

What you need to know about the amendments to the EU prospectus regime implemented on 1 July 2012

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The Prospectus Directive regime in the European Union has been amended by virtue of Directive 2010/73/EU (the “Amending Directive”), which gave member states until 1 July 2012 to implement the necessary measures by domestic legislation. At the same time, Commission Regulation (EC) No 809/2004 (the “Prospectus Directive Regulation”), which stipulates the detailed contents of prospectuses under this regime and which does not require implementing legislation but has direct effect in member states, has also been amended.

The European Commission has adopted two amending regulations to amend the Prospectus Directive Regulation, which also came into effect on 1 July 2012 (the “Amending Regulations”). The Amending Regulations address (i) the format and content of the prospectus, the base prospectus, the summary and final terms; (ii) the proportionate disclosure regime; (iii) retail cascades; and (iv) certain technical amendments and clarifications.

The Amending Regulations reflect technical advice received from the newly created European Securities and Markets Authority (“ESMA”). Unlike the Amending Directive (which needs to be implemented by individual member states), the Amending Regulations have direct effect in member states and do not require implementing legislation. In the UK, the changes will be reflected in amendments to the Prospectus Rules, the Listing Rules, and the Disclosure and Transparency Rules.

Among other effects, the amended EU prospectus regime will have a significant impact on the content of base prospectuses and final terms, as well as the general operation of debt programmes that are approved on or after 1 July 2012 and are not subject to grandfathering. This client alert summarises the most important changes to the EU prospectus regime and the likely impact such changes will have on the capital markets.

Exemptions to the obligation to produce a prospectus

The Financial Services and Markets Act 2000 (“FSMA”) sets out various offers which are exempt from the requirement to produce a prospectus. The exemptions from the obligation to produce a prospectus in respect of public offers have been amended as follows:

- *Offers to qualified investors* – the definition of “qualified investors” in the Prospectus Directive has been amended to conform to the professional client or eligible counterparty definition in the Markets in Financial Instruments Directive (2004/39/EC) (“MiFID”).

- *Offers to less than 100 persons per Member State* – the exemption for offers to no more than 100 persons per member state has been increased to 150 persons. The UK implemented this change in 2011 in advance of the required timeframe on the basis that the increased threshold would be beneficial to issuers.
- *Offers in excess of €100,000* – the prior exemption for offers where the total consideration for the transferable securities being offered or the minimum denomination of the securities cannot exceed €50,000 has been increased to €100,000, reflecting concern over the threshold level for retail investors' participation in offerings.
- *Offers with total consideration of less than €5 million* – the prior exemption for offers where the total consideration of securities offered in the EEA over a 12-month period is less than €2.5 million has been increased to €5 million. This change was also implemented in the UK in advance of the required implementation date.

Prospectus summaries

The Amending Directive notes that the prospectus summary should be “a key source of information for retail investors”. Following guidance from ESMA, the Amending Regulations have changed the former content requirements applicable to prospectus summaries that under the original Prospectus Directive were required to convey the essential characteristics of, and the risks associated with, the issuer and the relevant transferable securities.

From 1 July, 2012, the summary contained in any newly approved prospectus is required to convey “key information” relevant to the securities, which, when read with the rest of the prospectus, must be an aid to investors considering whether to invest in the securities.

Key information means 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. The summary is required to include:

- the essential characteristics of, and risks associated with, the issuer and investment in the transferable securities;
- the general terms of the offer, including an estimate of expenses;
- details of the admission to trading; and
- the reasons for the offer and proposed use of the proceeds.

The Amending Regulations set out the detail of the information to be included in the summary. Each summary contained in a prospectus approved on or after 1 July 2012 is required to be comprised of five tables: (i) introduction and warnings, (ii) issuer and guarantor, (iii) the securities, (iv) risks, and (v) the offer. The order of the sections and the items within each section are mandatory in order to ensure that equivalent information always appears in the same place. This is intended to make it easier for an investor to compare the summary with other prospectus summaries.

While the length of the summary will need to take into account the complexity of the issuer and the securities offered, it must not exceed the longer of 7 per cent of the length of the prospectus or 15 pages, replacing the prior limit of 2,500 words. The summary is also no longer permitted to contain cross-references to other parts of the prospectus.

Importantly, from 1 July 2012, a person may have separate civil liability for the prospectus summary if, when read with the rest of the prospectus, it does not provide key information. Previously, there was no separate civil liability for the summary.

Content of the base prospectuses and final terms

In addition to the changes to the prospectus summary requirements, the Amending Regulations provide details regarding a number of changes to the form and content of final terms. The changes follow ESMA recommendations that are likely to restrict the ability of companies to use debt programmes to issue anything other than plain vanilla securities unless more complex securities are “*hardwired*” into the base prospectus and form of final terms.

The Amending Regulations dictate 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 individual issuances. Some of the key changes include:

- the final terms must not amend or replace any information in the base prospectus and in such cases, a supplementary prospectus or new base prospectus will need to be prepared;
- "consolidated conditions", commonly used in the German market, are not permitted;
- no pay-out or other formula is permitted to be set out in the final terms that is not fully described in the base prospectus;
- no descriptions of proprietary indices can be set out in final terms;
- an issue-specific summary must be attached to the form of final terms;
- a copy of the final terms must be filed with each host Member State to which the issuance is passported; and
- the final terms must contain a clear and prominent statement that the final terms have been prepared in accordance with Article 5(4) of the Prospectus Directive, and must be read in conjunction with the base prospectus and any supplements, as well as identifying where the base prospectus and any supplements have been published.

Supplementary prospectuses

Amendments have been made to clarify the time period under which a supplementary prospectus is required to be prepared. Under the original wording of the Prospectus Directive, the requirement to produce a supplementary prospectus was triggered at any time up to the final

closing of the offer or the time when trading on a regulated market commenced. The Amending Directive makes it clear that the end period is the later of these two events.

In addition:

- supplementary prospectuses can only be used to describe something which is a significant new factor, material mistake or inaccuracy relating to information described in the prospectus; and
- 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 date of publication of the supplementary prospectus, or any longer period specified by the issuer in the supplementary prospectus.

In practice, the UK Listing Authority has been taking a conservative view on the appropriateness of using supplementary prospectuses, rejecting attempts by issuers to amend the terms and conditions of securities by anything other than a newly approved base prospectus. The result is that delays are occurring in issuing securities off of existing programmes and companies are facing increased costs, even if the features of the securities in question are largely contemplated by the disclosure contained in the base prospectus.

“Retail cascades”

Securities are frequently placed with financial intermediaries who subsequently sell the securities to retail investors over a period of time. This manner of publicly offering securities is often referred to as a “*retail cascade*”. The Amending Directive clarifies that a separate prospectus will not be required for a resale of securities or final placement of securities through financial intermediaries, provided 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. The Amending Regulations set out additional details regarding the disclosure requirements to be used for this type of offering.

Grandfathering of prospectuses approved prior to 1 July 2012

The Amending Regulations contain “grandfathering” provisions which provide temporary relief from certain changes made to the Prospectus Directive Regulation. The grandfathering provisions provide that certain changes introduced by the Amending Regulations will only apply to prospectuses and base prospectuses approved after 1 July 2012. Prospectuses and base prospectuses approved before this date will remain valid for one year from the date of approval predominantly under the former prospectus regime.

As grandfathering ceases to be available, issuers will have to consider the content of the base prospectus for any programmes, including carefully considering what types of securities and what features are most likely to be issued off the programme. The restrictive approach of the new prospectus regime will likely make it more difficult for more complex types of securities to be issued off programmes unless their terms can be specifically identified in advance and “hardwired” into the base prospectus and final terms. Once a programme is updated on or after 1 July 2012, only limited additional information will be permitted to be included in final terms.

Otherwise, the base prospectus will need to be supplemented or an entirely new base prospectus will need to be approved.

Sundry provisions of the Amending Directive and Prospectus Directive Regulation

The Amending Directive and Prospectus Directive Regulation also provide for a number of additional changes to the current EU prospectus regime, including:

- *Creation of a proportionate disclosure regime.* As required by the Amending Directive, a proportionate disclosure regime has been put in place, reducing disclosure requirements for rights issues, small- and medium-sized enterprises, companies with limited market capitalisation and certain issues by credit institutions.
- *Removal of annual information update.* The requirement to provide an annual information update has been removed given that it is subsumed by existing provisions of the Transparency Directive.
- *Clarifying how the 12 month validity of a prospectus is to be measured.* A prospectus will continue to be valid for a period of 12 months although this period will now run from the date of approval rather than the date of publication, effectively reducing the period of validity.
- *Expansion of the employee share schemes exemption.* The share scheme exemption has been expanded to include any company with its head office or registered office in the EU, and to companies outside of the EU with shares admitted to trading on a third-country market, which the European Commission deems to be equivalent in terms of supervision and enforcement.

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