Market newsletter 4/2016

October 2016

The Market newsletter addresses topical matters concerning interpretations, regulation, as well as supervisory findings relating to listed companies' disclosure obligation, financial reporting enforcement, securities trading and insider issues. Articles other than those pertaining to IFRS enforcement will appear mainly in English. The newsletter is published by FIN-FSA's Supervision of Markets and Conduct of Business Department.

In this newsletter, we discuss the following topics:

Topical matters at ESMA

Technical standards relating to Benchmarks Regulation

ESMA invites comments on technical standards relating to the Benchmarks Regulation. Comments should be submitted by 2 December 2016.

Level 2 regulation relating to Regulation on securities financing transactions

ESMA invites comments on Level 2 regulation relating to the Regulation on securities financing transactions. Comments should be submitted by 30 November 2016.

Regulation relating to the Markets in Financial Instruments Directive and Regulation

ESMA has published a number of invitations for comments on technical standards and Level 3 guidelines relating to the Markets in Financial Instruments Directive and Regulation. The invitations for comments in respect of technical standards concern the trading obligation for derivatives and the consolidated tape for non-equity financial instruments. The draft guidelines deal with product governance processes, suspension of trading and the suitability of management body members of trading venues and data reporting services providers.

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Market Supervision introduces electronic newsletter for swift communication of current issues

Market Supervision has introduced an electronic newsletter for communication of current issues, to complement the Market newsletter. The electronic newsletter will contain issues that fall within the scope of Market Supervision and which we wish to communicate promptly to the markets. We will report, for example, on matters relating to listed companies' insider issues, disclosure requirements and prospectus supervision. However, the new newsletter will initially be focused on application of the Market Abuse Regulation (MAR), such as information posted on our MAR website regarding updates of Q&A documents and notification forms for managers' transactions.

You can subscribe to Market Supervision's electronic newsletter from the FIN-FSA's online service at: http://www.finanssivalvonta.fi/ fi/Tiedotteet/Pages/Tiedotetilaus.aspx.

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Supervisory findings regarding application of the Market Abuse Regulation

The Market Abuse Regulation (EU) 596/2014 (MAR) has now been applicable for just over three months.

The FIN-FSA has continued to receive plenty of contacts concerning the application and interpretation of MAR.

Queries with regard to the notification of transactions by managers and persons closely associated with them have largely been focused on the definition of an entity closely associated with a person discharging managerial responsibilities, completion of the notification form and its technical usability. Procedures relating to market soundings have also been brought to the fore. This subject is discussed in a separate article in this issue.

With only a few months' experience of the procedures for notification and public disclosure of transactions, it appears on the basis of notifications that have arrived at the FIN-FSA that, when transactions have been made, managers and persons closely associated with them have generally submitted their respective notifications within the three-day time limit and companies have also duly made public, within the required time limit, the transactions reported to them.

Some shortcomings have been detected in the contents of notifications on transactions, and part of the notification forms have been filled out incorrectly. At the initial phase of the application of new regulation, we have provided advice to those subject to the notification obligation on questions regarding the completion of the form.

The form for notification of managers' transactions includes instructions for filling out the form, and the FIN-FSA has additionally published Q&A interpretations in respect of the notification of transactions. We urge persons subject to the notification obligation to familiarise themselves with these instructions and interpretations.

The FIN-FSA updates as necessary its published Q&A documentation, the notification form for managers' transactions and the template for managers' transactions reported electronically. Information on the updates is posted on the FIN-FSA website. Communication on the updates also takes place via Twitter and the electronic newsletter.

Please submit any questions by email to markkinat(at) finanssivalvonta.fi, as before.

This article contains a collection of some FIN-FSA supervisory findings and related FIN-FSA operational instructions in the area of notification of managers' transactions and public disclosure of inside information.

Notification and public disclosure of managers' transactions

Notification of transactions by a manager's closely associated entity, when the company's managers share the same closely associated entity

When several managers of the same issuer have a common closely associated entity, it is deemed sufficient that the entity in question submit one notification of the transaction conducted by it. In such a situation, the said entity submits (within a timeframe of T+3) one notification with information on all those managers whose closely associated entity the entity is. The FIN-FSA's notification form has been updated in this respect. The notification must be disclosed in full, and one announcement is to be issued on the basis of the notification form.

Heading of announcements

Companies have complied with different practices for headlining their announcements regarding managers' transactions. The FIN-FSA wishes to draw companies' attention to the fact that headings should indicate that the announcement is issued for the specific purpose of disclosing managers' transactions. Consequently, an announcement concerning managers' transactions should not be titled so that the heading points to transactions conducted by insiders, as this would refer to prohibited insider dealing as defined in Article 8 of MAR.

It would also be advisable to equip the heading of an announcement concerning managers' transactions with the name of the issuer making public the announcement, in order to ensure that the name also appears in RSS feeds published by the media. The issuer may title the announcement as, for example, 'Company Plc: Managers' transactions'. The heading need not include the name of the person making the notification, but the issuer may add this to the heading if it so wishes.

Contents of the announcement

According to Article 19(3) of MAR, issuers are required to disclose notifications of managers' transactions in full. Accordingly, the issuer may not include in the announcement any text stating that said announcement disseminates the key contents of the notification.

The mere public disclosure of a notification of managers' transactions is sufficient, and the company is not required to provide any other further information in its announcement. However, if so desired, the issuer may add to an announcement regarding managers' transactions, for example, a brief text presenting the issuer or, to the top of the announcement, a reference to the obligation under Article 19 of MAR to make public the notifications of managers' transactions.

Message category

In disclosing managers' transactions, the message category 'Managers' transactions' should be used. Given that managers' transactions do not constitute regulated information as referred to in the Securities Markets Act or MAR, the designation 'stock exchange release' or 'company release' should not be used in the identification data of the announcement, which should instead be designated as 'managers' transactions'.

Keeping information on managers' transactions available on the website

Under chapter 12, section 5 of the Securities Markets Act, an issuer must keep the information notified and disclosed under Article 19 of MAR on managers' and closely associated persons' transactions available to the public on its website for at least five years.

The FIN-FSA recommends that announcements on managers' transactions be kept available on the issuer's website as a category of their own, thus ensuring investors' access to a collected set of information.

Delayed disclosure of inside information

Article 17 of MAR obliges an issuer to inform the public as soon as possible of inside information which directly concerns the issuer. If an issuer has delayed the disclosure of inside information in accordance with Article 17(4) of MAR, it must inform the FIN-FSA that disclosure of the information was delayed, immediately after the information is disclosed to the public.

Insider projects may give rise to situations where an issuer publishes some information on the project as the project

makes headway. In disclosing partial information on the project, the issuer is required to submit to the FIN-FSA a delayed disclosure notification regarding such partial information and the related decision on delay of disclosure.

After disclosure of partial information, an issuer must ensure that the conditions for delay of disclosure continue to be fulfilled in respect of inside information not yet disclosed, and update the information on the conditions for delay of disclosure as necessary.

In informing the FIN-FSA of delayed disclosure, an issuer may additionally mention that it was a case of delayed disclosure of partial information on an insider project.

An explanation of how the conditions for delay of disclosure were met is to be submitted to the FIN-FSA separately upon request. The FIN-FSA has requested such explanations in some cases for supervisory purposes.

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- Anu Lassila-Lonka, Senior Market Supervisor, tel. +358 10 831 5566.

Market sounding procedures

The FIN-FSA has received several questions regarding regulation of market soundings under the Market Abuse Regulation (MAR) and related interpretation. The questions have mainly been focused on the obligations of the parties to a market sounding process and a situation where the views of the disclosing market participant conducting a market sounding and the investor receiving the market sounding differ as to whether the market sounding involves disclosure of inside information.

Article 11 of MAR and related Level 2 Commission Regulations impose procedural obligations on both disclosing market participants conducting market soundings and investors receiving market soundings. In addition, the Guidelines of the European Securities and Markets Authority (ESMA) give more detailed instructions on procedures for persons receiving market soundings.

The purpose of provisions regarding market soundings is to ensure proper handling of inside information in a market sounding situation. The provisions set out a process aimed at preventing unlawful disclosure of inside information and ensuring that investors receiving market soundings have the possibility of entirely refusing to receive inside information.

Market sounding procedures are described in Market newsletter 3/2016. In response to comments received by the FIN-FSA, we provide below some more specific details with respect to the provisions regarding market sounding.

What is market sounding?

Market sounding is defined in Article 11(1) of MAR. According to this provision, ‘a market sounding comprises the communication of information, prior to the announcement of a transaction, in order to gauge the interest of potential investors in a possible transaction and the conditions relating to it, such as its potential size or pricing, to one or more potential investors’.

Market sounding is typically conducted in connection with block trades, private placement arrangements and issuances of shares and bonds. However, in order to qualify for market sounding, a block trade, for example, must, under Article 11(1) (b) of MAR, be distinct from ordinary trading in either quantity or value.

On the basis of comments received by the FIN-FSA, it would appear that different parties interpret the definition of market sounding differently. It is unlikely that there will be more detailed EU-level harmonisation on the matter in the near term. The FIN-FSA has encouraged market participants to seek to formulate common views of the types of contacts that could constitute market sounding.

The obligation of disclosing market participant conducting market sounding to consider the nature of the information

Under Article 11(3) of MAR, a disclosing market participant must, prior to conducting a market sounding, specifically consider whether the market sounding will involve the disclosure of inside information and make a written record of its conclusion and the reasons therefor. It is important to undertake a careful assessment, as the scope of the obligations imposed on the disclosing market participant is determined by whether the market sounding involves the disclosure of inside information or only confidential information. The fact that the person receiving a market sounding is obliged to independently assess the nature of the information received has no impact on the obligation of the market participant conducting the sounding to make an assessment of its own on the nature of the information. A market participant conducting a market sounding must also indicate what information it considers to represent inside information.

The obligation of person receiving market sounding to assess for themselves the nature of the information

Under Article 11(7) of MAR, the person receiving the market sounding must assess for themselves whether they are in possession of inside information as a result of the market sounding. According to the ESMA Guidelines, such an assessment of the nature of the information should primarily be based on taking into consideration the assessment of the disclosing market participant conducting the sounding. In addition, all other information available to the person or function in receipt of the market sounding must be taken into consideration by the recipient. However, in performing such an assessment, the recipient is not required to access information behind any internal information barrier established within the organisation (known as 'Chinese walls').

Different assessments of the nature of the information on the part of the market participant conducting a sounding and the recipient of the sounding

Contrary to what was stated in Market newsletter 3/2016, the recipient of a market sounding need not notify the market participant conducting the sounding if the recipient's assessment of the nature of the information received in the course of the market sounding differs from the assessment of the market participant conducting the sounding. The Market newsletter article was based in this respect on ESMA's draft guidelines, which changed following completion of the round of comments. Recipient of market sounding must, however, record their differing assessments of the nature of the information.

Procedures in violation of market sounding provisions

Provisions governing market sounding are mandatory when it is a question of market sounding as defined in MAR. Reliable handling of inside information is a key priority for financial sector participants from the viewpoint of organisational requirements.

According to recital (35) of MAR, potential infringement of market sounding provisions is not automatically regarded as constituting unlawful disclosure of inside information. In such a situation, separate assessment will be made as to whether the inside information was disclosed in the normal exercise of a person's employment, profession or duties.

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Use of Twitter and other social media in the marketing of share issues

Use of social media has become increasingly widespread in the marketing of share issues. The FIN-FSA has received questions regarding marketing on Twitter, in particular. From the perspective of securities markets regulation, social media do not differ from other marketing channels, but are governed by the same provisions as applied to other forms of marketing of share issues:

- It is prohibited to provide false or misleading information in the marketing of securities.[1]
- Any marketing material shall be submitted to the FIN-FSA at the latest upon commencement of marketing. The marketing material shall include a reference to the prospectus and state the place where the prospectus is available.[2]

Information disclosed in the marketing shall not

- contradict the information contained in the prospectus;
- refer to information which contradicts that contained in the prospectus;
- present a materially unbalanced view of the information contained in the prospectus, including by way of omission or presentation of negative aspects of such information with less prominence than the positive aspects;
- contain alternative performance measures concerning the issuer, unless they are contained in the prospectus.[3]

The FIN-FSA does not issue comments on marketing material in advance on a regular basis, except for marketing material on initial public offerings and first-time issuers of securities.[4]

Use of Twitter in the marketing of share issues

If a company uses Twitter in connection with a share issue, the legal requirement for submission of marketing material can be fulfilled, for example:

- by providing the FIN-FSA with the necessary information for monitoring the Twitter account/accounts at the latest upon the commencement of marketing and
- by providing the FIN-FSA with a summary of Twitter messages upon termination of the offering, as well as
- by providing the FIN-FSA in advance with a plan regarding the use of Twitter.

  – Such a plan could include, for example, information on tweets decided in advance, Twitter accounts to be used and tweeters, as well as an explanation of how the company intends to respond to questions and tweets posted by others.

  – The submission of a plan only applies to situations cited above in which the FIN-FSA comments on the material in advance.

The length of Twitter messages is restricted. This presents challenges, when each tweet should refer to the prospectus and state the place where the prospectus is available. If it is not possible to include such a reference in all tweets, it can in practice be deemed sufficient that the company refer to the prospectus and its availability via one tweet upon the commencement of marketing and place it as a 'pinned tweet' at the top of the account.

Information provided in the marketing of share issues must be based on the prospectus and be consistent with the information contained therein. If a company marketing a share issue, or those acting on the company's behalf, in connection with such marketing, further delivers on Twitter an external party's tweet, such as a link to a newspaper article, the information may be considered to represent part of the marketing of the issue and is subject to the same provisions as applied to other forms of marketing of the share issue. When tweets are further shared, it may be challenging to ensure that all material information is based on the prospectus and presented in an unbiased manner.

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1 Securities Markets Act, Chapter 1, section 3.
2 Securities Markets Act, Chapter 5, section 4.
3 Commission Delegated Regulation (EU) 2016/301, Article 12.
4 Regulations and guidelines 6/2013 Securities offerings and listings.

Big differences in prospectus approval times – FIN-FSA's processing times short

There are effectively big differences in approval times for prospectuses between EEA member state supervisors. According to the Prospectus Directive, a decision regarding the approval of a prospectus must be issued within 10 working days of the submission of the draft prospectus. If the securities have not been listed or previously offered to the public, the time limit for approval is 20 working days. The time limits according to the Directive have been implemented in each country's national legislation, but in practice there are differences in calculation of the time limits.

The FIN-FSA calculates prospectus approval times in a manner that is beneficial to the compiler of the prospectus. The period of prospectus scrutiny is considered to include the days on which the prospectus compiler makes changes to the prospectus on the basis of comments received from the FIN-FSA. As a rule, a prospectus is approved no later than the tenth working day of the submission of the application, unless the prospectus compiler requests a later approval decision. Prospectuses related to initial public offerings (IPOs) are approved in an equivalent manner no later than the 20th working day. During the period of scrutiny, the FIN-FSA reviews 3–8 prospectus versions. In general, the FIN-FSA sends its first prospectus comments within four (4) working days.

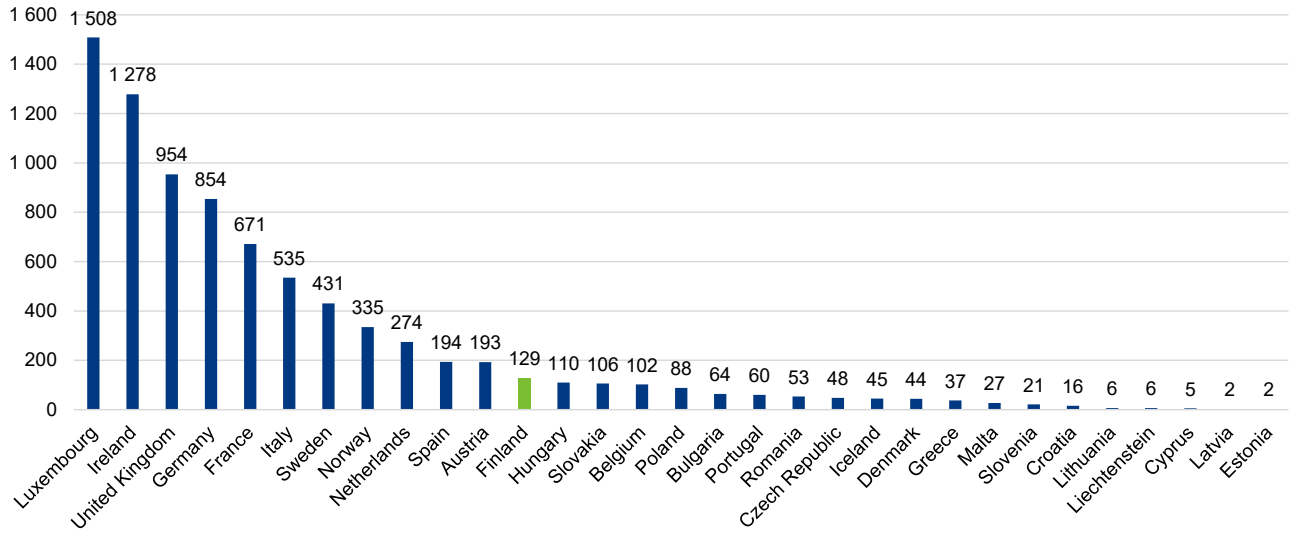
The manner of calculating the time required for prospectus scrutiny differs in several EEA member states from that applied in Finland. Many supervisors re-commence calculation of the scrutiny period for each version of a prospectus. In this way, approval times for prospectuses may even exceed 60 working days.

Peer review on prospectus approval process

The ESMA peer review on the prospectus approval process, published in June 2016,[1] analysed the prospectus scrutiny of 31 EEA member state supervisors in 2013 and 2014, based on a questionnaire completed by the supervisors. The review compared, among other things, the volume of prospectuses and the number of staff performing scrutiny and their experiences, as well as the times required for scrutiny.

Of the prospectuses examined in the peer review, more than 80% were approved in eight (8) countries: Luxembourg, Ireland, United Kingdom, Germany, France, Italy, Sweden and Norway.

Chart 1. Volume of prospectuses in EEA member states, 2013–2014



1 Peer Review on Prospectus Approval Process, 30 June 2016, ESMA/2015/1055.

A total of 129 prospectuses were scrutinised in Finland in 2013 and 2014

IPO prospectuses (stock exchange listings)	6
Other equity prospectuses (incl. FN listings)	38
Equity prospectuses, total	**44**
Debt prospectuses	64
Base prospectuses	15
Debt prospectuses, total	**79**
Cancelled applications etc.	6
Prospectuses, total	**129**

Equity prospectuses were approved most in the United Kingdom (365) and France (224). The United Kingdom also saw the highest number of approvals for IPO prospectuses (118). Meanwhile, debt and base prospectuses were concentrated in Ireland (1,262) and Luxembourg (1,441).

Peer review shows effectiveness of FIN-FSA prospectus scrutiny

The largest EEA prospectus teams were in the United Kingdom (72 persons), France (59 persons) and Germany (37.6 persons). There were four (4) persons working in the FIN-FSA prospectus team in 2013–2014. In Finland, as in many other countries, prospectus team members also perform other tasks (e.g. supervision concerning takeover bids, the obligation to notify major holdings and the disclosure obligation, ESMA-related work, regulatory issues and sanctions, inspections).

Chart 2 presents total staff size for prospectus teams and the number of FTE[2] staff dealing with prospectus scrutiny in selected countries.

Chart 3 shows that prospectuses were processed most per person in Ireland (123) and Luxembourg (94). The bulk of these were debt or base prospectuses. In Finland, one person scrutinised a total of about 52 prospectuses in 2013–2014. The comparison did not take account of how the four eyes principle was complied with across countries. In Finland, for example, IPO prospectus versions are normally reviewed by two readers.

Prospectus approval times short in Finland

The ESMA peer review explored prospectus approval times in four prospectus categories: 1. IPO prospectuses drawn up for stock exchange listing, 2. other equity prospectuses, 3. debt prospectuses and 4. base prospectuses. Approval times for equity and debt prospectuses were the second shortest in Finland. In general, the prospectus approval time in Finland exceeds 10/20 working days only upon the prospectus compiler's request. As regards base prospectuses, Finland had the shortest prospectus scrutiny times.

1. Of six (6) IPO prospectuses drawn up for stock exchange listing and approved in Finland in 2013–2014, four (4) were approved in 20 working days, one (1) in 21 working days and one (1) in 22 working days.

Chart 2. Prospectus teams and number of (FTE) staff dealing with prospectus scrutiny

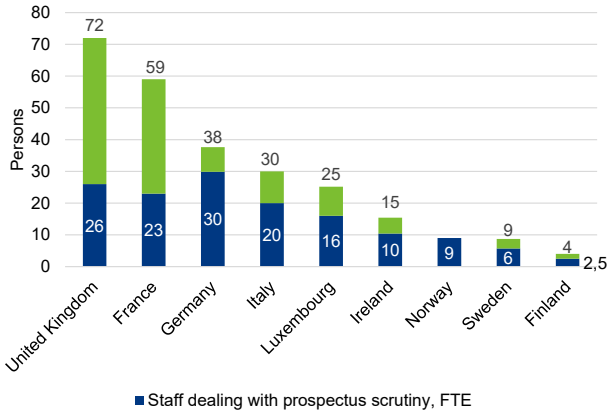
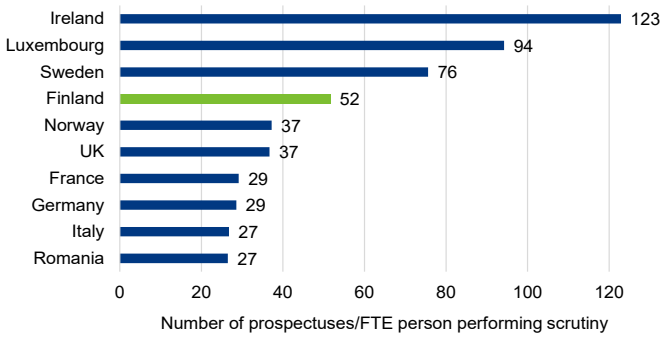


Chart 3. Prospectuses/person dealing with prospectus scrutiny in 2013–2014



2 Full-time equivalent.

– There were no IPO prospectuses approved within 20 working days in 20 of the benchmark countries;[3] instead, the approval times varied between 21 and over 60 working days.

– The approval time was over 60 working days for a large proportion of IPO prospectuses, for example in Hungary (100% of prospectuses), Poland (96%), Bulgaria (80%), United Kingdom (64%), Netherlands (50%), Germany (36%) and Luxembourg (33%).

2. Of other equity prospectuses in Finland, 65% were approved in 10 working days, and a quarter in 11–20 working days. Other equity prospectuses included, among other things, prospectuses drawn up for First North listings, for which the prospectus scrutiny time is 20 working days.

– There were no equity prospectuses approved within 10 working days in 14 of the benchmark countries.[4]

– Approval time exceeded 60 working days in, for example, Poland (81% of prospectuses), Hungary (67%), Bulgaria (64%), Czech Republic (50%), Austria (38%), Croatia (36%), Denmark (40%), Netherlands (28%), United Kingdom (25%) and Germany (22%).

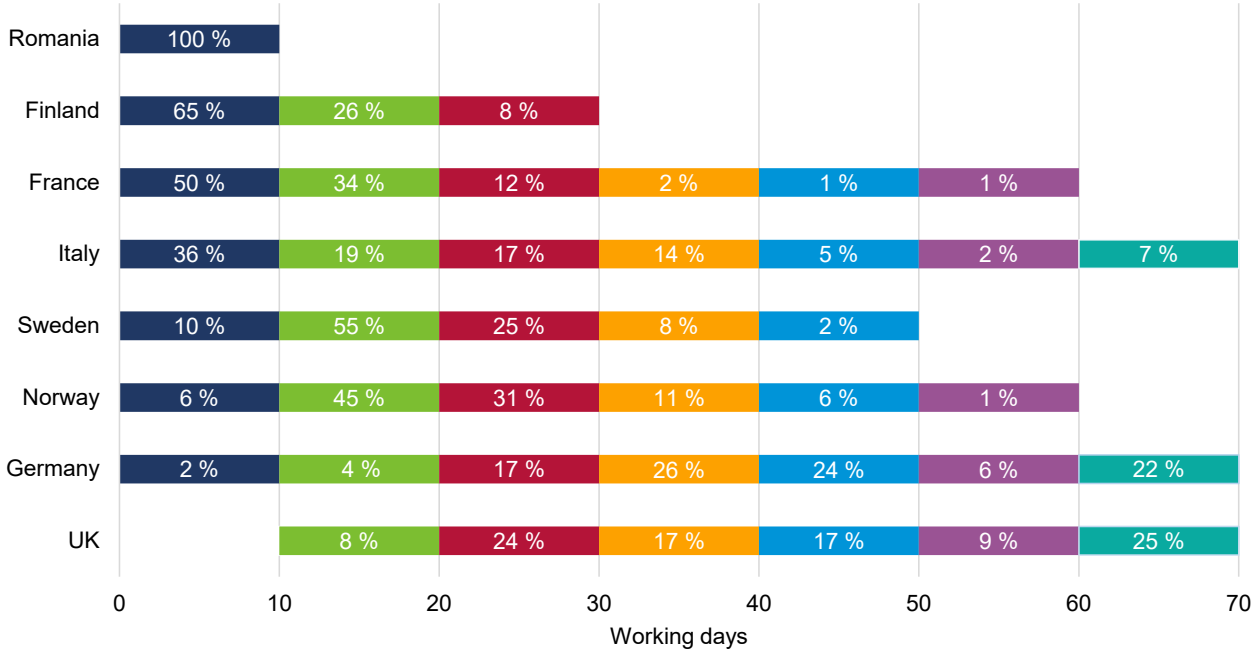
Chart 4 indicates the percentage of other equity prospectuses approved in 1–10, 11–20, 21–30, 31–40, 41–50, 51–60 and over 60 working days.

3. More than half of debt prospectuses were approved in Finland in 10 working days and 44% in 11–20 working days.[5]

– There were no debt prospectuses approved within 10 working days in 12 of the benchmark countries.[6]

– More than half of debt prospectuses were approved in 31–60+ working days in 11 benchmark countries.

Chart 4. Approval times for equity prospectuses in selected countries* in 2013–2014 (incl. FN IPOs and excl. IPOs for stock exchange listing)



*Countries with the shortest prospectus scrutiny times and countries with a great deal of equity prospectuses.

3 IPO prospectuses were drawn up in 27 EEA member states during the review period.

4 Equity prospectuses were drawn up in 29 EEA countries during the review period.

5 Approval times for debt prospectuses in Finland exceed 10 working days owing to the generally accepted practice under which the prospectus is scrutinised within 10 working days prior to the offering of the bond to institutional investors but the approval decision is issued only later in connection with the listing of the bond.

6 Debt prospectuses were drawn up in 28 EEA countries during the review period.

4. The bulk of base prospectuses were approved in Finland within 10 working days and the rest in 11–20 working days.

   – There were no base prospectuses approved within 10 working days in 15 of the benchmark countries;[7] instead, the approval times varied between 11 and over 60 working days.

Prospectus compilers themselves also influence prospectus scrutiny times

Prospectus compilers themselves also contribute to prospectus scrutiny timetables. High quality of draft prospectuses, the fact that FIN-FSA's comments are carefully taken into account and that new prospectus versions are submitted without delay enable a fast prospectus scrutiny process.

Informing FIN-FSA staff dealing with prospectus scrutiny in good time of any open questions or changed circumstances and duly filling out the relevant comment sheets also contribute to speeding up the prospectus approval process. More information on the FIN-FSA's prospectus review process is available at: http://www.finanssivalvonta.fi/en/Listed_companies/Prospectuses/Pages/Default.aspx.

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7 Base prospectuses were drawn up in 25 EEA countries during the review period.

Events for listed companies

An information event on listed companies' financial reporting will be organised on 28 November and 1 December 2016. This briefing will also address topical matters relating to the disclosure obligation and the notification of managers' transactions.

Invitations to the event will be sent electronically, closer to the date, to listed companies' finance managers and other stakeholder representatives. The invitations are intended for two persons; therefore, staff members responsible for financial reporting or the disclosure obligation are urged to be in contact with their respective finance managers in order to register for the event via the relevant link.

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