Amendments to the Prospectus Directive and Transparency Directive

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January 2011
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Amendments to the Prospectus Directive and Transparency Directive

BACKGROUND


SUMMARY

This note provides a discussion of the key issues the Amending Directive presents for debt capital markets transactions:

- The rules applicable to the prospectus summary will become mandatory and more detailed in form and content. Prospectus summaries will be required to conform to certain format and content requirements and to contain “key information” relating to the issuer and the securities. A new head of civil liability will be introduced for failure to comply with these requirements;

- The minimum denomination to qualify as wholesale debt will be doubled to €100,000 – issuers wishing to take advantage of the concessionary reporting obligations under the Transparency Directive for wholesale debt should consider starting to use €100,000 minimum denominations now;

- Supplements for listed deals not offered to the public will no longer trigger withdrawal rights;

- Withdrawal rights timing will be harmonised across the EEA;

- Exempt offers that do not require a prospectus to be published can be made to a larger group of people than before. Offers will be exempt if made to fewer than 150 persons (the previous threshold was fewer than 100 persons) and offers with a total consideration of less than €5,000,000 (the previous threshold was €2,500,000) will be exempt; and

- A requirement to publish prospectuses electronically will alter publication requirements.


2 Article 4 of the Amending Directive.

3 However electronic publication has been made easier in UK by the National Storage Mechanism that the UKLA made mandatory for publication of UKLA approved offers and admissions recently.
1. PROSPECTUS SUMMARY AND KEY INFORMATION

1.1 The Amending Directive makes a number of changes to the content and format of the prospectus summary and introduces a new civil liability provision in relation to the key information that must be included in the summary.

1.2 The directive introduces a new requirement that a summary will have to be "drawn up in a common format in order to facilitate comparability of the summaries of similar securities"; the recitals to the Amending Directive further specify that equivalent information should always appear in the same position in the summary. The details of the proposed format will have to be set out in specific legislation to be adopted by the EU Commission.

1.3 Key information is defined as "essential and appropriately structured information which is to be provided to investors with a view to enabling them to understand the nature and the risks of the securities that are being offered to them". The definition then includes examples of the type of information that should be included. The recitals to the Amending Directive further state that key information should "convey the essential characteristics of, and risks associated with, the issuer, any guarantor, and the securities offered". It should also provide the general terms of the offer, including estimated expenses, and the risk associated with an investment.

2. MINIMUM DENOMINATIONS

2.1 The Amending Directive includes a number of changes to the offer and admission related exemptions from the requirements of the Prospectus Directive.

2.2 Under the Prospectus Directive, issuers of debt securities with minimum denominations of €50,000 (or equivalent) can offer these securities to the public without publishing a prospectus. Issuers who seek to list wholesale debt securities on an EU-regulated exchange have to publish a prospectus, but can do so in accordance with the larger 'wholesale' disclosure regime under Annexes IX and XIII of the Prospectus Regulation. The Amending Directive increases the minimum denomination per security to €100,000, or its equivalent in another currency. Debt securities which have already been admitted to trading will be grandfathered. Further issuance of the same securities (tap issues) as securities that were issued before 31st December 2010 (the date the Amending Directive comes into force) are not specifically addressed. Therefore, it would appear to be prudent to increase the minimum denominations of any new securities to allow for future tap issues.

2.3 The Amending Directive also changes the minimum denominations for purposes of the relevant provisions in the Transparency Directive. Under the Transparency Directive, issuers of wholesale debt securities that are admitted to an EU-regulated market are exempt from the obligation to publish annual and half-yearly reports. Issuers whose securities were admitted to trading before 31 December 2010 will be grandfathered. Any securities to be admitted to an EU-regulated market are exempt from the obligation to publish annual and half-yearly reports.

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4 Art 5(2).
5 Recital 15 of the Amending Directive.
6 See Recital 27 of the Amending Directive.
7 See new Art 2(5).
9 Art 3(2)(d) and (e).
10 Art 8(1)(b) of the Transparency Directive, as amended.
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EU-regulated market after the Relevant Date will need to be issued in denominations of €100,000 in order to benefit from this exemption.\textsuperscript{11}

2.4 These grandfathered issues will also continue to be exempt from Articles 4, 5, and 6 of the Transparency Directive. Those issuers who wish their new issues (made after the Relevant Date) to continue to benefit from these exemptions will need to issue in denominations of €100,000.

3. WITHDRAWAL RIGHTS

3.1 An issuer must publish a prospectus supplement if a significant new factor, material mistake or inaccuracy relating to the information included in a prospectus arises which is capable of affecting the assessment of the securities to which that prospectus relates, after approval of the prospectus and before the final closing of the offer or the time when trading on a regulated market begins.

3.2 Investors who have already agreed to purchase the securities before the supplement is published are allowed to withdraw their acceptances within a certain time limit not shorter than two working days. The Amending Directive clarifies these requirements in a number of ways:\textsuperscript{12}

– The period during which the publication of a prospectus supplement is triggered ends at the later of the closing of the offer and beginning of trading in the securities.

– Investors have withdrawal rights only in relation to a public offer, not in the context of prospectuses that have only been prepared in connection with an admission to listing. Accordingly, deals marketed only to professional investors will not trigger withdrawal rights.

– Withdrawal rights are only available where the circumstances which gave rise to the publication of the supplement arose before the close of the public offer and delivery of the securities.

3.3 The period during which withdrawal rights may be exercised is set at two working days after publication of the supplement in all EU Member States (previously Member States could provide longer), and the supplement has to state the final date of the right of withdrawal.

4. EXEMPT OFFERS

4.1 100 person exemption

There is currently no obligation to publish a prospectus if an offer to the public of securities is addressed to fewer than 100 natural or legal persons per Member State (other than qualified investors). The Amending Directive increases the threshold of this exemption to fewer than 150 natural legal persons per Member State.\textsuperscript{13}

4.2 Merger exemptions

Under the current regime, securities offerings to the public or listings on an EU-regulated market in connection with a merger are exempt from the obligation to publish a prospectus, provided that a document is available containing information which is regarded by the home Member State regulator as being equivalent to that of the

\textsuperscript{11} New Art 8(4) of the Transparency Directive, as amended.

\textsuperscript{12} See Art 16, as amended.

\textsuperscript{13} Art 3(2)(b).
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4.3 Thresholds for exempt offers

The Prospectus Directive provides that offers of securities below a certain size are outside of its scope, and the Amending Directive increases these size limits as follows:

- Securities in an offer where the total consideration of the offer in the EU is less than €5m over a 12-month period (increased from €2.5m); and
- Non-equity securities issued in a continuous or repeated manner where the total consideration of the offer in the EU is less than €75m (increased from €50m).

5. CLARIFYING PROVISIONS

5.1 Supplementary prospectus

The Amending Directive makes it clear that the obligation to produce a supplementary prospectus ends at the later of the closing of the offer or the beginning of trading in the securities. This reflects current UKLA practice but was not necessarily the case in other jurisdictions. The Amending Directive requires that the final date on which the withdrawal right can be exercised is stated in the supplementary prospectus.

5.2 Civil liability

5.2.1 The Amending Directive retains the provision regarding civil liability which states that the issuer will not incur civil liability solely on the basis of the summary, unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus. However, a new provision has been added permitting civil liability if the summary "does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities". In practice the content of summaries may not change significantly. Any change of practice will depend on the outcome of the implementing legislation that the Amending Directive requires the Commission to work on in order to specify the detailed content and specific form of the summary. The result of this debate is currently unclear.

5.2.2 On a practical level, most issuer’s liability is not affected by this amendment as liability will continue to only arise when the summary and the rest of the prospectus (taken together) is misleading, inaccurate, inconsistent or omits key information.

5.3 Definition of qualified investors

The Prospectus Directive contains an exemption from the obligation to publish a prospectus for offers addressed solely to qualified investors. Under the Amending Directive, the term "qualified investors" is defined as those persons that are classified as professional clients or eligible

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14 Art 4(1)© and 4(2)(d).
15 See UKLA LIST! issue number 11.
16 Similarly, the Amending Directive changes the date from which the validity of a prospectus starts. It is the date of its approval instead of the date of its publication. This is also current UKLA practice.
17 Art 6(2)(2), second subparagraph (first part of sentence).
18 Art 6(2)(2), as amended.
5.4 Final terms

The Amending Directive clarifies that final terms to a base prospectus, typically used in the context of a debt issuance programme, should only contain information which is specific to the issuance and which can only be determined at the time of the individual issuance (e.g. issue price, maturity, coupon, exercise date, exercise price and redemption price and other terms not known at the time of the prospectus). This indicates that any material updates to the prospectus, such as additional risk factors or changes to the business section or operating and financial review should be included in a supplement, which requires the home Member State regulator’s approval and triggers the withdrawal rights discussed above.

5.5 Retail cascades

Subsequent resales of securities by financial intermediaries constitute separate offers under the Prospectus Directive and require a separate exemption from the original offer, or publication of a prospectus. The amendments provide that no new prospectus is required in a subsequent resale or final placement of securities through financial intermediaries as long as a valid prospectus is available and the issuer or person responsible for the prospectus consents to its use by means of a written agreement. It is expected that an industry standard form of consent agreement will be developed.

5.6 Electronic publication of prospectuses

5.6.1 The Prospectus Directive allows publication of a prospectus in accordance with a number of methods listed in the current Article 14(2): (i) insertion in a newspaper with wide circulation; (ii) in printed form made available at the offices of the market on which the securities are being admitted to trading, or at the registered offices of the issuer and the financial intermediaries; (iii) in electronic form on the issuer’s website and on the website of the financial intermediaries; (iv) in electronic form on the website of the regulated market where admission to trading is sought; or (v) in electronic form on the website of the home Member State regulator. Home Member States currently have the choice of requiring electronic publication on an issuer’s website in case issuers choose method (i) or (ii).

5.6.2 The Amending Directive introduces a choice of electronic publication on the issuer’s or the financial intermediary’s website for method (iii) above. Rather than leaving Member States the choice, it now also requires that prospectuses are always published in electronic form on the issuer’s or financial intermediaries’ website(s), where the prospectus is also published in a newspaper or in printed form under methods (i) or (ii). This is a useful harmonisation of diverging practices in different Member States. In the UK this is now somewhat of a moot point as the UKLA now requires publication via the National Storage Mechanism.

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20 See Art 5(4), as amended, and Recital 10b.
21 Art 3(2), as amended.
22 See revised Art 14(2).
5.7 Abolition of annual information update

The obligation in Article 10 to publish an annual information statement (which contains or refers to all information made available by the issuer to the public over the preceding 12 months) has been eliminated, as it was duplicative of the requirements under the Transparency Directive. Periodic disclosure requirements will continue to apply under the Transparency Directive.

6. CONCLUSION

The Amending Directive has now been published in the Official Journal. After publication, the work of Implementing legislation begins in the Home Member States. Until that begins, market participants will not know the details and practical changes they will need to make in practice. ICMA is trying to anticipate some of these changes and is working on pro forma that can be adopted by the market in due course.