



The Prospectus Directive



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Introduction

The revised Prospectus Directive is designed to replace the Directive on Listing Particulars (80/390/EEC, now consolidated with other directives into the Directive on Admission of Securities to Listing (2001/34/EC)) and the Directive on Prospectuses (89/298/EEC). The existing directives have had only limited success in creating common standards for issues of securities throughout the EU and in achieving mutual recognition of prospectuses and listing particulars.

The Commission regards the revised Prospectus Directive as a fundamental part of the Financial Services Action Plan, and in its haste to implement the plan it produced its original proposal on 30 May 2001 without formal consultation. The proposal had a hostile reception from participants in the capital markets who felt it would increase the cost of raising capital and did not reflect the realities of securities issuance in a number of market sectors. Many of the objections to the original proposal were addressed by the European Parliament's Committee on Economic and Monetary Affairs and amendments to the proposal were adopted by the Parliament on 13 March 2002. However, the Council was unable to reach agreement on the original proposal as amended by Parliament and on 9 August 2002 the Commission published an amended proposal. The amended proposal adopted or considered many of the Parliament's revisions, but on a number of significant issues it maintained its original stance. The Council reached political agreement on a revised text on 5 November 2002. At the time of writing, a common position is awaited, which will then proceed to a second reading in the Parliament.

Scope and approach

As mentioned above, the proposed new directive will replace the existing directives on prospectuses and listing particulars. Unlike the listing particulars directive, however, it applies to securities that are admitted to trading on a regulated market (using the definition in the Investment Services Directive (93/22/EEC), which is itself being revised) rather than to official listing on a stock exchange: these would include securities traded on domestic 'second' markets, which are not currently regarded as admitted to official listing.

The types of securities to which the Directive applies are similar to those covered by the two existing directives. They include shares, bonds, securitised debt and entitlements to acquire any of those instruments by subscription, purchase or exchange (including cash settlement). There are exemptions for debt securities with a maturity of less than one year; open-ended collective investment schemes; debt securities issued or guaranteed by governments, local authorities, public international bodies, the European Central Bank and the central banks of member states; securities issued by non-profit making bodies; and bank CD programmes.

A new exemption has been introduced for offers of securities with a total consideration of less than €2.5m within a 12-month period, in order to address concerns that the Directive would impose a disproportionate cost on small issuers and inhibit the raising of capital by them.

The Directive follows the so-called Lamfalussy procedure, under which a four-level approach is adopted to harmonise regulation throughout the EU: framework principles, implementing measures, strengthened co-operation and enforcement. The Directive sets out framework principles to be implemented by more detailed measures made by the Commission on the advice of the Committee of European Securities Regulators (CESR).

Before embarking on a detailed review of the Directive it is worth looking at some of the definitions that are frequently used in it. In order to incorporate provisions to deal with the professional markets in eurobonds and other similar securities, a definition of 'non-equity securities' has been created. This includes any securities other than shares, securities equivalent to shares and securities giving the right to acquire shares that are issued by the issuer of the underlying shares (or another group member). Covered warrants and exchangeable bonds issued by an entity unrelated to the issuer of the underlying shares would therefore be non-equity securities, whereas convertible bonds issued by the underlying share issuer would be

equity securities. This distinction has been questioned in view of the similarity in distribution procedures between convertible bonds and other debt instruments issued to professional investors. The definition also fails to take into account the fact that warrants and certificates issued by the issuer of the underlying shares are marketed and traded in the same way as similar instruments issued by separate entities.

The majority of the relaxations available in the amended proposal apply only to non-equity securities having a denomination of at least €50,000, on the basis that they are intended to apply to issues aimed at professional rather than retail investors. However, the €50,000 limit does not reflect market practice. Many wholesale issues are in smaller denominations, in particular to allow investors to split holdings internally between different funds or to allow institutional investors to rebalance portfolios by trading in small lots. Furthermore, the concept of a minimum denomination is not readily applicable to derivative instruments, such as warrants.

In order to introduce provisions to lighten the burden on smaller companies, a definition of ‘small and medium sized enterprise’ (SME) has been introduced. This includes companies meeting two of the following three tests: an average of less than 250 employees during the last financial year, a total balance sheet not exceeding €43m and annual net turnover not exceeding €50m. The definition is similar, but not identical, to the test for large companies to be considered as professional clients under the Commission’s proposal for a revised Investment Services Directive. Again, two out of three tests must be satisfied, but the tests are slightly different: a balance sheet total of €20m, net turnover of €40m and own funds of €2m. However, the figures under the Prospectus Directive may be adjusted subsequently by the Commission under the Lamfalussy procedure.

Obligation to publish a prospectus

The cornerstone of the Directive is a requirement to publish a prospectus where either an offer of securities is made to the public or securities are admitted to trading on a regulated market.

An 'offer of securities to the public' is defined for the first time. The definition refers to a communication presenting sufficient information on the terms of the offer and the securities to be offered so as to enable an investor to decide to purchase or subscribe for securities. On the basis that this definition is unlikely to catch materials that do not refer to the offer price, it should not unduly constrain the distribution of preliminary promotional materials before publication of a prospectus.

Offers are excluded from the definition in certain cases (although it should be remembered that a prospectus is still required in these cases if securities are admitted to trading on a regulated market). The first exclusion relates to offers made to 'qualified investors'. The amended proposal adopts a definition similar, but not identical, to the definition of professional clients under the Commission's proposal for a revised Investment Services Directive. The harmonisation of the concept of 'professional investors' in the regulation of both offers of securities and conduct of business would be a welcome development. The qualified investors exemption is wider than that available under the current Prospectus Directive. As well as regulated entities and national and regional governments and international institutions, the exemption covers large corporates (ie those that are not SMEs), irrespective of their business. Unregulated investment companies (which may not meet the tests for large corporates) are also included, but only if their purpose is 'solely' to invest in securities – if strictly interpreted, this could be a hard test to satisfy (and it is also worth noting that the 'solely' requirement is absent from the proposed Investment Services Directive definition). The exemption can also apply to certain individual investors and SMEs if they ask to be treated as qualified investors, although the criteria proposed will be difficult for individual investors to meet. The Directive provides for the establishment of registers of qualified individual investors and SMEs.

As under the existing Prospectus Directive, exemptions are also provided for private placements and for offers with a minimum total consideration or specified denomination. The private placement exemption is made more specific: it applies where the offer is made to less than 100 persons (other than qualified investors) per member state. The relevant amount specified as the minimum consideration or denomination is increased slightly from €40,000 to €50,000.

The existing exemptions from the requirement to produce a prospectus in the case of conversion offers, takeovers, mergers, bonus issues and employee offers are maintained in relation to both public offers and the admission of securities to trading. It will remain possible for accelerated placings to professional investors to be made without a prospectus using an exemption for offers of up to 10 per cent of the number of shares already admitted to trading on the relevant regulated market (which applies only in the case of admission to trading, not to public offers).

Subsequent resales are treated as offers in their own right. The effect of this on secondary market transactions is not clear. For example, in the disposal of a large block of existing listed shares in the market, the position is different from that under the existing Prospectus Directive, which does not apply to securities that are already listed on a stock exchange. Although the 'qualified investor' exemption may be available, the ability of placees who are themselves qualified investors to dispose of shares taken up by them could be constrained. Furthermore, in the case of secondary market offers, responsibility for the prospectus is placed on the offeror of the securities rather than the issuer. An offeror in such cases may be unable to discharge its responsibilities without the co-operation of the issuer.

Form and content requirements

Having set out when a prospectus must be published, the Directive goes on to specify the form it must take and what needs to be included in it.

The overriding requirement in the existing prospectus and listing directives to contain all the information necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses and prospects of the issuer and the rights attaching to the securities remains unchanged.

Form of prospectus

There is a new requirement to include a summary of the prospectus, which is required to convey, 'in a brief manner' and in non-technical language, the essential characteristics and risks associated with the issuer, any guarantor and the securities. Annex IV sets out the matters expected to be covered in the summary. To meet the concern that an issuer could be liable for incomplete information contained in the summary, the Directive contains a requirement on member states to ensure that no civil liability can be incurred solely on the basis of the summary unless it is misleading, inaccurate or inconsistent with the rest of the prospectus. Nevertheless, a determined plaintiff may still be able to claim that a summary note is misleading by omission. A summary is not required for certain prospectuses not directed at retail investors – where the prospectus relates to 'non-equity securities' having a denomination of at least €50,000 – although member states can require in domestic national legislation that a summary must be prepared in those cases.

The Directive introduces the concept of a tripartite prospectus consisting of a registration document (relating to the issuer), a securities note (giving details of the securities being issued) and a summary note. The registration document remains valid for a period of 12 months and can be used together with a new securities note and summary for new issues of securities during that period. The issuer has the option to take advantage of this shelf registration approach or to draw up the prospectus in the traditional form of a single document (which may itself be supplemented if further issues are made within 12 months). Although a similar shelf registration facility is now offered for London Stock Exchange listings, it has been little used by issuers.

The amended proposal introduces the new concept of a 'base prospectus' for non-equity securities issued under an offering programme. This must contain all relevant information about the issuer and the relevant securities, and can be supplemented by filing

the final terms of particular issues with the competent authority without any further approval requirement. This procedure appears consistent with the existing mechanics of medium term note and covered warrant programmes, although supplementary information relating to a change since the issue of the base prospectus would still need to be approved and would therefore be subject to the timing constraints mentioned in the discussion on the approval process below.

Annual information

Whatever form of prospectus is used, there is a new obligation on issuers whose securities are admitted to trading on a regulated market to provide annually a document that contains or refers to all information that the issuer has published or made available to the public over the last 12 months in compliance with the requirements of securities laws. This document must be filed with the competent authority of the home member state after publication of the issuer's financial statements.

The information required to be given or referred to is likely to include that originally published in compliance with the requirement in the Market Abuse Directive for issuers of securities admitted to trading on regulated markets to disclose price sensitive information as soon as possible, and the requirement in the proposed Transparency Directive for annual, semi-annual and quarterly financial statements. There is some concern at the lack of a co-ordinated approach in dealing with these interrelated disclosure requirements, with the possibility of different competent authorities being responsible for compliance with the separate requirements (see discussion on the approval process below). The competent authority under the Transparency Directive is required to be the same as that designated under the Prospectus Directive, but there could be a different competent authority under the Market Abuse Directive.

The requirement to provide this annual information does not apply to non-equity securities with a denomination of at least €50,000, in order to meet the concerns of bond issuers who do not also issue equity securities and so would not otherwise be required to prepare the information. However, the requirement remains for issues of non-equity securities unable to meet the minimum denomination requirement – for example, covered warrant programmes, and issuers of eurobonds in the wholesale market having lower denominations.

Content requirements

Much of the detail of the content requirements for prospectuses is left to the Commission to determine at 'level 2' of the Lamfalussy procedure under the framework provided by the Directive. The amended proposal requires the Commission to consider differences between types of issuer and securities in developing different models of disclosure requirements.

CESR has published for consultation its draft advice to the Commission on the implementing measures to be adopted. It proposes a so-called building block approach under which separate schedules containing information requirements are proposed for different types of securities. The basis of all the schedules is the core equity building block. Separate building blocks are then proposed for corporate retail debt, derivatives and asset backed securities. The Directive requires the Commission to take into account the information appropriate for issuers of non-equity securities having a denomination per unit of at least €50,000. CESR has accordingly proposed a separate wholesale debt building block. Some doubt has been expressed over whether the disclosure requirements for debt securities are sufficiently distinguished from those for equities and whether the requirements take enough account of the different requirements of retail and professional investors. For example, there is no separate building block for derivatives offered to professional investors. Concern has also been voiced that the requirements do little to accommodate the position of issuers located outside the EEA.

The Directive also requires the Commission to take into account the different activities of the issuer. CESR proposes separate building blocks for start-up companies, property companies, mineral companies, investment companies, scientific research based companies, shipping companies and banks (for debt securities only). Despite the Directive's requirement to take into account the size of the issuer, and in particular SMEs, CESR did not consider it necessary to propose a separate building block for SMEs, on the basis that references to materiality in the core equity building block left enough scope for items to be omitted if they were not relevant.

The core equity building block is based closely on the disclosure standards for cross-border equity offerings issued by the International Organisation of Securities Commissions, as required by the Directive. Some features of note are that:

- risk factors must be disclosed (although no list of particular risk factors is specified);

- pro forma financial information is required where there is a change of at least 25 per cent in the size of a company; and
- the future prospects of the company for at least the current financial year must be given – profit forecasts may be provided and need not be reported on by a third party.

The Directive broadly preserves the provisions of the existing prospectus and listing directives authorising derogations from the requirements where disclosure would be contrary to the public interest or seriously detrimental to the issuer, provided that the public would not be misled by the omission, or where the information is of minor importance only. It permits the incorporation of public documents by reference, except in the summary, provided that these documents have been previously published and filed.

Harmonisation

The Directive is commonly referred to as one requiring maximum rather than minimum harmonisation, meaning that it sets common standards to be implemented rather than mandating minimum standards and leaving member states free to impose ‘super-equivalent’ requirements. The preamble contains references to the harmonisation of disclosure requirements and the approval procedure. Otherwise, indications that maximum harmonisation is required are contained in the background material on the Directive. For example, the Explanatory Memorandum to the Commission’s amended proposal of 9 August 2002 stated that ‘existing disclosure standards need to be aligned in order to introduce the same standards for the public offer of securities and admission to trading throughout the Union, in accordance with the principle of maximum harmonisation’. Considerable concern has been voiced that this would not enable competent authorities, such as the UK Listing Authority (UKLA), to maintain rules on the content of prospectuses that are not required by the Directive (for example, the requirement in certain cases to include a working capital statement). There may nevertheless be scope for a degree of freedom to be exercised by national competent authorities. For example, competent authorities are given the right to require issuers to include in the prospectus ‘supplementary information if necessary for investor protection’, although this is presumably intended to apply on an ad hoc basis rather than allowing competent authorities to make rules going beyond the requirements of the Directive. Concerns have also been expressed over whether competent authorities will be able to retain super-equivalent continuing obligations for listed companies, such as the UKLA’s class tests. The Directive does not seek to amend those parts of the existing listing

directive dealing with the requirements for listed companies and continuing obligations. Nevertheless, there is some doubt as to how the concept of a competent authority under the remaining parts of the existing listing directive would be affected by a different definition in the Prospectus Directive and as to the continuing relevance of the concept of official listing.

Despite the harmonisation of content requirements, the revised proposal provides only limited harmonisation of civil liability for the information included in the prospectus. Those required to be fixed with liability are specified and include the issuer or its board, the issuer itself, and the offeror or person requesting admission to trading (the Directive seems to offer scope for limiting responsibility to the issuer rather than the board in the case of eurobond and similar issues). However, the standard of liability is left to individual member states to determine. Moreover, there would seem to be nothing to prevent member states other than those of the competent authority (see discussion on the approval process below) from imposing liability on issuers and other responsible parties regarding the circulation of the prospectus in their own jurisdiction.

The approval process – home state control

Some of the most controversial aspects of the Directive have been those relating to the process of approval. The Directive provides for all prospectuses to be approved by the relevant competent authority. This is in contrast to the existing Prospectus Directive, which contains no approval requirement: prospectuses issued by companies with securities traded on domestic second markets are not, therefore, currently required by the directives to be approved (as the existing listing directive, which does contain an approval requirement, applies only to official listing of securities). The additional burden on second market issuers may, however, be alleviated by the ability granted to member states to permit competent authorities to delegate the task of approval (although any such delegation must end five years after the entry into force of the Directive). This would permit, for example, the UK competent authority to delegate the approval of an AIM company's prospectus to its nominated adviser.

The Directive places responsibility for approval of a prospectus on the competent authority of the home member state. For EU issuers of securities with a denomination of less than €5,000 (note the lower minimum denomination requirement here), this is defined as the member state where the issuer has its registered office. The home member state competent authority has discretion to transfer responsibility for approval to another competent authority, although it is perhaps unlikely that very much use will be made of this power. There has been considerable debate on whether it is appropriate to restrict the issuer's choice of competent authority in this way, particularly if the primary listing of securities is in another jurisdiction. The amended proposal acknowledges the concerns that have been raised in relation to the professional specialist securities markets (where competent authorities in the jurisdictions of the main exchanges have developed particular expertise) by permitting issuer choice both in the case of non-equity securities with a minimum denomination of €5,000 and in the case of warrants and certificates (provided that the issuer of the warrants and certificates is not also itself the issuer, or in the same group as the issuer, of the underlying shares). However, issuers of equity securities (including convertible bonds) and non-equity securities that do not satisfy the minimum denomination limit are subject to the requirement for the competent authority to be that of the state where they have their registered office.

Where an issuer is not incorporated in a member state, the home member state is that in which securities are first offered to the public

or admitted to trading. Such an issuer cannot choose a different competent authority if it chooses to list future securities in a different member state (except in the case of non-equity securities having a minimum denomination of at least €5,000) unless the home member state was not chosen by the issuer.

The Directive specifies time limits within which approval must be given: 15 working days, extended to 30 working days for an IPO, with an ability to extend further if 'complementary information' is required or the documents submitted are incomplete. No shorter periods are specified for approval of the securities note alone. These limits should not present particular problems if sensibly applied (although there is scope for competent authorities to delay the process by making requests for further information). However, the same time periods appear to apply in the case of the supplement to the prospectus, which must be prepared if a significant new factor arises or a material inaccuracy is discovered in the prospectus. If rigidly applied in this context, the specified periods could prove a significant inconvenience.

The Directive does not purport to harmonise the laws of member states regarding liability of the competent authority for the approval process.

Once approved, the prospectus is required to be published 'as soon as practicable, and in any case, at a reasonable time in advance of, and at the latest at the beginning of, the offer or the admission to trading'. For an IPO, the prospectus must be available at least six working days before the end of the offer. It is also worth noting that, where the final offering price and the amount of the issue (or the criteria for determining them) cannot be included in the prospectus, a period of two working days must be allowed after the final offering price and/or issue amount have been published, during which acceptances may be withdrawn. This could have implications for the mechanics of issues involving price-range prospectuses.

Publication may be by means of posting on an issuer's or a competent authority's website, and competent authorities are obliged to publish approved prospectuses on their own websites (or at least to provide a hyperlink to them). Competent authorities may require issuers to publish on their websites as well as by hard copy. The issue of potential breaches of other countries' securities laws (particularly those of the US) by publication on an open-access website needs to be addressed.

Publicity

The Directive imposes limited controls over publicity for an issue other than the prospectus. Advertising must not be inaccurate, misleading or inconsistent with that contained (or expected to be contained) in the prospectus. Any information concerning the offer, even if not advertising, must also be consistent with the prospectus. This requirement would apply to roadshow presentations but should not lead to a change in practice, as existing procedures should already be designed to ensure consistency with the prospectus. There is no requirement to submit advertising to the competent authority for approval. It should also be noted that some publicity might itself be regarded as sufficiently specific to constitute an offer to the public, thereby triggering the requirement for a prospectus (see the discussion on the obligation to publish a prospectus above).

In offers where no prospectus is required, the Directive forbids selective disclosure of material information to particular qualified investors or special categories of investors: any material information disclosed to them (for example, at meetings) must also be disclosed to all other qualified investors or investors falling within those categories. This prohibition on selective disclosure may have implications for roadshows, although there will remain scope, as at present, to conclude that information given at roadshows is only a summary or amplification of information contained in the prospectus and is not material for these purposes.

Mutual recognition

The Directive promises a real improvement in the mechanism for mutual recognition of prospectuses between member states. It provides that a prospectus that is approved by the competent authority of one member state is to be valid for the public offer or admission to trading of securities in any other member state, provided only that the competent authority of that member state is notified. There is no need for the host competent authority to approve the prospectus for use in its own jurisdiction and so no scope for it to require additional information to be included. The notification procedure requires delivery of a certificate of approval from the home member state together (if applicable) with a translation of the summary note prepared by the issuer.

If a prospectus is to be used in connection with an offer to the public or admission to trading in a member state other than the home state, it must be drawn up either in a language accepted by the competent authority of that member state or in a language 'customary to the sphere of international finance' – English would presumably be regarded as qualifying. However, the whole of a prospectus drawn up in another language would need to be translated into English or the language of the host state. If a language customary in the sphere of international finance is used, the competent authority of a host member state can only require the summary to be translated into its language. If the offer is also to be made in the home member state, the prospectus must also be drawn up in a language accepted by the competent authority in that member state. However in relation to non-equity securities with a minimum denomination of €50,000, no requirements to translate can be imposed, except that member states are free to require in national legislation that a summary be drawn up in their domestic language.

Where securities are being admitted to listing without an offer to the public, it is possible to dispense with the notification requirement if securities of the same class have been admitted to trading on another regulated market for at least 18 months and a prospectus or listing particulars were approved in connection with the original listing. A summary document, which the competent authority of the host member state may require to be translated, must be made available.

Where issuers are based in countries outside the EU, the home member state may approve a non-EU prospectus if it has been drawn up in accordance with international standards and information requirements that are 'equivalent' to the requirements under the Directive. The Commission has the discretion to decide

whether a third country's law or practice is sufficient to satisfy the equivalence test.

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