

## The Prospectus Directive: what's on the horizon?

### Background

This alert looks at some of the key changes being proposed to the EU Prospectus Directive, including the introduction of a reduced disclosure regime for rights issues, a new exemption for retail cascades, a wider employee share scheme exemption and (less helpfully) an increase in wholesale debt minimum denominations.

The draft amending directive (**Amending Directive**) has been approved by the European Parliament, and is expected to be acceptable to both the European Council and the European Commission. It will come into force 20 days after publication in the Official Journal. Member states will then have 18 months to implement the Amending Directive, so the changes may not be reflected in the national law of member states until early 2012.

Some of the key proposals are:

### Prospectus summary

- The summary should be a key source of information for retail investors. It will have to include “key information”, meaning essential and appropriately structured information which is to be provided to investors with a view to enable them to understand the nature and the risks of the particular securities, and which includes certain prescribed information about the issuer, any guarantor and the offer itself.
- To help investors compare summary prospectuses for similar products, each summary should be drawn up in a common format with equivalent information always appearing in the same place.
- As is the case now, there will be no separate civil liability for the summary, although the circumstances which may give rise to civil liability will be expanded.

### Rights issues

- Issuers will be able to take advantage of a “proportionate disclosure regime” for pre-emptive offers (including rights issues where statutory pre-emption rights have not been disapplied).
- The proportionate disclosure regime will apply to offers of shares by companies whose shares of the same class are admitted to trading on a regulated market or on a multilateral trading facility which is subject to appropriate ongoing disclosure requirements and rules on market abuse. It will be for the new European Securities Market Authority to issue guidelines on these disclosure and market abuse conditions.
- The detailed content requirements for the short form prospectus are not known yet.

### Supplementary prospectus

- The requirement to produce a supplementary prospectus can be triggered at any time up to the final closing of the offer or the time when trading on a regulated market begins. Under the Amending Directive, this wording will be clarified and the end period will be the later of these two events.
- Following publication of a supplementary prospectus, withdrawal rights will only apply where there is an offer of securities to the public (and not where a prospectus has been prepared for admission purposes only).
- Withdrawal rights will only apply if the event that triggers the need for a supplementary prospectus arises before final closing of the offer and delivery of the securities.
- Withdrawal rights will need to be exercised within two working days or any longer period specified by the issuer (some member states currently have different time periods for exercise of withdrawal rights so this is designed to achieve greater harmonisation).

## Retail cascades

- Securities are sometimes placed with financial intermediaries and subsequently sold to retail investors over a period of time (known as a retail cascade). Under the Amending Directive, a new prospectus will not be required for a resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available and the issuer or person responsible for it gives written consent for its use. It is expected that an industry standard form of consent will be developed.

## Employee share schemes

- The employee share scheme exemption currently only applies where the employer has securities admitted to trading on a regulated market. Under the Amending Directive, this exemption will be extended to apply to any employer which has its head office or registered office in the EU. The exemption will also be available to companies established outside the EU whose shares are admitted to trading on a third country market which the European Commission deems to be equivalent to a regulated market in terms of both effective supervision and enforcement.

## Merger exemption

- The merger exemption will be extended to cover divisions such as a demerger.

## General exemptions

- The exemption for offers to no more than 100 people per member state will be increased to 150 people per member state.
- The exemption for offers addressed to investors who acquire securities for a total consideration of at least €50,000 per investor will be increased to €100,000.
- The exemption for offers of securities whose denomination per unit amounts to at least €50,000 will be increased to €100,000.

## Offers falling outside the Prospectus Directive

- The Prospectus Directive does not apply to (i) securities where the total consideration of the offer is less than €2.5 million or (ii) certain non-equity

securities where the total consideration of the offer is less than €50 million (in each case calculated over a 12 month period). These limits will be raised to €5 million and €75 million respectively, and the wording will be amended to make it clear that the limits are an EU-wide calculation.

## Qualified investors definition

- The term “qualified investors” will mean persons classified as professional clients or treated on request as professional clients, or recognised as eligible counterparties in each case in accordance with the Market in Financial Instruments Directive (or MiFID).

## Annual information update

- An annual information update will no longer be required on the basis this duplicates obligations under the EU Transparency Directive.

## Shelf life of a prospectus

- A prospectus will continue to be valid for 12 months, although this will now run from the date of approval rather than the date of publication.

## Internet publication

- Where a prospectus is published in hard copy form (in a newspaper or printed form made available to the public), the issuer or other person responsible for preparing the prospectus will also have to publish the prospectus electronically on its website.

## Final terms

- The final terms to a base prospectus should only include securities note information which is specific to the issue and can only be determined at the time of the individual issue. Other new information should generally be included in a supplementary prospectus.

If you have any questions or require specific advice on any matter discussed in this alert, please contact:

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