contained in other parts of the prospectus must be moved in the risk factor section

OUR TEAM



Dr. Patrick Scholl
Partner, Frankfurt
Banking & Finance
E pscholl@mayerbrown.com
T +49 69 7941 1060



Alexei Döhl, LL.M.
Senior Associate, Frankfurt
Banking & Finance
E adoehl@mayerbrown.com
T +49 69 7941 1105



Marcel Hörauf
Senior Associate, Frankfurt
Banking & Finance
E mhoerauf@mayerbrown.com
T +49 69 7941 2236



Dr. Berthold Kusserow, LL.M.
Senior Counsel, Frankfurt
Banking & Finance
E bkusserow@mayerbrown.com
T +49 69 7941 2995



Sarah Faylor, LL.M.
Transaction Lawyer, Frankfurt
Banking & Finance
E sfaylor@mayerbrown.com
T +49 69 7941 2975



Johannes Mönch, LL.M.
Transaction Lawyer, Frankfurt
Banking & Finance
E jmoench@mayerbrown.com
T +49 69 7941 2238



Ann-Kathrin Balster
Associate, Frankfurt
Banking & Finance
E abalster@mayerbrown.com
T +49 69 7941 2283

OUR TEAM *(cont'd)*



Ed Parker

Partner, London
Banking & Finance
E eparker@mayerbrown.com
T +44 20 3130 3922



Chris Arnold

Partner, London
Banking & Finance
E carnold@mayerbrown.com
T +44 20 3130 3610



Chris Chapman

Partner, London
Financial Services Regulatory
E cchapman@mayerbrown.com
T +44 20 3130 3344



James Taylor

Partner, London
Banking & Finance
E jtaylor@mayerbrown.com
T +44 20 3130 3136



Nanak Keswani

Counsel, London
Banking & Finance
E nkeswani@mayerbrown.com
T +44 20 3130 3710



Neil Macleod

Counsel, London
Financial Services Regulatory
E nmacleod@mayerbrown.com
T +44 20 3130 3252



Emma Khoo

Senior Associate, London
Financial Services Regulatory
E ekhoo@mayerbrown.com
T +44 20 3130 3183

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