

Proposals to Change the EU Prospectus Regime

The Council of the European Union confirmed on 28 June 2010 that the text of the legislative resolution passed by the European Parliament, on 17 June 2010, to amend Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market in the EU (the "Prospectus Directive"), has been informally agreed between the EU institutions.

The resolution passed by the European Parliament adopted, with amendments, the European Commission's proposals published on 24 September 2009. The European Commission's proposals followed a public consultation aimed to improve and simplify the application of the Prospectus Directive. The proposals form part of a wider initiative aimed to reduce the administrative burden on companies within the EU to the minimum that is necessary to ensure the protection of investors and the proper functioning of the securities markets.

This update summarises the main changes adopted by the European Parliament.

Thresholds for Offers that Fall Outside the Scope of the Prospectus Directive

It is proposed that the total consideration threshold for an offer to fall outside the scope of the Prospectus Directive be raised from EUR 2.5 million to EUR 5 million, calculated over a period of 12 months. The total consideration threshold for an offer to fall outside the scope of the Prospectus Directive where non-equity securities are issued in a continuous or repeated manner will also be raised from EUR 50 million to EUR 75 million. In both cases, the resolution clarifies that the total consideration is calculated on an EU wide basis.

Thresholds for Offers of Securities that Are Exempt from the Prospectus Directive

The European Parliament has proposed a number of amendments to the current public offer exemptions where a Prospectus Directive

compliant prospectus is not required. These include:

- increasing the maximum person exemption for offers addressed to less than 100 persons to offers addressed to less than 150 persons (other than qualified investors) per member state;
- increasing the exemption for offers of securities with a minimum denomination of EUR 50,000 to offers with a minimum denomination of EUR 100,000;
- increasing the exemption for offers of securities with a minimum total consideration of EUR 50,000 to offers of securities with a minimum total consideration of EUR 100,000 per investor;
- amending the definition of 'qualified investors' so that it conforms with the definition of 'professional clients' in the Markets in Financial Instruments Directive; and
- increasing the scope of the exemption for employee share schemes to include issuers that do not already have securities admitted to trading on a regulated market if either (i) the issuer's head office or registered office is in the EU; or (ii) the securities are admitted to trading on a regulated market with regard to which the European Commission has adopted an equivalence decision.

Prospectus Summary: "Key Information" and Civil Liability

It is proposed that a number of amendments be made to the requirements for the summary included in a prospectus. The amendments are aimed at producing a more useful summary

drawn up in a common format, containing key information set out in a precise manner and in non-technical language, to facilitate comparability with similar securities. A new definition of “key information” has been added which includes:

- a short description of the risks associated with and essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position;
- a short description of the risk associated with and essential characteristics of the investment in the relevant security, including any rights attaching to the securities;
- general terms of the offer, including estimated expenses charged to the investor by the issuer or the offeror;
- details of admission to trading; and
- reasons for the offer and use of proceeds.

The added importance of the prospectus summary is evident in the proposed amendments which provide that civil liability may arise if the summary, when read together with other parts of the prospectus, is misleading, inaccurate or inconsistent or does not provide key information in order to aid investors when considering whether to invest in such securities. The summary should include a clear warning in this respect.

Supplementary Prospectuses and Withdrawal Rights

The requirement as to the period when it will be necessary to publish a supplementary prospectus will be clarified. The resolution provides that the period will end on the later of the final closing of the offer to the public or the time when trading on a regulated market begins.

With regard to withdrawal rights, where the prospectus relates to an offer of securities to the public, and not only to admission to trading, it is proposed that the Prospectus Directive be amended to provide that investors who have agreed to purchase or subscribe for securities before a supplementary prospectus is published, shall have two working days to withdraw their acceptances “provided that the new factor, mistake or inaccuracy” arose before the final closing of the offer of securities to the public and the delivery of securities. Further, the issuer or offeror will be able to extend the period by two working days. The final date for the withdrawal must be stated in the supplementary prospectus.

Final Terms

The European Parliament has proposed a new requirement that where the final terms of an offer are not included in the base prospectus or a supplement, they should be made available to investors and filed with the competent authority of the home member state as well as communicated to the competent authority of the host member state(s). It has also been clarified that final terms should only contain information relating to the securities note and shall not be used to supplement the base prospectus.

Rights Issues

It is proposed that a “proportionate disclosure regime” be introduced for pre-emptive share issues. The new regime, which will replace the current more onerous disclosure requirements, will apply to offers of shares of the same class which are already admitted to trading on a regulated market or a multilateral trading facility and subject to appropriate ongoing disclosure requirements.

Electronic Publication

It is proposed that the current methods of publication of a prospectus will be amended to provide that a prospectus is deemed available to the public when published on the issuer’s website. This is an improvement of the current requirements which provide that publication on the issuer’s website must be accompanied by publication on the website of any financial intermediaries and paying agents. The directive will also be amended to require issuers who choose to publish by physical means to also publish in electronic form on their website or, if appropriate, the financial intermediaries’ or paying agents’ website.

Going Forward

Once formally adopted, member states will be required to implement the directive into their national law within 18 months. It remains to be seen whether the amendments will achieve the stated aims of creating a less burdensome and more flexible prospectus regime.

Practice group contacts

For more information, please contact one of the attorneys listed, or the Dechert lawyer with whom you regularly work. Visit us at www.dechert.com/corporateandsecurities.

Sean Geraghty
London
+44 20 7184 7540
sean.geraghty@dechert.com

Jodie Valler-Feltham
London
+44 20 7184 7486
jodie.valler-feltham@dechert.com

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