

News Update

AMENDMENTS TO THE PROSPECTUS DIRECTIVE

On 11 December 2010, an amendment to the Prospectus Directive¹ adopted by the European Parliament and the Council and dated 24 November 2010 was published² ("**Amendment**"). The purpose of the amendment is to simplify and improve the application of the Prospectus Directive, to enhance the EU's international competitiveness, and at the same time to enhance the level of investor protection. In this Newsletter we look at some of the most important changes. The Amendment needs to be transposed into national law by 1 July 2012.

- Small offer exemptions

The exemption for the publication of a prospectus for an offer of securities of up to €2.5 million (calculated over 12 months) has been increased to an offer of up to €5 million. This exemption cannot be used in combination with other exemptions. Under the Prospectus Directive a prospectus is also not required for an offer of securities of up to €100,000 (calculated over 12 months), but this exemption can be applied in combination with other exemptions.

It is further clarified that the calculation of the relevant amount is to be made on a Community wide basis and not a country-by-country basis.

The exemption that a prospectus is not required if it concerns an offering to less than 100 investors per Member State, not being qualified investors, has been extended to less than 150 investors per Member State. The exemption for offers with a minimum consideration of €50,000 per investor for each separate offer is tightened as the threshold is increased to €100,000.

In addition, the requirement to publish a prospectus in the case of an offer to debt securities to the public with a denomination of €50,000 has been doubled to €100,000.

- Offer of securities to employees

The exemption for employee-share schemes has been extended and also applies to issuers that do not have their securities admitted to trading on a regulated market, but which have either (i) their registered office or head office within the EEA and have made a document available containing information on the number and nature of the securities and the reasons for, and the details of, the offer, or (ii) are non-EEA issuers which have securities admitted to trading on a EEA regulated market or on a third-country market, which the Commission believes is equivalent to that of an EEA regulated market in terms of disclosure rules, and have made available the abovementioned information document. The Commission shall need to decide on the equivalency of the third-country market in order to rely on this exemption. It is not yet clear when they will take such a decision.

- Harmonization of the definition of "qualified investor"

Formerly there was a difference between a "qualified investor" in the Prospectus Directive and a "professional client" in the MiFID Directive.³ Following the Amendment, "qualified investors" now means (i) "professional clients" as defined in the MiFID Directive, which includes the retail investor who has opted for a professional client status all in accordance with the procedures set out in the MiFID Directive, but excluding the professional client who has opted out and who does not wish to be treated as a

¹ Directive 2003/71/EC.

² Directive 2010/73/EC.

³ Directive 2004/39/EC.

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professional client, and (ii) "recognised eligible counterparties" as meant in the MiFID Directive.

- Proportionate disclosure regime for certain offerings

The Amendment introduces a proportionate disclosure regime for rights issues in respect of equity securities that are admitted to trading on a regulated market or an multi-trading facility, provided that this facility is subject to appropriate ongoing disclosure obligations, within the EEA. This new regime only applies to issuers that have not excluded or restricted the statutory pre-emptive rights. This is different from what was suggested in the consultation document. Generally speaking in the case of a rights issue these statutory rights are excluded in order to make it easier to deal with investors outside the EEA and fractional entitlements.

Reduced disclosure regimes have further been introduced for credit institutions offering non-equity securities in a continuous or repeated manner by credit institutions of up to €75 million⁴, and more importantly, for SMEs⁵ and issuers with a reduced market capitalization (i.e. an average market cap of less than €100 million in the three previous calendar years to be calculated on the basis of the closing price on the last trading day of the relevant calendar years).

It is still unclear how the exact disclosure regimes for such offerings will look, as these will be dealt with in delegated acts. The practical impact of the reduced disclosure regime will also depend on how underwriters will react to such a regime as they may wish a complete prospectus for different reasons.

⁴ These type of offerings do in principle not fall under the scope of the Prospectus Directive, but issuers may opt in and prepare a prospectus in accordance with the Prospectus Directive.

⁵ SMEs are small and medium sized companies having according to their latest (consolidated) annual accounts less than an average of 250 employees annually, a balance sheet total equal to or less than €43 million and a net turnover equal to or less than €50 million.

ESMA has been requested advice on the requirements of such proportionate disclosure regime.

- Supplementary prospectus and withdrawal rights

A supplementary prospectus must be published if a new factor, material mistake or inaccuracy arises or is noticed between the date of the approval of the prospectus and the closing of the offer or, as the case may be, the start of trading on a regulated market.

According to the Amendment, investors only have withdrawal rights in the case of an offering to the public and no longer in the case of an admission to trading. The new factor, mistake or inaccuracy should arise before the closing of the offer and delivery of the securities. The right of withdrawal is to be aligned throughout the EEA and is now two working days (instead of a minimum of two working days as was formerly provided). This term can be extended by the issuer.

- Prospectus summary

The summary must be in plain and comprehensible language. It has to focus on "key information", which is defined as:

"essential and appropriately structured information which is to be provided to investors with a view to enable them to understand the nature and risk of the securities that are being offered to them or admitted to trading on a regulated market and ..., to decide which offers of securities to consider further. In light of the offer and securities concerned, the key information shall include the following elements:

- (i) *a short description of the risks associated with and essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position;*
- (ii) *a short description of the risks associated with and essential characteristics of the investment in the*

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- relevant security, including any rights attaching to the securities;*
- (iii) *general terms of the offer, including estimated expenses charged to the investors by the issuer or the offeror;*
- (iv) *details of the admission to trading; and*
- (v) *reasons for the offer and use of proceeds."*

The summary is to be prepared in a standard format in order to secure comparability of the summaries of similar securities. The exact format of the summary is not yet clear. The Commission has asked ESMA technical advice on this subject matter.

The issuer is not only liable for a summary that is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus, but the issuer is also liable for a summary if it does not provide key information in order to aid investors when considering whether to invest in such securities.

- **Retail cascade**

In a "retail cascade" the securities are not sold by the issuer directly, but through financial intermediaries. It was unclear how the prospectus requirement and responsibility provisions applied when the securities were not directly sold by the issuer. The Commission has now explained that intermediaries are entitled to rely on the prospectus initially published by the issuer and for which the issuer has assumed responsibility, provided, however that the issuer consents to the use of its prospectus. If consent is withheld, the financial intermediary will have to publish a new prospectus.

- **Annual update document**

The requirement in the Prospectus Directive to publish an annual update document has been abolished. The issuer's disclosure obligations

are now dealt with by the Transparency Directive.⁶

- **Miscellaneous**

Validity of the prospectus. The validity of a prospectus has not been extended from 12 months to 24 months, as was earlier suggested in the consultation document.

Electronic publication. Electronic publication of the prospectus has become mandatory. Having the prospectus available only in printed form is no longer sufficient.

Guaranteed by a Member State. If securities are guaranteed by a Member State, it is no longer required to include information on such guarantor in the prospectus.

OTHER DEVELOPMENTS: FRAMEWORK FOR THIRD COUNTRY PROSPECTUSES

ESMA has adopted a framework which allows a third country issuer that has prepared a prospectus in accordance with its national legislation to prepare a 'wrap' that is added to its prospectus resulting in a document that meets the requirements of the Prospectus Directive.⁷ ESMA will publish a list of specific disclosures which will need to be included in a wrap on a country-by-country basis. Recently ESMA has published such list for prospectuses coming from Israel.

⁶ See our News Update of December 2008 (www.houthoff.com/_files-cms/file/Newsupdates/Corporate%20News%20Update%20Transparency%20Directive.pdf).

⁷ www.esma.europa.eu/index.php?page=groups&mac=0&id=40

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**FOR FURTHER DETAILS, PLEASE
CONTACT:**

Matthijs van den Broek
+31-20-605-6105
m.van.den.broek@houthoff.com

Hugo Oppelaar
+31-20-605-6983
h.oppelaar@houthoff.com

**Houthoff Buruma
Gustav Mahlerplein 50
1082 MA Amsterdam
The Netherlands**

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