

Debt Programme Updates and the Prospectus Directive Amending Directive

The United Kingdom implemented the Prospectus Directive Amending Directive¹ (the "AD") on 1 July 2012 by way of the Prospectus Regulations 2012² and changes to the Handbook of the UK Listing Authority (the "UKLA") covering the Listing, Prospectus and Disclosure Rules. The UKLA now grants prospectus approvals based on the UKLA checklists updated for the AD.³

The key legislation at the EU level which required implementation in each Member State by 1 July 2012 is the Prospectus Directive Amending Directive (2010/73/EU), which was followed by two EU Regulations⁴ which form part of the delegated acts and have direct effect.

Set out below are the key areas of change for updates of debt programmes admitted to trading on the London Stock Exchange due to the implementation of the AD.

SUMMARY – RETAIL PROGRAMMES⁵

Under the AD, the mandatory requirements for the prospectus summary for retail programmes are more detailed in form and content, and the word limit is now the shorter of 15 pages or 7 per cent. of the length of the base prospectus (exclusive of the summary, we understand).

Prospectus summaries are required to conform to a common format and to contain "key information" relating to the issuer and the securities,⁶ such as estimated expenses and the risk associated with an investment.⁷ The required form of summary is governed by the new Annex XXII to the Amending Regulation, and a new head of civil liability has been introduced for failure to comply with the requirement.

In practice, the content of existing programme summaries have not changed significantly. However, there are number of technical changes in order to comply with the new regime. On a practical level, issuer's liability is not generally affected by this new requirement because liability will arise only when the summary and the rest of the prospectus, taken together, are misleading, inaccurate, inconsistent or omit key information.

¹ Directive 2010/73/EU.

² See SI 2012 No.1538 which amends the Financial Services and Markets Act 2000.

³ See <http://www.fsa.gov.uk/pages/doing/ukla/forms/checklists.shtml>

⁴ (EU) No. 486/2012 and (EC) No. 809/2004 respectively.

⁵ The summary remains applicable to programmes providing for the issuance of retail denominations (below €100,000 or equivalent).

⁶ The details of which are set out in Regulation (EU) No. 486/2012 (the "Amending Regulation").

⁷ Recital 15 of the Amending Directive.

FINAL TERMS

The AD clarifies that final terms to a base prospectus should only contain information which is specific to the issuance and which can only be determined at the time of the issuance itself (e.g. issue price, maturity, coupon, call/put exercise date, exercise price, redemption price and other terms not known at the date of the base prospectus: see further below).⁸ The UKLA has operated this principle in practice for some months now. Importantly, we believe that this clarification significantly limits an issuer's ability to incorporate additional, or amend existing, terms and conditions in the final terms. This, in particular, affects the way structured note and derivative-linked programmes function.

An issue specific summary ("ISS") needs to be provided in the final terms for each retail issuance and may need to be translated accordingly under passporting rules. The ISS is formulaic in nature and requires elements of the base prospectus summary as well as information specific to the issue.

The Amending Regulation requires a base prospectus to indicate which information will be included in the final terms and to include a pro forma of the final terms document. Final terms may only contain the information listed in Categories B and C in Annex XX of the Amending Regulation (see below), together with any permitted "additional information" set out in Annex XXI. Final terms may not amend or replace information in the base prospectus (Article 22(4)).

Some key changes in the updated ICMA pro forma final terms document (which will shortly be finalised) are the inclusion of placeholders for: (i) Spens or make-whole amounts; (ii) put options; (iii) change of control provisions; (iv) detailed provisions for distribution; (v) detailed provisions for retail cascades; and (vi) an issue-specific summary for retail final terms⁹.

PASSPORTING

Matters regarding passporting will need to be explored on a case by case basis in each Member State. However, one procedural change is that the issuer must file a copy of the final terms with each host Member State into which the issuance is passported, as well as the home Member State.

THE STRUCTURE OF, AND INTERACTION BETWEEN, THE BASE PROSPECTUS AND FINAL TERMS

Disclosure items have been categorised, in an exhaustive list from the various securities note schedules of the EU Prospectus Directive Regulation,¹⁰ into categories A, B and C information.

The base prospectus must contain all information required by the Prospectus Directive and Prospectus Directive Regulation that is "knowable" at the time of its approval.

⁸ See Article 5(4), as amended, and Recital 10b.

⁹ The ICMA pro forma final terms is expected shortly however there are many examples in the market of the new post AD form of final terms which roughly follow the ICMA draft document.

¹⁰ Commission Regulation No 809/2004.

Category A information (such as risk factors or information as to the ranking of the securities) must be included in the base prospectus. Category A information may not be contained, amended or supplemented in the final terms; the information, depending on what it is, may require a supplement or a drawdown prospectus.

Category B information (such as provisions relating to methods of interest calculation, methods of yield calculation and a description of the type and class of security to be offered and/or admitted to trading) must be included in the base prospectus. Only specific details of certain category B information, which are unknown at the date of approval of the base prospectus, may be included in the final terms.

A placeholder may be included in the pro forma final terms in the base prospectus for Category C information (such as estimated expenses, the ISIN and reasons for the offer) which is not known at the time of approval of the base prospectus. Such information will then be included in the final terms.

The distinction between Category A, B, and C information is based on whether or not the information should, or should not, be vetted by the competent authorities in accordance with the Prospectus Directive. Revised UKLA checklists indicate which sections of the checklists fall into each category.

MINIMUM DENOMINATIONS

As already known, the minimum denomination threshold to qualify as wholesale debt has doubled to €100,000 or its equivalent in another currency. This is relevant for issuers wishing to take advantage of the concessionary reporting obligations under the Transparency Directive (2004/109/EC) and the exemptions (from the requirement to publish a prospectus at all) in Article 3(2) of the Prospectus Directive (as amended) .

SUPPLEMENTS

A more restrictive approach to supplemental prospectuses ("SP") has developed.

A "significant new factor", under section 87G of the UK Financial Services and Markets Act 2000, is the main reason for the requirement to publish an SP for programmes. Minor changes to drafting or presentation in the base prospectus will not be able to be effected by a SP.

SPs cannot duplicate information already contained in the base prospectus. Instead, an issuer will need to identify exactly which information is new and include only that in the SP.

Identification of material incorporated by reference must be very specific. The SP needs to refer specifically to the sections and/or page numbers of the relevant document being incorporated.

The 'purpose' statement in the SP (i.e. the stated reason for publishing the particular SP) needs to be precise and cover each separate item in the SP.

Each SP which incorporates a document by reference must contain a statement that no 'daisy-chained' information is being incorporated and must also include this specific rubric:

"Any information contained in any of the documents incorporated by reference which is not incorporated in and does not form part of this [Supplement] or the [Prospectus] is either not relevant for investors or is covered elsewhere in the [Prospectus]."

RETAIL CASCADE

So long as the base prospectus is valid, financial intermediaries placing or reselling the securities will be allowed to use it if the issuer/person responsible for drawing up the prospectus consents to its use by means of a written agreement.¹¹ Retail cascade legends are being developed by ICMA and it is expected that an industry standard form of consent will be available shortly¹².

CHANGES TO SELLING RESTRICTIONS

Selling restrictions need to be updated to the amended ICMA forms of selling restrictions for the AD which are available now from ICMA.

GRANDFATHERING

An issuer who has established or updated a debt programme in the 12 months prior to 1 July 2012 may be able to take advantage of the grandfathering provisions that apply to a base prospectus approved prior to 1 July 2012 in cases where the issuer is using only final terms. However, prospectuses (including drawdown prospectuses) approved after 1 July 2012 will not be grandfathered.

CONCLUSION

The United Kingdom implemented the AD on 1 July 2012 and the UKLA will now approve prospectuses based on the revised updated UKLA Handbook and checklists. Some debt programmes have been grandfathered until their next update. Issuers should consider now the changes brought in by the AD that will need to be made to their debt programmes at the next programme update.

¹¹ Article 3(2) of the Prospectus Directive (as amended).

¹² The debate as to whether to use specific consent or general consent has moved on (from building in general consent conditionalities and drafting mechanics for the consent user in a separate contractual agreement with issuer) to a potential distribution agreement (particularly in general consent context). However, there are many examples in the market of post AD general consent in base prospectuses.