

## UK implementation of amendments to the Prospectus Directive – where are we now?

Along with other member states, the UK has until 1 July 2012 to implement EU directive 2010/73/EU (**Amending Directive**). The Amending Directive amends the EU Prospectus Directive and the EU Transparency Directive, and will be implemented in the UK by amendments to:

- the Financial Services and Markets Act 2000 (**FSMA**); and
- the Prospectus Rules, with some consequential amendments to the Listing Rules and the Disclosure and Transparency Rules.

A statutory instrument amending FSMA was published on 15 June 2012 and comes into force on 1 July 2012. “Near final” amendments to the Prospectus Rules, the Listing Rules and the Disclosure and Transparency Rules have also been published.

### The EU prospectus regime – a recap

The Prospectus Directive sets out an EU regime governing the preparation of prospectuses, and applies:

- where there is a public offer of securities; or
- where securities are being admitted to trading on a regulated market.

In the UK, regulated markets include the London Stock Exchange but not AIM. This means that if securities are being admitted to trading on AIM, but there is no offer to the public, a prospectus will not be required (although an AIM admission document will need to be prepared).

The EU Prospectus Regulation sets out the form and content of a prospectus required by the Prospectus Directive.

### Amendments to the Prospectus Directive and the Prospectus Regulation

The Prospectus Directive was amended by the Amending Directive on 31 December 2010. The deadline by which member states must implement the amendments is 1 July 2012.

The European Commission must also adopt amendments to the Prospectus Regulation in order to implement the new framework set out in the Amending Directive. These include amendments in relation to summaries, final terms, retail cascades and proportionate disclosure. Two regulations (**Amending Regulations**) have been published by the European Commission amending the Prospectus Regulation:

- the first (**First Amending Regulation**) was published in the Official Journal on 11 June 2012 (having been published in draft on 30 March 2012) and will come into force on 1 July 2012. It deals with (i) the format and content of the prospectus, the base prospectus, the summary and the final terms and (ii) the proportionate disclosure regime; and
- the second (**Second Amending Regulation**) was published in draft on 4 June 2012 and is expected to come into force on 1 July 2012. It deals with retail cascades (as well as some other technical adjustments and clarifications).

These Amending Regulations reflect technical advice received from European Securities and Markets Authority (**ESMA**). Unlike the Amending Directive (which needs to be implemented by individual member states), the Amending Regulations will have direct effect in member states and do not need implementing legislation. That said, relevant extracts of the Amending Regulations will be reproduced in the Prospectus Rules.

As well as providing clarification on some of the existing provisions of the Prospectus Directive, the changes introduced by the Amending Directive should simplify the prospectus regime and, importantly, make it easier for smaller companies to raise funds without having to produce a prospectus.

This alert considers some of the key changes being made to FSMA and the Prospectus Rules in order to implement the Amending Directive in the UK, as well as some key aspects of the implementing framework set out in the Amending Regulations.

## General exemptions and thresholds

FSMA sets out various offers which are exempt from the requirement to produce a prospectus. Most of the changes to the exemptions and thresholds are relaxations and include the following:

- the exemption for offers to no more than 100 people per member state has been increased to 150 people per member state. This amendment was implemented in the UK on 31 July 2011, nearly a year ahead of the deadline for implementation, on the basis it is helpful to companies;
- the exemption for offers of certain non-equity securities where the total consideration for the offer is less than €50 million, calculated over a 12 month period, is being amended so as to raise the threshold to €75 million. A similar exemption applies to offers of securities where the total consideration of the offer is less than €5 million, calculated over a 12 month period. This threshold used to be €2.5 million but it was raised to €5 million on 31 July 2011, in order to help small companies access capital markets more easily; and
- also exempt are offers where the total consideration for the transferable securities being offered cannot exceed €100,000. This €100,000 is an EEA-wide calculation, and clarifying wording is being added to this effect.

Two of the thresholds are becoming stricter rather than relaxed: exempt offers include where the minimum consideration which may be paid by an investor for transferable securities under the offer is at least €50,000, or where the transferable securities being

offered are denominated in amounts of at least €50,000. These thresholds are being raised to €100,000. These stricter thresholds have been introduced to reflect concerns that retail investors may be committing €50,000 to a single investment without necessarily having an adequate understanding of the investment and the associated risks or benefitting from the safeguards provided by being issued with a prospectus.

These various amendments to the general exemptions and thresholds are being implemented by changes to FSMA with some consequential amendments to the Prospectus Rules.

## Retail cascades exemption

Securities are sometimes placed with financial intermediaries and subsequently sold to retail investors over a period of time (known as a retail cascade). The exemption for retail cascades has been formalised, with the Amending Directive confirming that a new prospectus will not be required for a resale of securities or final placement of securities through a financial intermediary as long as a valid prospectus is still available for the securities, and the issuer – or other person responsible for drawing up the prospectus – has given written consent to the use of the prospectus. A prospectus is valid if approved no earlier than 12 months before the date of the current offer. In cases where someone other than the issuer is responsible for drawing up the prospectus, the written consent only needs to be given by the other person responsible for drawing up the prospectus, and not the issuer itself (this is a change from the Government's initial view that consent should be sought from the issuer as well). These amendments are being implemented by changes to FSMA and the Prospectus Rules. The Second Amending Regulation sets out additional detail on what information must be included in the prospectus, including:

- the express consent by the issuer or person responsible for drawing up the prospectus to the use of the prospectus for a resale of securities or final placement of securities through a financial intermediary;

- a statement that the issuer or other person responsible for drawing up the prospectus accepts responsibility for the content of the prospectus with respect to subsequent resale or final placement of securities by any financial intermediary given consent to use the prospectus;
- the period for which consent to use the prospectus is given;
- the offer period upon which subsequent resale or final placement of securities can be made by financial intermediaries;
- the member states in which financial intermediaries may use the prospectus for a subsequent resale or final placement of securities;
- any other conditions attached to the consent which are relevant for the use of the prospectus; and
- a notice in bold informing investors that the financial intermediary will provide information to investors on the terms and conditions of any offer made by the financial intermediary at the time that offer is made.

Where the consent is given to one or more specified financial intermediaries, the prospectus must list and identify the financial intermediary or intermediaries that are allowed to use the prospectus, and give an indication of how any new information with respect to financial intermediaries unknown at the time of approval of the prospectus, the base prospectus or the filing of the final terms (as relevant) is to be published and where it can be found. Where consent is given to all financial intermediaries, there must be a notice in bold informing investors that any financial intermediary using the prospectus has to state on its website that it used the prospectus in accordance with the consent and the conditions attached to that consent.

### Employee share schemes exemption

The employee share scheme exemption currently only applies where the issuer already has securities admitted to trading on a regulated market. Under the Amending Directive, this exemption will be extended to apply to any issuer 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. These amendments are being implemented by changes to the Prospectus Rules.

### Merger exemption

The merger exemption will be extended to cover divisions such as a demerger. This is being implemented by a change to the Prospectus Rules.

### Prospectus summary

The summary currently has to convey the essential characteristics of, and risks associated with, the issuer, any guarantor and the relevant transferable securities. From 1 July 2012, the summary will be required to convey “key information” relevant to the securities, and, when read with the rest of the prospectus, it must be an aid to investors considering whether to invest in the securities. “Key information” means the information which is essential to enable investors to understand the transferable securities to which the prospectus relates and to decide whether to consider the offer further, and must include:

- the essential characteristics of, and risks associated with, the issuer and any guarantor, and investment in the transferable securities;
- the general terms of the offer, including an estimate of expenses charged to an investor by the issuer and the person offering the securities to the public, if not the issuer;
- details of the admission to trading; and
- the reasons for the offer and proposed use of the proceeds.

This is being implemented by changes to FSMA with some consequential amendments to the Prospectus Rules.

The First Amending Regulation sets out the detail of the information to be included in the summary. Each summary will comprise five tables: introduction and warnings; issuer and any guarantor; the securities;

risks; and the offer. The order of the sections, and the items within each section, is mandatory – this is in order to ensure that equivalent information always appears in the same place, which in turn should make it easier to compare the summary with other prospectus summaries. Where an item is not applicable to a prospectus, it must still appear in the summary marked “not applicable”. Whilst the length of the summary must take into account the complexity of the issuer and of the securities offered, it must not exceed 7% of the length of the prospectus, or 15 pages (whichever is longer), and it must not contain cross-references to other parts of the prospectus. The provision of the Prospectus Rules providing that the summary should not exceed 2,500 words is being deleted accordingly.

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. Currently there is no civil liability solely on the basis of the summary unless the summary, when read with the rest of the prospectus, is misleading, inaccurate or inconsistent. From 1 July 2012, a person may also have separate civil liability for the summary if, when read with the rest of the prospectus, it does not provide key information. This amendment will be implemented by amendment to FSMA, with some consequential amendments to the Prospectus Rules.

The exemption from producing a summary for a prospectus relating to non-equity transferable securities that have a denomination of at least €50,000 if the prospectus relates to an admission to trading has been raised to €100,000. This is in line with changes made to thresholds and exemptions, and will be implemented by amendments to the Prospectus Rules.

## Final terms

Amendments will be introduced to make it clear that the final terms to a base prospectus may only contain information that relates to the securities note, and must not be used to supplement the base prospectus. This will be implemented by amendments to FSMA.

The First Amending Regulation contains further detail on final terms, including what information should be included in the base prospectus at the time of approval,

and what information should be included in the final terms at the time of an individual issue. Whilst some additional information may be included in the final terms on a voluntary basis, this is limited to ensure consistency with other final terms. The First Amending Regulation also emphasises that the final terms must not amend or replace any information in the base prospectus. This is acknowledged to reduce the flexibility of the final terms regime, but it is considered necessary to prevent abuse of the final terms regime. A summary of the individual issue, containing key information for investors, must be annexed to the final terms.

## Supplementary prospectus and withdrawal rights

Changes have been made in relation to supplementary prospectuses in order to increase legal certainty and consistency. Under the original wording of the Prospectus Directive, 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. The Amending Directive makes it clear that the end period is the later of these two events and FSMA is being amended to reflect this.

Withdrawal rights will only apply where an offer is made to the public, and will need to be exercised within two working days after the day of publication of the supplementary prospectus, or any longer period specified by the issuer in the supplementary prospectus.

These amendments are being implemented by changes to FSMA.

## Proportionate disclosure regime for rights issues and other offers

The Amending Directive introduced a proportionate disclosure regime for rights issues, small and medium-sized enterprises and companies with reduced market capitalization, and certain issues by credit institutions. The framework for this reduced disclosure regime (including details of the disclosures that are required in each case) is set out in the First Amending Regulation.

**Rights issues:** for these purposes, “rights issue” means any issue of statutory pre-emption rights which allow for the subscription of new shares and is addressed only to existing shareholders. It also includes any issue where statutory pre-emption rights are disabled and replaced by an instrument or a provision conferring “near identical” rights to existing shareholders when those rights meet the following conditions:

- shareholders are offered the rights free of charge;
- shareholders are entitled to take up new shares in proportion to their existing holdings, or, in the case of other securities giving a right to participate in the share issue, in proportion to their entitlements to the underlying shares;
- the rights to subscribe are negotiable and transferable or, if not, the shares arising from the rights are sold at the end of the offer period for the benefit of those shareholders who did not take up those entitlements;
- in relation to the shareholders’ proportionate entitlements, the issuer is able to impose limits or restrictions or exclusions and make arrangements to deal with treasury shares, fractional entitlements and requirements laid down by law or regulatory authority in any country or territory;
- the minimum period during which shares may be taken up is the same as the period for the exercise of statutory pre-emption rights; and
- the rights lapse at the end of the exercise period.

The reduced disclosure requirements apply to rights issues where the issuer has shares of the same class already admitted to trading on a regulated market or a multilateral trading facility (**MTF**). Issuers whose shares of the same class are already admitted to trading on an MTF can only use the reduced disclosure regime when the rules of that MTF contain provisions:

- requiring issuers to publish annual financial statements and audit reports within six months after the end of each financial year, half yearly financial statements within four months after the end of the first six months of each financial year and make inside information public in accordance with the EU Market Abuse Directive;

- requiring issuers to make those reports and other information available to the public by publishing them on their websites; and
- preventing insider dealing and market manipulation in accordance with the EU Market Abuse Directive.

The approach taken when identifying which items may be omitted from the prospectus is based on avoiding duplication of mandatory disclosures already required by other directives such as the EU Transparency Directive and EU Market Abuse Directive. The prospectus must contain a statement at the beginning clearly indicating that the rights issue is addressed to shareholders of the issuer and that the level of disclosure of the prospectus is proportionate to that type of issue.

**Small and medium-sized enterprises and companies with reduced market capitalization:** the proportionate disclosure regime will apply when the securities issued by those companies are offered to the public or admitted to trading on a regulated market situated or operating within a member state. However, issuers may still choose to prepare prospectus in accordance with the full disclosure regime.

**Credit institutions issuing certain debt securities:** if such issuers voluntarily opt to issue a prospectus drawn up in accordance with the EU Prospectus Directive, they may include historical financial information that only covers the last financial year, or such shorter period that the issuer has been in operation.

As the requirements of the proportionate disclosure regime are set out in the First Amending Regulation, there is no need for direct implementation in the UK. However, relevant extracts of the Amending Regulations will be reproduced in the Prospectus Rules in due course.

### Amended definition of “qualified investor”

The definition of “qualified investor” is being amended to reflect the client classification categories in the Market in Financial Instruments Directive (**MiFID**), including taking account of any opt-up or opt-down by a client. As the MiFID categories of qualified investor are slightly wider than the original Prospectus

Directive categories of qualified investor, more investors will be eligible for inclusion in private placements of securities. This definition is being amended in FSMA with consequential amendments to the Prospectus Rules.

Investment firms will be required to communicate their classification of their clients as being or not being qualified investors on request to an issuer (subject to complying with data protection legislation). This requirement will be contained in FSMA.

### Annual information update

This will no longer be required on the basis it duplicates obligations under the Transparency Directive. The Prospectus Rules will be amended accordingly.

### 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. The Prospectus Rules will be amended accordingly.

### Electronic publication

In the case of an application for admission, 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. The Prospectus Rules will be amended accordingly.

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