

June 2020

Issuing Structured Products into the EU

MAYER | BROWN

A g e n d a

- Brexit update
- EU structured products market update
- 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)
- Post BREXIT Considerations (Part IV)



Brexit Update

Brexit Timeline

Key Milestones



17 October 2019

UK and EU agree on terms of the Withdrawal Agreement



13 December 2019

Conservative party, led by Boris Johnson, wins the 2019 general election by a substantial majority



29 October 2019

EU and UK agree to third extension of the Article 50 period

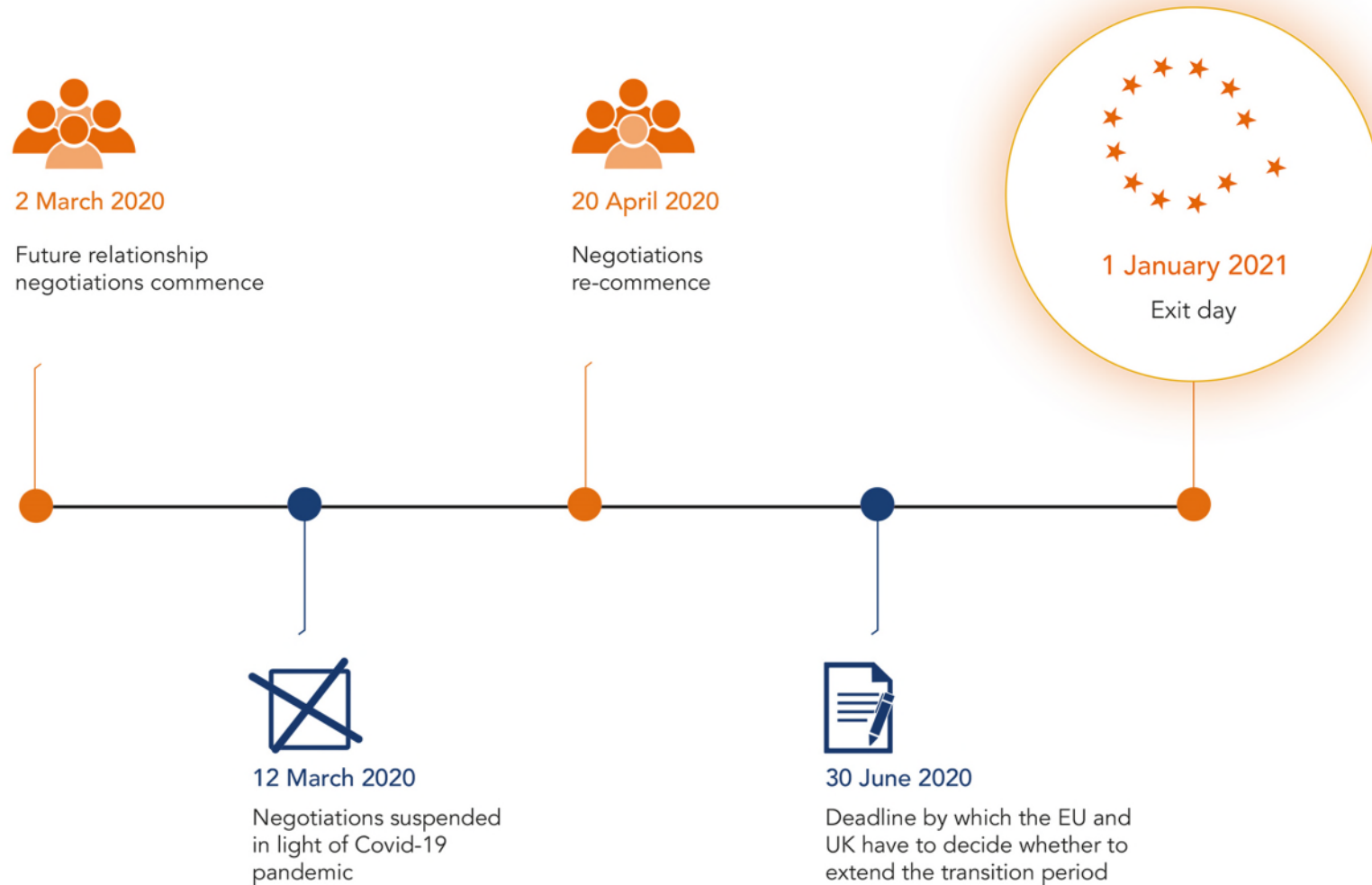


31 January 2020

UK leaves the EU and transition period begins

Brexit Timeline

Recent Developments and Next Steps



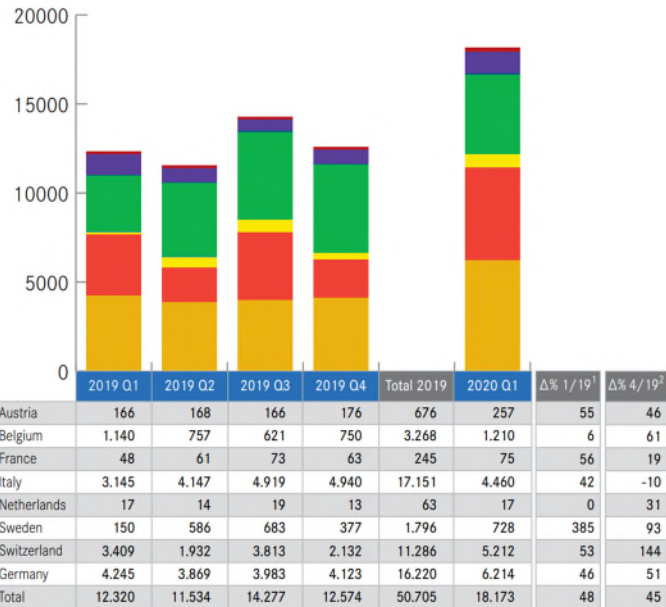
EU structured product market update

MARKET UPDATE

THE GERMAN MARKET FOR STRUCTURED PRODUCTS: POSITION WITHIN THE EUROPEAN MARKET

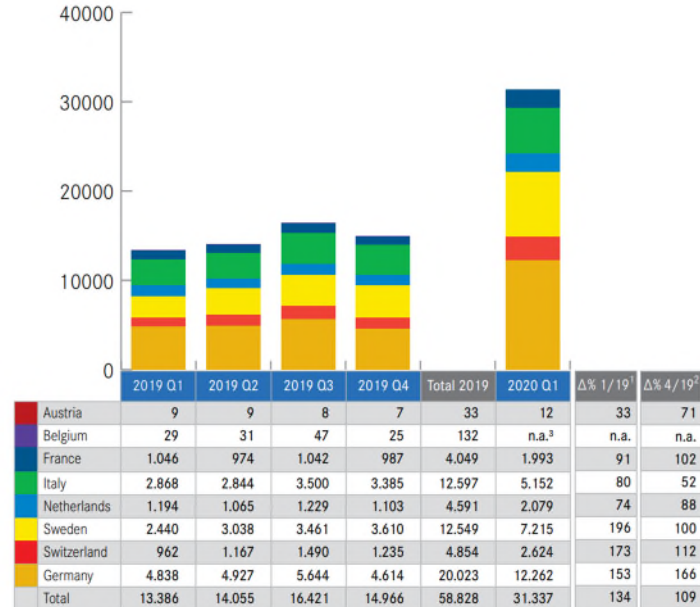
Investment Products

in Mio. EUR



Leverage Products

in Mio. EUR



Source: Country Associations, Derivative Partners

¹ Field indicates per cent change between Q1/2020 and equivalent last year quarter Q1/2019.

² Field indicates per cent change between reporting quarter Q1/2020 and previous quarter Q4/2019.

³ Reporting disruption for Q1 due to business transformation of commercial entities. Reporting resumes in Q2.

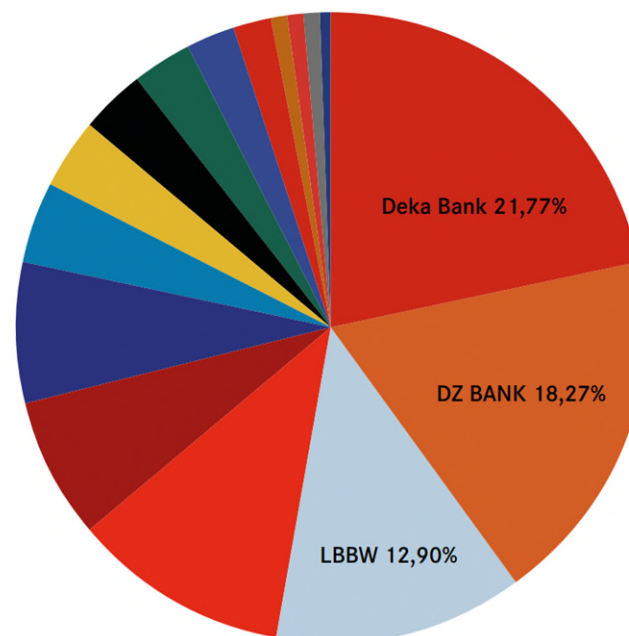
Source: European Structured Investment Products Association (EUSIPA)

MARKET UPDATE

THE GERMAN MARKET FOR STRUCTURED PRODUCTS: THE ISSUERS

Market shares by market volume (December 2019):

■ Deka Bank	14.274.392.788	21,77%
■ DZ BANK	11.976.726.912	18,27%
■ LBBW	8.454.256.193	12,90%
■ Helaba	7.121.841.203	10,86%
■ HypoVereinsbank	4.890.217.131	7,46%
■ Deutsche Bank	4.619.829.788	7,05%
■ BayernLB	2.818.289.737	4,30%
■ Commerzbank	2.288.874.744	3,49%
■ Société Générale	2.246.924.022	3,43%
■ BNP Paribas	1.849.845.939	2,82%
■ Vontobel	1.758.754.327	2,68%
■ HSBC Trinkaus	1.176.249.960	1,79%
■ Goldman Sachs	614.771.560	0,94%
■ UBS	561.159.628	0,86%
■ Citi	476.656.136	0,73%
■ Morgan Stanley	427.260.010	0,65%



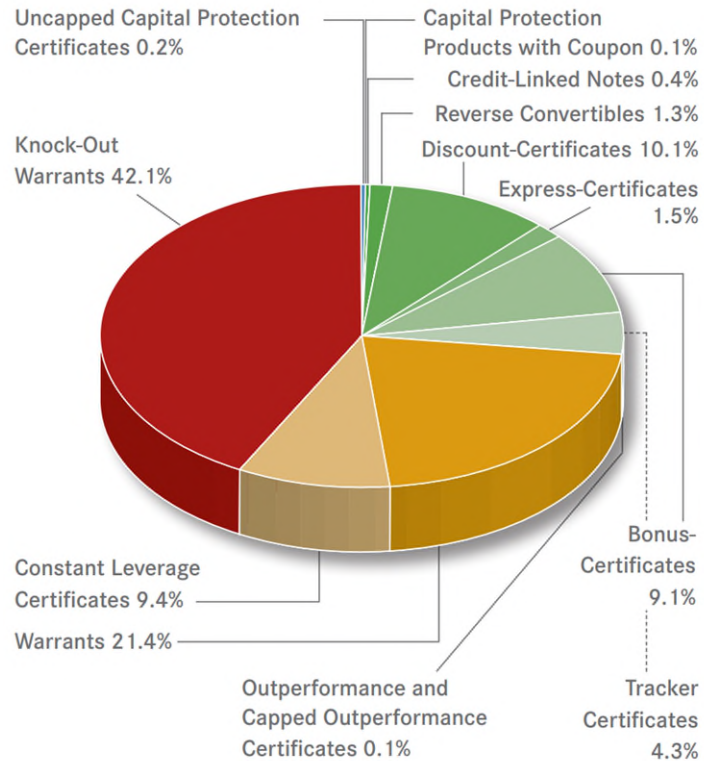
Top 3 issuers ≈ 52,94%

Source: German Derivatives Association (Deutscher Derivateverband)

MARKET UPDATE

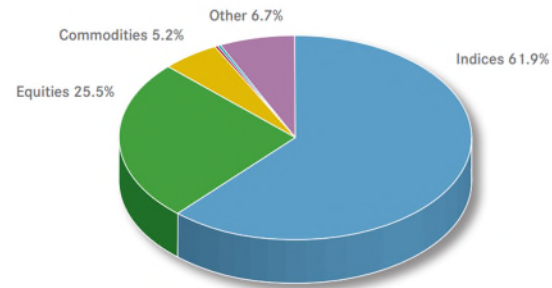
THE GERMAN MARKET FOR STRUCTURED PRODUCTS: THE PRODUCTS

Market share by volume of product category (March 2020):

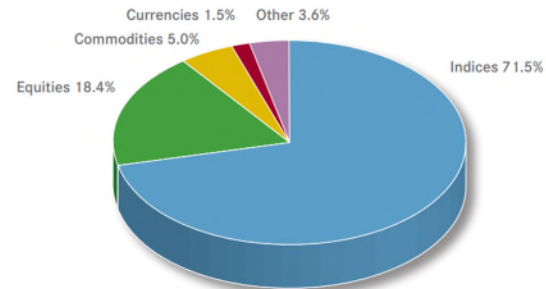


Underlyings per product category (March 2020):

Investment products by underlying



Leverage products by underlying



Source: German Derivatives Association (Deutscher Derivateverband)

MARKET UPDATE

THE GERMAN MARKET FOR STRUCTURED PRODUCTS: RECENT TRENDS

Turnover (March 2020):

ca. **EUR 2.3 billion** in investment products

+

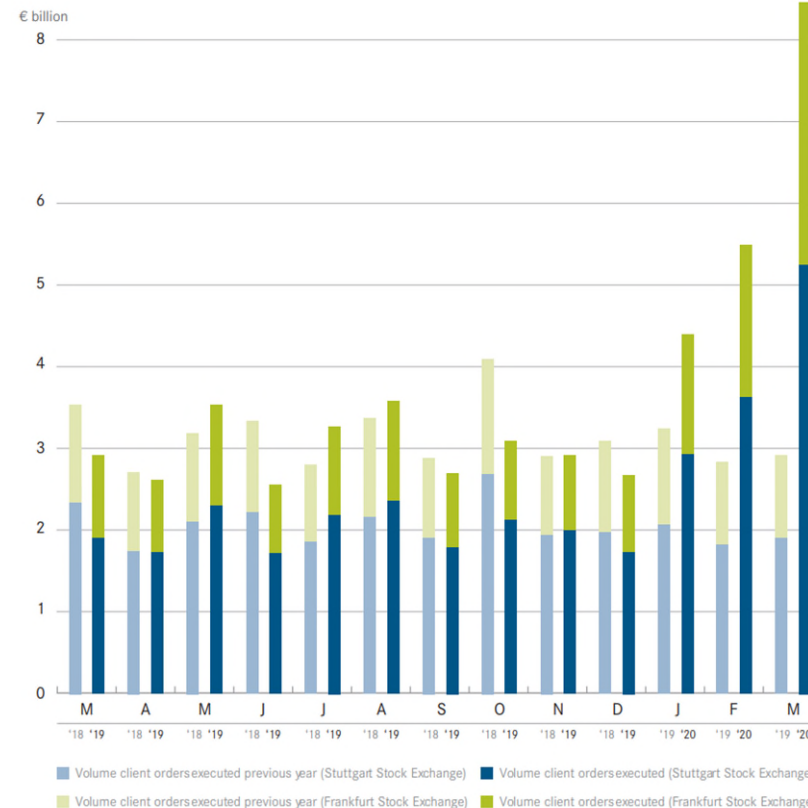
ca. **EUR 6.2 billion** in leverage products
(*Knock-out Products up by 93.5% from February*)

≈

ca. EUR 8.5 billion in total

(up **53.1%** from February)

Stock exchange turnover (March 2019 vs March 2020):



Source: German Derivatives Association (Deutscher Derivateverband)

PART I:

Background

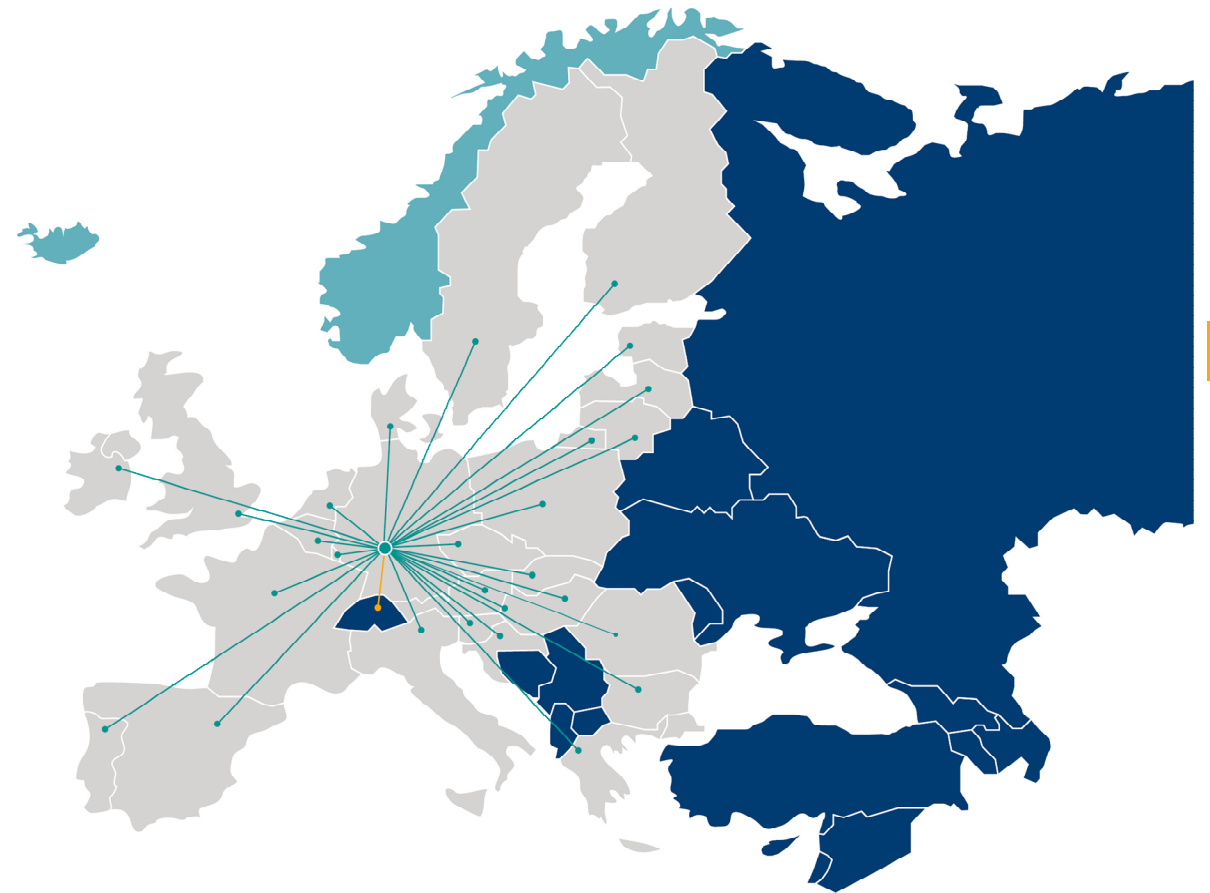
PART I: BACKGROUND

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.
- Language requirements with respect to the relevant EU offering states apply in case of retail offerings but only with respect to the language of the summary.
- **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 “on-shored” 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

EU MARKET ACCESS: REGULATORY AND CIVIL LAW ASPECTS

- MIFID (I+II) and EU-PRIPs Regulation form the basis of the retail distribution in the EU.
- MIFID II implements strict principles on product governance (in particular via the obligation to pre-define a target market) and on investment advise
- EU-PRIPs Regulation establishes short form information documents - Key Information Document (KID) (three pages long) - with a pre-determined content and order of contents; even certain disclosures for certain information or warnings are pre-determined and may not be altered. The most material aspect of the KID is the risk indicator as a “pure number”. KIDs must be prepared in an accepted language in the relevant EU offering state
 - A review of the EU-PRIPs Regulation with a market consultation is ongoing
- Civil law requirements on the terms and conditions of structured products are not harmonized within the EU. There are still differences with regard to consumer protection and there are certain jurisdictions with case law on “unfair contract terms”
- Prospectus liability is also not harmonized on the EU level – however there are certain harmonized aspects (like liability concepts for prospectus summaries and KIDs)
- Other regulations: Benchmark-Regulation / EU Sustainable Finance package (EU Taxonomy Regulation, Disclosure Regulation and EU Green Bond Standard)

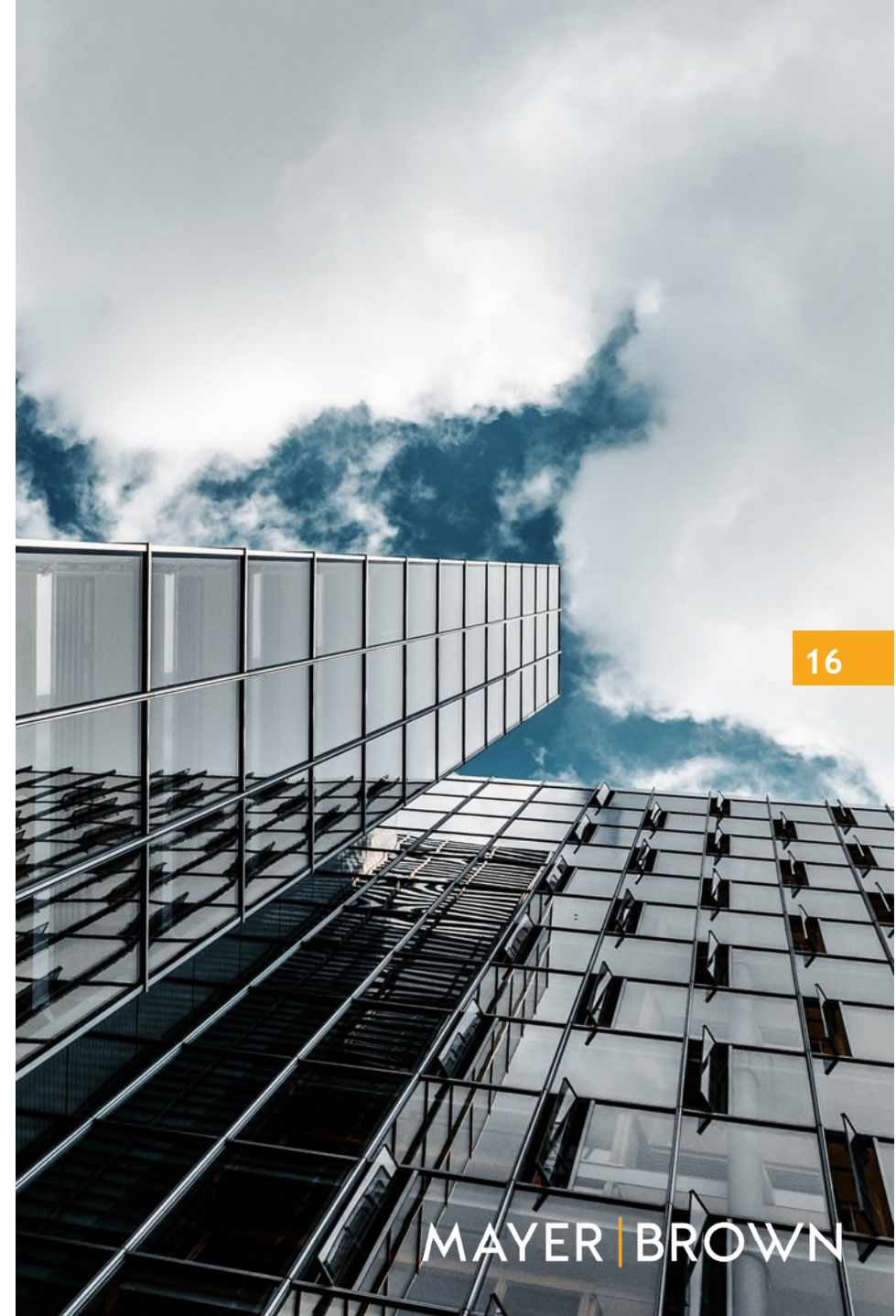
PART II:

The New PR

PART II: THE NEW PR

REASONING OF THE NEW PROSPECTUS REGULATION (PR)

- Part of legislative programme of the Commission for Capital Markets Union (CMU)
- Ongoing commitment of the Commission to simplify EU laws and make them more effective and efficient
- Decrease administrative burdens
- Enhance consumer and investor protection
- 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 (a Regulation is directly applicable in all EU member states)
 - Eliminating the “smallest” national differences in the application of the Regulation
 - **But:** Each member state has its own National Competent Authorities (NCAs) with an established approval practice. 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 Regulation)





PART II: THE NEW PR

OVERVIEW OF THE LEGAL FRAMEWORK (EXCERPT)

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

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:
 - Strictly private offers
 - Public offer is addressed solely to qualified investors
 - Public offers relating to securities with a minimum denomination of at least EUR 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 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 and if URD is not approved)
 - Disclosure obligations under the Transparency Directive may be fulfilled by approval or filing of the URD

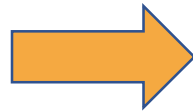
PART II: THE NEW PR

STRUCTURE AND CONTENT OF EU PROSPECTUSES

Regulatory Structure (based on 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 for Structured Products

PART III: IMPORTANT ASPECTS FOR RETAIL BASE PROSPECTUSES

TRANSPARENCY AND PLAIN LANGUAGE

- 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; limitation of number of products in the prospectus are requested / welcomed by certain regulators
- Plain language requirement for retail prospectuses
 - Plain language/short sentences should be used, if possible
 - Transparency of prospectus and its structure. How to use section or glossary can be used
 - Description of complex legal aspects (like bail-in) in plain form
 - Explanations of payout-formulas. Examples or payout scenarios to illustrate the payout can be used but are not required

PART III: IMPORTANT ASPECTS FOR RETAIL BASE PROSPECTUSES

GENERAL REQUIREMENTS FOR RISK FACTORS

- No uniform application currently in the EU. Certain regulators apply a very details and strict review on risk factors
- 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
 - For example, risks that general apply to all kind of financial instruments are not specific to a structured product (however, the border line is complex and needs to be cautiously addressed in line of liability risks)
 - 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
- 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 NCAs, however, require at least the application of some kind of materiality scale (as a substitute for low, medium or high), for example with respect to the negative impact (loss of capital / total loss of capital / zero yield / negative yield / (material) additional costs / material loss in rights)
- 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 particular in base prospectuses)
- In each category the **most material risk factors** shall be mentioned first (unclear: plural or singular?)
- Each risk factor shall end with a specific risk conclusion (no repetitions or similar conclusions for each risk factors)
- Duplicative risk factors will be challenged by NCAs. The combination of several risks within one risk factor should be avoided.
- Further requirements set out in the ESMA Guidelines which are addressed to NCAs; certain NCAs ask for the reasoning of categorization

PART III: IMPORTANT ASPECTS FOR RETAIL BASE PROSPECTUSES

CATEGORIZATION OF RISK FACTORS

- 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
 - 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 payments under the securities
 - Risks related to the other terms of the securities
 - Risks related to the offer to the public and/or admission of the securities to trading on a regulated market
 - Risks related to the underlying
 - Risks related to the guarantor and the guarantee
- Recommendation: Existing risk factors as a starting point for re-ordering in categories. Use of sub-categories helpful in case of base prospectuses

PART IV:

Post-BREXIT Considerations

PART 1: BACKGROUND

UK FINANCIAL SERVICES REGIME POST-BREXIT

- European Union (Withdrawal Act) 2018 (“EUWA”) preserves UK legislation implementing EU financial services law and regulation
- Conversion of directly applicable EU legislation into domestic law (so called “on-shoring”)
- Statutory instruments (“SIs”) made by Her Majesty’s Treasury (“HMT”) enables on-shored-EU law to function effectively
- SIs to become effective post-implementation period (currently set to expire at 11pm (London time) on 31 December 2020)



PART 1: BACKGROUND

UK FINANCIAL SERVICES REGIME POST-BREXIT)

- Coverage of SIs includes all critical UK financial services law relating to structured products:
 - Official Listing of Securities, Prospectus and Transparency (Amendment) (EU Exit) Regulations 2019 (Prospectus Regulation/Transparency Directive)
 - Packaged Retail and Insurance-based Investment Products (Amendment) (EU Exit) Regulations 2019 (PRIIPs Regulation)
 - Market Abuse (Amendment) (EU Exit) Regulations 2018 (Market Abuse Regulation)
 - Benchmarks (Amendment) (EU Exit) Regulations 2018 (Benchmarks Regulation)
 - Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (Markets in Financial Instruments Directive II) – so called “UK MiFIR”
- Approach of SIs:
 - EU member states treated as third (non-EU) countries
 - Passport rights of EU financial services firms revoked
 - Functions of European Securities and Markets Authority (ESMA) transferred to UK regulators (FCA or PRA) and functions of European Commission transferred to HMT

PART 1: BACKGROUND

UK FINANCIAL SERVICES REGIME POST-BREXIT

- More specific outcomes of on-shoring:
 - **Prospectus Regulation:** Issuers wishing to offer securities to the public in the UK or admit securities to trading on the London Stock Exchange will need to seek approval of their prospectuses by FCA
 - **PRIIPs Regulation:** UK legislation covers only retail investors in the UK, functions of ESMA and Occupational Pensions Authority transferred to FCA and functions of European Commission transferred to HMT
 - **Market Abuse Regulation:** UK legislation continues to cover instruments admitted to trading or traded on both UK and EU trading venues, transfer of powers to FCA and removal of obligation on UK supervisors to share information or co-operate with EU authorities
 - **Benchmarks Regulation:** EU-located administrators (such as EMMI, the administrator of EURIBOR) must be approved by the FCA through equivalence, recognition or endorsement to enable continued use by UK supervised entities, but additional transitional provision migrates to new UK register for 24-months any benchmark or administrator on the ESMA register



PART 1: BACKGROUND

UK FINANCIAL SERVICES REGIME POST-BREXIT

- The loss of passporting rights affects “approved person” status in the UK of European based financial institutions and investment firms
- Entities with temporary permission under the Temporary Permission Regime (TPR) deemed permission under Part 4A of FSMA pursuant to The EEA Passport Rights (Amendment, etc., and Transitional Provisions) (EU Exit) Regulations 2018
 - Accepting deposits regime (s. 19 FSMA)
 - Financial promotion regime (s. 21 FSMA)
 - Markets in Financial Instruments (Amendment) (EU Exit) Regulations 2018 (Directive 2014/65/EU (MiFID II) and EU Delegated Regulation 2017/593 (Product Governance Rules)) – so called “UK MiFIR”
- FCA Handbook Product Intervention and Product Governance Sourcebook requires UK investment firm subject to UK MiFIR to determine target market assessment in respect of securities it manufactures, mutual responsibility of manufacturers and requirements for distributors
- FCA Handbook Conduct of Business Sourcebook (COBS) regulate suitability / appropriateness tests need to be conduct by UK manufacturers
- Requirements of the UK MiFIR substantially the same as the EU MiFID II regime though, on an securities offering, manufacturers located in the UK AND EU will need to refer to the relevant legislation that governs their product governance rules

UK FINANCIAL SERVICES – LOOKING TO THE FUTURE

- EU equivalence regime? Level playing field vs sovereignty and politicization of decisions by EU
- House of Lords (EU Financial Affairs Sub-Committee)
 - Equivalence regime “patchwork” (40 areas across 17 pieces of legislation) in any case and equivalence can be removed at very short (30-days) notice (e.g. equivalence for Switzerland (share-trading) withdrawn in July 2019 as part of negotiation of broader EU-Swiss relationship)
 - “Rule based approach” (EU rule-book) vs “outcome based approach” to financial regulation - More power transferred to UK regulators, rather than prescribed rules in primary legislation (drives innovation and ability to respond flexibly)
 - Feeling that EU financial services regime is, in parts, not “fit for purpose” (see below)
 - No “bonfire of regulations” but targeted adjustments to EU financial services rules (divergence) that do not prevent cross-border financial services
 - Regulators may be given a “secondary competitiveness objective” – generates attractiveness for the City of London (risk and return analysis, not just risk analysis)
 - New areas such as fin-tech and existing areas such as asset management / insurance where divergence will benefit UK industry and passporting rights less critical, and UK will take the lead as principal financial services market
- Financial Services Bill announced in December 2019 Queen’s Speech
- HM Treasury “Regulatory Initiatives Grid – two year timetable for major regulatory initiatives affecting financial services regulation
- Financial Services Regulatory Initiatives Forum (Bank of England, PRA, FCA, Payment Systems Regulator, Competition and Markets Authority and HM Treasury)





UK FINANCIAL SERVICES – LOOKING TO THE FUTURE

- Andrew Bailey: “there are bits of European legislation that just do not work particularly well for the UK”
 - PRIIPs Regulation: Michael Dobson (Chairman of Schroders): “it has been very expensive to implement” and “hard to represent to clients”
 - Reluctance from a cost and timing perspective of issuer’s to prepare key information documents (“KID”) under the PRIIPs Regulation in order to allow for offerings to retail investors in the UK and EU, so prohibiting sales to retail investors and stifling development of retail bond market
 - MiFID 2: Impractical nature of MiFID II product governance rules that require the regular re-assessment of target market (which requires a “feed-back loop” with non-EU distributors reporting back to them information on sales and negative target market concerns)
 - US distributors comply with FINRA suitability requirements do not wish to be burdened with MiFID 2 product governance
 - Global investment firms needing to comply with US and EU (and now UK) rules on product governance

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Team video:
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