



Amendments to the Prospectus Directive

On 11 December 2010, the final text of the Directive amending the Prospectus Directive and the Transparency Directive (the “Amending Directive”) was published in the Official Journal of the European Union (“EU”).¹ The Amending Directive will come into force on 31 December 2010, and member states must implement the changes by 1 July 2012. The British government, however, has announced that it intends to enact some of the measures ahead of the deadline, subject to public consultation in early 2011, as a means of helping small and medium sized enterprises (“SMEs”) raise finance in the capital markets.²

The final version of the Amending Directive is almost identical to the version approved by the EU Parliament in June 2010, as reported in our previous client alert.³ We set out below a summary of the key changes:

- **Qualified investors (Article 2):** The definition of “qualified investors” in the Prospectus Directive will be aligned to the definitions of “professional clients” and “eligible counterparties” in the Markets in Financial Instruments Directive (“MiFID”). This means that investment firms may rely on the same client categorisations when conducting private placements.
- **Other exemptions from the prospectus requirement (Article 3(2)):** The amendments will also extend the scope of certain other exemptions allowing securities to be offered without publishing a prospectus:
 - i) **Small number of investors:** the exemption for an offer of securities to fewer than 100 persons per member state will be increased to 150 persons per member state (other than qualified investors);
 - ii) **Minimum total consideration:** there is an exemption for an offer of securities to investors who acquire them for a total consideration of at least €100,000 (raised from €50,000); and
 - iii) **Minimum denomination threshold:** the exemption for an offer of securities whose denomination per unit is at least €50,000 will be increased to €100,000.
- **Retail cascades (Article 3(2)(ii)):** A new subparagraph will be added under Article 3(2)(ii) which expressly provides that financial intermediaries will not be required to publish a new prospectus when reselling the securities whilst the original prospectus is still valid (i.e., 12 months from its approval) provided that the issuer (or the person responsible for drawing it up) has given its written consent to such

¹ Directive 2010/73/EU of 24 November 2010 amending the Prospectus Directive (2001/71/EC) and the Transparency Directive (2004/109/EC), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF>.

² Financing business growth: The Government’s response to the consultation, Financing a private sector recovery (1 November 2010), <http://www.bis.gov.uk/assets/biscore/corporate/docs/f/financing-business-growth-response.pdf>.

³ See Morrison & Foerster client alert: EU Parliament’s adoption of amendments to the Prospectus Directive (24 June 2010), <http://www.mofo.com/files/Uploads/Images/100624Directive.pdf>.

use. This clears up the confusion among distributors of securities as to when they may rely on a prospectus published by the issuer as satisfying their own obligation under the Prospectus Directive.

- **Employee share schemes (Article 4):** The exemption for offers to employees will be extended to non-EU companies which have securities admitted to trading on a regulated market or a third-country market subject to an equivalent disclosure regime.
- **Prospectus summary (Article 5):** The prospectus summary must contain key information necessary for the investors in deciding whether to invest in the securities and be presented in a format which facilitates comparisons with other similar securities.
- **Civil liability (Article 6(2)):** Civil liability may arise based on the prospectus summary but only if it is misleading, inaccurate or inconsistent when read together with other parts of the prospectus, or if it fails to provide key information for the investors in considering whether to invest.
- **Rights issues (Article 7):** To increase the efficiency of preemptive issues of shares to existing shareholders, a shorter form of “proportionate disclosure” regime will be introduced for rights issues by listed companies, where the shares offered are of the same class as those admitted to trading on a regulated market or multilateral trading facility. However, the issuer must not have disappplied the statutory preemption rights, which UK companies often do.
- **The investor’s right to withdraw (Article 16):** The Prospectus Directive currently gives an investor who has already agreed to purchase the securities before a supplementary prospectus is published the right to withdraw his or her acceptance within two working days after its publication. Pursuant to the Amending Directive, this withdrawal right is to be limited to non-exempt public offers only and it has been clarified that the obligation to publish a prospectus supplement does not extend beyond the later of the final closing of the offer and admission to trading.

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