

# Prospectus Directive amendments – discussion of key changes

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*This article discusses key changes to the EU Prospectus Directive which were approved by the EU Parliament on 17 June 2010, as well as areas for future improvement. The changes will have a number of practical implications for issuers, although a number of key amendments still require further implementing legislation. The most important areas covered in the Amending Directive include changes to the summary of the prospectus, a new reduced disclosure regime for rights offerings and changes to the withdrawal rights in connection with prospectus supplements. In addition, a number of changes have been made to the offer and admission exemptions, including an increase of wholesale debt denominations, which will necessitate adjustments for offerings even before the deadline for implementation of the amending directive.*

## A. Introduction

The changes adopted in the directive (the “Amending Directive”)<sup>1</sup> amending the directive on the prospectus to be published when securities are offered to the public or admitted to trading (the “Prospectus Directive”)<sup>2</sup> and the directive on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the “Transparency Directive”)<sup>3</sup> are the result of several months of discussions among the European Commission, the European Parliament and the European Council and various market participants,<sup>4</sup> following the five-year review called for in the Prospectus Directive.<sup>5</sup>

The Amending Directive will come into force 20 days from publication in the Official Journal, which is expected to occur in September or October of 2010. EU Member States are required to implement the Amending Directive into national law within 18 months following its entry into force. Accordingly, issuers will have some time to consider the proposed changes for debt and equity offerings in the EU, although individual Member States may choose to implement the directive sooner once all implementing legislation has been published by the Commission.

A number of important areas still require further implementing legislation and changes to the EU Prospectus Regulation,<sup>6</sup> and the timing of these changes is unclear. In order to develop implementing legislation, the Commission will be assisted by the European Securities and Market Authority (ESMA), the new European securities regulator which is expected to be established by 2011 and will replace the Committee of European Securities Regulators (CESR).<sup>7</sup>

## B. Key amendments

### 1. Summary of the prospectus, key information and civil liability

The Prospectus Directive requires that a prospectus contain a summary of no more than 2,500 words.<sup>8</sup> The Amending Directive has made a number of changes to the contents and format of the summary to make them easier to understand for retail investors, and introduces a new civil liability provision.

The Amending Directive introduces the concept of a defined term of “key information” that has to be included in the summary. In addition, the directive introduces a new requirement that a summary will have to be “drawn up in a common format in order to facilitate comparability of the summaries of similar securities”;<sup>9</sup> the recitals to the Amending Directive further specify that equivalent information should always appear in the same position in the summary.<sup>10</sup> The details of the proposed format will have to be set out in specific legislation to be adopted by the EU Commission.<sup>11</sup>

The definition of key information was subject to some intense debates, and the concept is important in particular in light of the introduction of a new prong of civil liability as discussed below. Key information is “essential and appropriately structured information which is to be provided to investors with a view to enable them to understand the nature and the risks of the securities that are being offered to them”.<sup>12</sup> The definition then includes examples of the type of information that should be included. The recitals to the Amending Directive further state that key information

should “convey the essential characteristics of, and risks associated with, the issuer, any guarantor, and the securities offered”.<sup>13</sup> It should also provide the general terms of the offer, including estimated expenses, and the risk associated with an investment.

The Amending Directive retains the current provision regarding civil liability which states that the issuer will not incur civil liability solely on the basis of the summary, unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus.<sup>14</sup> However, a new provision has been added permitting civil liability if the summary “does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities”.<sup>15</sup> In previous proposals this phrase was more open-ended as to whether liability resulted from the omission of key information from the summary, even if it was contained in the rest of the prospectus,<sup>16</sup> but in the final version this phrase was changed such that it now appears clearer that “when read together with the other parts of the prospectus” does apply to key information, thereby limiting the scope of potential liability.<sup>17</sup> However, there is still some ambiguity and scope for increased civil liability left in the formulation, as one could read the sentence to say that civil liability *would* attach if key information were missing, even though the rest of the prospectus would be taken into account for further detail. The Amending Directive did retain the recital to the original Prospectus Directive, reiterating that “Member States should ensure that no civil liability attaches to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent with the relevant parts of the prospectus.”<sup>18</sup> This recital could be used to support the argument that no fundamental change of the regime was intended.

In sum, it remains to be seen whether these modifications will increase issuers’ liability. Given that contrary to initial expectations, the 2,500-word limit set out in Recital 21 of the Prospectus Directive was not abolished, in practice the content of summaries may not change significantly. Any change of practice will depend on the outcome of the implementing legislation that the Amending Directive requires the Commission to work on in order to specify the detailed content and specific form of the summary. The Recitals to the Amending Directive state that this should be undertaken following the outcome of the EU Commission Communication on Packaged Retail Investment Products (PRIPs) of 30 April 2009,<sup>19</sup> “aligning to the maximum extent possible the content and form of the summary for securities with that outcome”.<sup>20</sup>

The result of this debate is currently unclear. Generally, there are concerns whether it is possible to align the content and form of the summary of such different products as prospectuses for debt and equity securities and PRIPs.<sup>21</sup> As the Commission notes in its Communication on PRIPs, PRIPs can take a wide variety of legal forms – examples are investment or mutual funds, investments packaged as life insurance policies and structured term deposits.<sup>22</sup> The summary requirements for PRIPs may be copied from the directive on the co-ordination of laws, regulations and

administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (the “UCITS Directive”),<sup>23</sup> which regulates many types of collective investments.<sup>24</sup> The recently amended UCITS regime requires a simplified prospectus to be provided to retail investors prior to entering into a contract that contains “key investor information”. However, an investment in a UCITS is quite different in nature from an investment in securities offered under the Prospectus Directive, as UCITS are vehicles that are exclusively dedicated to the investment of assets raised from investors in accordance with specific requirements and, accordingly, disclosure is focused on how a UCITS can invest its money. As a result, the UCITS Directive definition of key investor information is focused on matters that an investor in a fund needs to know, including a description of the fund’s investment objectives and policy, past performance presentation, costs and charges of the fund, and risk/reward profiles of the investment.<sup>25</sup>

By contrast, investment in a security subject to the Prospectus Directive requires an investor to grasp various aspects of the issuer, including its business, risks, financial position and any other material information, which is quite a complex undertaking, typically making it difficult to summarise all material aspects in the 2,500-word summary. Therefore, it seems unlikely that it will be possible to develop uniform format and content requirements for PRIPs and prospectuses that are useful for each. It remains to be seen what the outcome of the PRIPs initiative will be and how much the content and form requirements for summaries will be aligned for prospectuses under the Prospectus Directive with PRIPs. Given that the final text of the Amending Directive did not take up the proposal of the European Parliament to replace the prospectus summary with a ‘Key information document’ comparable to the one introduced in the amended UCITS Directive,<sup>26</sup> one may hope that the outcome of the various consultations will be that investors in securities governed by the Prospectus Directive do need different types of information from investors in UCITS and PRIPs.

## 2. Reduced disclosure regime for rights offerings

### (a) Overview of the new regime

Currently, rights offerings are subject to extensive disclosure requirements under the share schedule set out in Annex I to the Prospectus Regulation. These requirements do not distinguish in principle between an initial public offering and a secondary rights offering. The Amending Directive introduces a “proportionate disclosure regime” for pre-emptive issues of equity securities, with a view to increasing the efficiency of capital raising by way of a rights issue. Application of the regime is subject to the conditions that (i) the shares offered are of the same class as shares of the issuer admitted to trading on a regulated market or on a multi-lateral trading facility that is subject to appropriate ongoing disclosure requirements and rules on market abuse, and (ii) that pre-emptive rights of existing shareholders are not excluded.<sup>27</sup>

Current practice in the UK is to disapply pre-emptive

rights, but it is possible that following implementation of the new regime, UK practice will change. Any change of existing practice will also depend on the way the amendments are implemented in the UK.

In Germany, rights offerings currently do not require publication of a prospectus if the rights offering does not constitute a public offer. Rights issues offered exclusively to existing shareholders would not be treated as a public offer in Germany, which in practice means that no rights trading is allowed. The rationale behind this is that existing shareholders do not need the same protection as new shareholders. The same argument was put forward in the Parliament's Report on proposals for the Amending Directive, arguing that rights issues should be fully exempt from the obligation to publish a prospectus.<sup>28</sup> However, this rationale is questionable for public companies, as existing shareholders do not necessarily have more information about the company than new shareholders, and subscribing to a rights issue may be viewed as a new investment decision. It has to be seen whether the German practice will continue following implementation of the Amending Directive.

The new reduced disclosure regime will be subject to further rules to be developed by ESMA. Therefore, it is not clear at present what level of disclosure the short-form prospectus will contain. It will have to be seen whether the new rules to be adopted by ESMA follow the recommendations made in November 2008 by the UK's Rights Issue Review Group, as discussed further below.<sup>29</sup>

For large rights offerings of European issuers which include an offering into the US under Rule 144A, it is likely that underwriters will continue to require a full-scale prospectus rather than the short-form prospectus allowed by the Amending Directive due to liability considerations and the need for US counsel to provide a 10b-5 disclosure letter.

*(b) Further reform – discussion of UK Rights Issue Review proposals, integrated disclosure and shelf registrations*

The UK Rights Issue Review Group report calls for prospectus simplification and states that existing shareholders already have access to a range of financial and other information about the issuer, which is accessible without creating prospectus liability for such information by incorporating it by reference.<sup>30</sup> The report does note that where issuers have a substantial overseas shareholder base or otherwise need to access a market such as the United States where detailed disclosure may be required, a more fulsome prospectus may be required.<sup>31</sup> Specifically, the report proposes that a rights issue prospectus does not include the following items currently required for all prospectuses by the share registration document of the Prospectus Regulation: business overview; operating and financial information and capital resources; remuneration and benefits and board practices; information on employees and major shareholders; financial information concerning the issuer's assets and liabilities, financial position and profits and losses, among other items.<sup>32</sup> It is proposed that these items not be included, as related information can be found in the periodic disclosures made in accordance with the Transparency Directive and the

directive on insider dealing and market manipulation (market abuse) (the "Market Abuse Directive").<sup>33</sup>

From the point of view of improving efficiency of the capital raising process, a simplification of disclosure requirements for rights offering prospectuses can be welcomed. At the same time, it is important, however, that investors continue to have easy access to all the material information required in a prospectus, including such important items as required in the operating and financial review and business sections of the prospectus. In this regard it would be better if the disclosure requirements under the Transparency Directive and related requirements under the Prospectus Directive could be further aligned to create a system of "integrated disclosure" as it has existed under the rules of the US Securities and Exchange Commission for many years: integrated disclosure means that the disclosure requirements for offerings and ongoing disclosures are, in principle, the same and that it is easy to incorporate by reference from one to the other.<sup>34</sup> Currently, for instance, the requirements for an operating and financial review in the Prospectus Regulation are more detailed and descriptive than the requirements for a narrative as part of the periodic financial disclosures in annual and semi-annual reports and interim management statements under the Transparency Directive.<sup>35</sup> It would be a welcome step if in future reviews of both the Prospectus and Transparency Directives such an alignment of requirements could be achieved.

Another related topic that was discussed in the UK Rights Issue Review Group report is how to increase the use of shelf registrations, in particular in the context of equity offerings.<sup>36</sup> Shelf registration is currently allowed by the Prospectus Directive.<sup>37</sup> However, it is only commonly used for debt issuances and not for equity issuances in the EU. The reason is the inherent limitation of the shelf registration and incorporation by reference system of the Prospectus Directive, which requires separate regulatory approval for each offering and restricts the use of incorporation by reference as a disclosure method.<sup>38</sup> Even where a registration document has previously been approved, a securities note and any prospectus supplement will need separate approval when used with the previously approved registration document. Forward-looking incorporation by reference to future periodic reports is not possible; instead, a prospectus supplement must be filed that can incorporate the relevant documents by reference, requiring the home Member State competent authority's approval.

By contrast, the US system of shelf registration allows a seasoned issuer to register the amount of securities it may wish to offer over a three-year period,<sup>39</sup> and, for "well-known seasoned issuers" (WKSI),<sup>40</sup> automatic shelf registration that provides for automatic effectiveness without the SEC's review, pay-as-you-go registration fees and maximum flexibility in the offering process was introduced as part of a reform of the system in 2005.<sup>41</sup> Even before the US Securities Offering Reform, the US system has allowed for quick take-downs from a shelf for years, as prospectus supplements can be filed with the SEC without further SEC approval. This is essential as it allows issuers to take advantage of good market opportunities immediately. In addition, the three-year period as opposed to one-year period in the EU for use

of the shelf reduces the cost for an issuer of updating its registration document annually. This is coupled with the ability to incorporate by reference to periodic filings in the US due to the system of integrated disclosure, which does not fully exist in the EU. Accordingly, both integrated disclosure and shelf registrations are areas that require further work at the EU level and are areas of reform that were missed as part of the process resulting in the Amending Directive; it remains to be hoped that ESMA and the Commission will consider these areas for future reform.

### 3. Prospectus supplements and withdrawal rights

The Prospectus Directive provides that an issuer must publish a prospectus supplement if a significant new factor, material mistake or inaccuracy relating to the information included in a prospectus arises which is capable of affecting the assessment of the securities to which that prospectus relates, after approval of the prospectus and before the final closing of the offer or the time when trading on a regulated market begins. A prospectus supplement has to be approved by the home Member State regulator in a maximum of seven working days. Investors who have already agreed to purchase the securities before the supplement is published are allowed to withdraw their acceptances within a certain time limit not shorter than two working days. The Amending Directive clarifies these requirements in a number of ways:<sup>42</sup>

- The period during which the publication of a prospectus supplement is triggered ends at the later of the closing of the offer and beginning of trading in the securities.
- Investors have withdrawal rights only in relation to a public offer, not in the context of prospectuses that have only been prepared in connection with an admission to listing. Accordingly, any deals marketed only to professional investors, such as many bond deals and initial public offerings, will not trigger withdrawal rights.
- Withdrawal rights are only available where the circumstances which gave rise to the publication of the supplement arose before the close of the public offer and delivery of the securities.
- The period during which withdrawal rights may be exercised is set at two working days after publication of the supplement in all EU Member States (previously Member States could provide for longer), and the supplement has to state the final date of the right of withdrawal.

## C. Offer and admission exemptions

The Amending Directive includes a number of changes to the offer and admission related exemptions from the requirements of the Prospectus Directive.

### 1. Increase of wholesale debt minimum denominations to €100,000

Under the Prospectus Directive, issuers of debt securities

with minimum denominations of €50,000 (or equivalent) can offer these securities to the public without publishing a prospectus.<sup>43</sup> Issuers who seek to list wholesale debt securities on an EU-regulated exchange have to publish a prospectus, but can do so in accordance with the lighter “wholesale” disclosure regime under Annexes IX and XIII of the Prospectus Regulation. The Amending Directive increases the minimum denomination per security to €100,000, or its equivalent in another currency. Debt securities which have already been admitted to trading will be grandfathered. Further issuances of the same securities (tap issues) as securities that were issued before the Amending Directive comes into force are not specifically addressed. Therefore, it would appear to be prudent to increase the minimum denominations of any new securities now so that there will be no issue with future tap issues.

The Amending Directive also changes the minimum denominations for purposes of the relevant provisions in the Transparency Directive. Under the Transparency Directive, issuers of wholesale debt securities that are admitted to an EU-regulated market are exempt from the obligation to publish annual and half-yearly reports.<sup>44</sup> Issuers whose securities are admitted to trading before the date of entry into force of the Amending Directive will be grandfathered. Any securities to be admitted to an EU-regulated market after that date will need to be issued in denominations of €100,000 in order to benefit from this exemption.<sup>45</sup>

### 2. Increase of the 100-person exemption

There is currently no obligation to publish a prospectus if an offer to the public of securities is addressed to fewer than 100 natural or legal persons per Member State (other than qualified investors). The Amending Directive increases the threshold of this exemption to fewer than 150 natural or legal persons per Member State.<sup>46</sup>

### 3. Merger exemptions expanded

Under the current regime, securities offerings to the public or listings on an EU-regulated market in connection with a merger are exempt from the obligation to publish a prospectus, provided that a document is available containing information which is regarded by the home Member State regulator as being equivalent to that of the prospectus. These exemptions have been extended to include securities offered or listed in connection with a “division”, such as a demerger.<sup>47</sup>

### 4. Thresholds for offers outside the scope of the Prospectus Directive

The Prospectus Directive currently provides that offers of securities below a certain size are outside of its scope, and the Amending Directive increases these size limits as follows:

- securities in an offer where the total consideration of the offer in the EU is less than €5m over a 12-month period (increased from currently €2.5m); and

- non-equity securities issued in a continuous or repeated manner where the total consideration of the offer in the EU is less than €75m (increased from currently €50m).

The Amending Directive will give the EU Commission powers to adjust the relevant euro-limits again in the future.

#### D. Extension of the exemption for employee share schemes

The current exemption from the requirement to publish a full prospectus for offers to employees is limited to companies with securities listed on an EU-regulated market. Under the Amending Directive, this exemption will be extended to apply to companies with securities admitted to trading on an “equivalent” third-country market.<sup>48</sup> The EU Commission will have to make a positive decision as to specific countries’ regimes being equivalent, in accordance with criteria set out in the Amending Directive as to the equivalence of the legal and supervisory framework of the corresponding regulation of markets in the third country.<sup>49</sup> The Commission will decide following the submission by a competent authority of a Member State, and it is not specified in detail how this submission process of relevant information to demonstrate that the third country framework is equivalent will work. Nonetheless, it is expected that registration with the SEC and listing on major US exchanges, including the NYSE and NASDAQ, will be determined to be “equivalent”.

If equivalence will be confirmed, this would be beneficial to many large US-listed companies which do not maintain a listing on an EU-regulated market, as such companies would be able to use the short-form disclosure document required in the Prospectus Directive rather than a prospectus complying with the more fulsome disclosure requirements under the Prospectus Regulation when operating their employee share plans in the EU (to the extent the company’s employees in any Member State exceed 99, or following implementation of the amending Directive, 149 employees per Member State). Short-form disclosure under the applicable exemption requires a document containing information on the number and nature of the securities offered, and the reasons for and details of the offer, which can usually be included in an explanatory booklet provided to employees.

The exemption is also extended to all companies whose head office or registered office is in the EU. For European issuers with non-listed securities, this may involve updating the disclosure document where necessary for an adequate assessment of the securities, as no ongoing disclosure requirements and rules on market abuse apply to such non-listed companies.

#### E. Final terms

The Prospectus Directive provides that a prospectus used to offer non-equity securities, including warrants, can consist of a base prospectus containing all relevant information concerning the issuer and the securities, which is supple-

mented by final terms of the offer if not included in the base prospectus or a supplement thereto. The final terms do not need to be approved by the home Member State regulator and do not trigger any withdrawal rights.

The Amending Directive clarifies that final terms to a base prospectus, typically used in the context of EMTN or GMTN programmes, should only contain information which is specific to the issuance and which can only be determined at the time of the individual issuance (eg issue price, maturity, coupon, exercise date, exercise price and redemption price and other terms not known at the time of the prospectus).<sup>50</sup> This indicates that any material updates to the prospectus, such as additional risk factors or changes to the business section or operating and financial review should be included in a supplement, which requires the home Member State regulator’s approval and triggers the withdrawal rights discussed above.

#### F. Retail cascades

Subsequent resales of securities by financial intermediaries constitute separate offers under the Prospectus Directive and require a separate exemption from the original offer, or publication of a prospectus. The amendments provide that no new prospectus is required in a subsequent resale or final placement of securities through financial intermediaries as long as a valid prospectus is available and the issuer or person responsible for the prospectus consents to its use by means of a written agreement.<sup>51</sup> It is expected that an industry standard form of consent agreement will be developed.

#### G. Electronic publication of prospectuses

The Prospectus Directive allows publication of a prospectus in accordance with a number of methods listed in the current Article 14(2): (i) insertion in a newspaper with wide circulation; (ii) in printed form made available at the offices of the market on which the securities are being admitted to trading, or at the registered offices of the issuer and the financial intermediaries; (iii) in electronic form on the issuer’s website and on the website of the financial intermediaries; (iv) in electronic form on the website of the regulated market where admission to trading is sought; or (v) in electronic form on the website of the home Member State regulator. Home Member States currently have the choice of requiring electronic publication on an issuer’s website in case issuers choose method (i) or (ii).

The Amending Directive introduces a choice of electronic publication on the issuer’s or the financial intermediary’s website for method (iii). Rather than leaving Member States the choice, it now also requires that prospectuses are always published in electronic form on the issuer’s or financial intermediaries’ website(s), where the prospectus is also published in a newspaper or in printed form under methods (i) or (ii).<sup>52</sup> This is a useful harmonisation of diverging practices in different Member States.

## H. Definition of qualified investors

The Prospectus Directive contains an exemption from the obligation to publish a prospectus for offers addressed solely to qualified investors. Under the Amending Directive, the term “qualified investors” is defined as those persons that are classified as professional clients or eligible counterparties in accordance with Annex II of the Markets in Financial Instruments Directive (Directive 2004/39/EC, “MiFID”)<sup>53</sup> (see Article 2(1)(e)).

This change was made to reduce the burden on financial intermediaries of checking investor status. In practice this means that investment firms can rely on their register of qualified investors under MiFID. The MiFID definition is broadly equivalent to the previous definition in the Prospectus Directive.

## I. Passporting notifications

The Prospectus Directive provides that once the home Member State has approved a prospectus, it is valid for a public offer or admission to trading in any number of host Member States, only subject to notification of the competent authority of each host Member State by the competent authority of the home Member State (at the request of the issuer or person responsible for the prospectus). The only additional requirement is a translation of the summary into the official language of the host Member State, where applicable.

In the context of this passporting procedure, the Amending Directive imposes a new obligation on the competent authority of the home Member State to notify the issuer at the same time as it notifies the competent authority of the host Member States that a certificate of approval of a prospectus has been issued.<sup>54</sup> This provides clarity to issuers as to when a notification has actually been made. In the past only the host Member State competent authority needed to be notified.

## J. Choice of home Member State for sub-€1,000 debt

The Prospectus Directive allows issuers of non-equity securities to choose their home Member State for offerings of securities whose denomination is at least €1,000 on an issue-by-issue basis.<sup>55</sup> The Amending Directive provides that the EU Commission will review this limitation, following calls by the EU Commission and the Parliament to remove the €1,000 threshold.<sup>56</sup> Currently, for equity securities and non-equity securities below €1,000, issuers incorporated outside the EEA effectively have a one-time choice depending on where the initial public offer or initial application for admission to trading is made.

Abolishing the threshold would increase the flexibility of debt issuances, as it would eliminate practical problems to issuers of non-equity securities who may need to use different prospectuses for a single issue, such as one to cover

a debt programme within the threshold and another for the remaining debt issuance which might exceed that threshold. In addition, certain structured products are not denominated.<sup>57</sup>

## K. Member State guarantors

The Prospectus Directive excludes from its scope, among others, non-equity securities issued by a Member State or by one of its regional or local authorities and securities unconditionally and irrevocably guaranteed by a Member State or one of its regional or local authorities. However, the directive does permit an issuer of such securities to opt into the Prospectus Directive regime and to publish a prospectus and to benefit from passporting. When opting in, the issuer would be required to disclose information on the guarantor according to Annexes VI and XVI of the Prospectus Regulation. The Amending Directive now allows such issuers to publish a prospectus without disclosure of such information about Member States as guarantors.<sup>58</sup>

## L. Abolition of annual information update

The current obligation in Article 10 to publish an annual information statement (which contains or refers to all information made available by the issuer to the public over the preceding 12 months) has been eliminated, as it was duplicative of the requirements under the Transparency Directive. Periodic disclosure requirements will continue to apply under the Transparency Directive.

## M. Validity of prospectus

Despite proposals to extend the validity duration period for a prospectus to 24 months,<sup>59</sup> the current period of 12 months remains unchanged.<sup>60</sup> The Amending Directive introduces a slight change to the date from which the validity of a prospectus starts: the date of its approval instead of the date of its publication.

## N. Role of the new European Securities Regulator

In September 2009, the European Commission adopted its proposals for the creation of a European Securities and Markets Authority (ESMA), for entry into force on 1 January 2011.<sup>61</sup> Its adoption by the European Parliament and Council is expected soon. The proposals for ESMA follow the de Larosière expert group report on the financial crisis<sup>62</sup> and the EU Commissions’ announcement of a European System of Financial Supervisors.<sup>63</sup> Once established, ESMA will take over from the Committee of European Securities Regulators (CESR) and will act in the scope of a number of existing directives, including the Prospectus Directive, Trans-

parency Directive, Market Abuse Directive, Takeover Bids Directive,<sup>64</sup> UCITS Directive and the future Directive on Alternative Investment Fund Managers,<sup>65</sup> as well as all future legal acts entitling ESMA to take action.

ESMA will be authorised to develop binding technical standards by qualified majority vote, which will be formally adopted by the EU Commission. ESMA will also ensure that national supervisory authorities fully apply EU supervisory rules, including the technical standards.

## O. Civil liability

Another topic identified in the initial Commission consultation on the Prospectus Directive review is civil liability. Currently, there is no harmonisation of liability regimes at EU level generally or in the context of the Prospectus Directive, apart from the provisions in Article 6(1) and (2), which require that Member States ensure that responsibility for the information given in a prospectus attaches to a clearly identified person, and that Member States ensure that their laws on civil liability apply to the person responsible for the prospectus. There has been some concern that diverging liability regimes create an un-level playing field and may lead to a certain “race-to the bottom” to choose home Member States with the lowest regime, although the Commission consultation document made reference to issuers basing their decisions on whether to approach investors in certain Member States on factors other than legal considerations on liability.<sup>66</sup> Following the consultation process, the Commission decided not to include any proposals on harmonising liability regimes as part of the process of amending the Prospectus Directive, as that would have been a very ambitious task that appeared to be outside the scope of the review, and the recitals to the Amending Directive provide that the Commission should establish a comparative table of Member States’ regimes.<sup>67</sup> However, the European Parliament called for ESMA, once established, to work on a comparative table showing the differences in

national liability regimes,<sup>68</sup> as a starting point for future work on harmonising regimes. It remains to be seen whether in the long term there will be appetite for harmonising more elements of civil liability regimes in the context of securities laws.

## P. Conclusion

The amendments mostly provide useful clarifications and streamlining of existing requirements.

For non-EU issuers whose regimes are considered equivalent, the extension of the short-form disclosure regime for employee share offerings will provide a long-awaited exemption from the onerous requirements to publish a full prospectus in connection with employee share offerings in EU countries. A future liberalisation of the regime for choosing a home Member State for sub-€1,000 debts would be beneficial to non-EU issuers. Further EU rules regarding the content of the prospectus summary and the reduced disclosure regime for rights offerings are expected, which will help clarify the new requirements.

The impact of the new summary requirements and the addition of potential civil liability for the summary remain to be seen, although it is questionable whether it is possible to align the more detailed summary requirements with the summary and key information used in the context of PRIPs and UCITS funds. Furthermore, there remains room for further, more fundamental reforms as part of the next Prospectus Directive review and as part of a review of the Transparency Directive, in order to align the disclosures required under both in a more consistent way and to allow for more useful incorporation by reference of disclosures made under the Transparency Directive for purposes of the reduced system of disclosure for rights issues. In addition, future amendments to the Prospectus Directive could make the system of shelf registration for equity offerings more efficient. ■

<sup>1</sup> The text adopted is awaiting publication in the Official Journal; the provisional edition is published on the European Parliament’s website, A7-0102/2010, 17 June 2010.

<sup>2</sup> Directive 2003/71/EC [2003] OJ L345/64, 31 December 2003.

<sup>3</sup> Directive 2004/109/EC [2004] OJ L390/38, 31 December 2004.

<sup>4</sup> See the “Consultation on the review of the Prospectus Directive”, 9 January 2009, in particular, the background document and the consultation document published by the Commission (available at: [ec.europa.eu/internal\\_market/consultations/2009/prospectus\\_en.htm](http://ec.europa.eu/internal_market/consultations/2009/prospectus_en.htm)) (the “Commission Consultation”). The consultation resulted in the initial proposal for an amending directive, COM(2009) 491 final, 23 September 2009 (the “Commission Proposal”); the European Council’s compromise texts of 11 December 2009 and 16 December 2009 (2009/0132 (COD)); and comments of the European Parliament’s Committee on Economic and

Monetary Affairs in the draft Report on the Amending Directive (Rapporteur: Wolf Klinz), 2009/0132(COD), PE431.183v01, 11 January 2010 (the “Parliament Committee Report”); and the compromise text of the European Council of 28 May 2010.

<sup>5</sup> See Art 31 Prospectus Directive. In the following, references to Articles are to Articles of the Prospectus Directive, as amended, unless otherwise noted.

<sup>6</sup> Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements, [2004] OJ L149/1, 30 April 2004.

<sup>7</sup> Proposal for a Regulation of the European Parliament and of the Council establishing a European Securities and Markets Authority, COM(2009) 503 final, 23 September

2009. See also the amended proposal of the European Parliament, A7-0169/2010, 7 July 2010.
- <sup>8</sup> Recital 21 of the Prospectus Directive.
- <sup>9</sup> Art 5(2).
- <sup>10</sup> Recital 15 of the Amending Directive.
- <sup>11</sup> See Recital 27 of the Amending Directive.
- <sup>12</sup> See new Art 2(s).
- <sup>13</sup> See Recital (15) of the Amending Directive.
- <sup>14</sup> Art 6(2)(2), second subparagraph (first part of sentence).
- <sup>15</sup> Art 6(2)(2), as amended.
- <sup>16</sup> The initial Commission Proposal appeared even wider, as it was joined with the rest of the sentence with an “and” and also referred to the comparability of securities: “. . . no civil liability shall attach to any person solely on the basis of the summary . . . unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, and it does not provide key information enabling investors to take informed investment decisions and to compare the securities with other investment products” (Commission Proposal, *supra* n 4, 16). The Commission also noted that a “logical consequence of having a more substantial summary document is to attach civil liability . . . if it does not provide key information . . .”. However, this was premised upon having a more substantial summary (and potentially abolishing the 2,500-word limit).
- <sup>17</sup> See the discussion of the previous proposal in L Burn, “KISS, but tell all: short-form disclosure for retail investors” (2010) 5(2) *Capital Markets Law Journal* 141, 149.
- <sup>18</sup> See Recital (16).
- <sup>19</sup> Communication from the Commission to the European Parliament and the Council, Packaged Retail Structured Securities, and Investment Products, COM(2009) 204 final, 30 April 2009.
- <sup>20</sup> See Recital 27 of the Amending Directive.
- <sup>21</sup> See Burn, *supra* n 17, 154–56.
- <sup>22</sup> COM(2009) 204 final, 2f.
- <sup>23</sup> Directive 2009/65/EC of 13 July 2009 (recast), [2009] OJ L302/32, 17 November 2009.
- <sup>24</sup> See the Commission paper “Packaged Retail Investment Products: Issues for discussion”, PRIPs workshop, Brussels, 22 October 2009 ([http://ec.europa.eu/internal\\_market/finservicesretail/investment\\_products\\_en.htm](http://ec.europa.eu/internal_market/finservicesretail/investment_products_en.htm)). See also the discussion in the “Update on Commission Work on Packaged Retail Investment Products”, 16 December 2009 ([http://ec.europa.eu/internal\\_market/finservices-retail/investment\\_products\\_en.htm](http://ec.europa.eu/internal_market/finservices-retail/investment_products_en.htm)). According to the Commission paper, the key features of the UCITS ‘Key Information Document’ (KID) regime might be readily transferrable to all PRIPs. PRIPs pre-contractual disclosures would be governed by a single common framework which applies a consistent set of core principles, although the Commission did stress that there is no ‘one-size fits all’ for all PRIPs, so that there would be some variations among KIDs.
- <sup>25</sup> Art 78–82 of Directive 2009/65/EC.
- <sup>26</sup> See the Parliament Committee Report, *supra* n 4, 48.
- <sup>27</sup> See new Art 7(2)(g).
- <sup>28</sup> See the Parliament Committee Report, *supra* n 4, 47.
- <sup>29</sup> A Report to the Chancellor of the Exchequer: by the Rights Issue Review Group, November 2008, 11f and Annex E of the report.
- <sup>30</sup> *Supra* n 29, para 2.7.
- <sup>31</sup> *Supra* n 29, para 2.8.
- <sup>32</sup> *Supra* n 29, Annex E.
- <sup>33</sup> Directive 2003/6 EC, OJ L96/16, 12 April 2003.
- <sup>34</sup> For a more detailed discussion see D Fischer-Appelt and T Werlen, “The EU Prospectus Directive – Content of the Unified European Prospectus Regime and Comparison with US Securities Laws” (2004) 3 *European Banking and Financial Law Journal* 379, 401.
- <sup>35</sup> See D Fischer-Appelt, “Implementation of the Transparency Directive – Room for Variations Across the EEA” (2007) 2(2) *Capital Markets Law Journal* 133, 137f.
- <sup>36</sup> *Supra* n 29, 13f.
- <sup>37</sup> See Art 12 Prospectus Directive and the provisions of the Prospectus Regulation.
- <sup>38</sup> Fischer-Appelt and Werlen, *supra* n 34, 399f. See also J Oakes and I McNeil, “Capital Raising: A Transatlantic Perspective” (2009) 4(2) *Capital Markets Law Journal* 155, 168f.
- <sup>39</sup> See Rule 415(a)(5) of the General Rules and Regulations under the Securities Act of 1933 (the “Securities Act Rules”).
- <sup>40</sup> See the test in Rule 405 of the Securities Act Rules, where a well-known seasoned issuer is defined, among others, as an issuer that has an aggregate worldwide market value of the voting and non-voting common equity by its non-affiliates of \$700m or more, or has issued at least \$1bn aggregate principal amount of non-convertible debt securities in primary offerings for cash in the last three years (additional requirements apply).
- <sup>41</sup> SEC Release Nos. 33-8591; 34-52056; IC-26993; FR-75; International Series Release No. 1294, File No. S7-38-04, “Securities Offering Reform”, 19 July 2005.
- <sup>42</sup> See Art 16, as amended.
- <sup>43</sup> Art 3(2)(d) and (e).
- <sup>44</sup> Art 8(1)(b) of the Transparency Directive, as amended.
- <sup>45</sup> New Art 8(4) of the Transparency Directive, as amended.
- <sup>46</sup> Art 3(2)(b).
- <sup>47</sup> Art 4(1)(c) and 4(2)(d).
- <sup>48</sup> Art 4(1)(e).
- <sup>49</sup> As to equivalence, Art 4(1)(e) requires that (i) markets in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis; (ii) markets have clear and transparent rules regarding admission of securities to trading; (iii) security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and (iv) it ensures market transparency and integrity by preventing market abuse.
- <sup>50</sup> See Art 5(4), as amended, and Recital 10b.
- <sup>51</sup> Art 3(2), as amended.
- <sup>52</sup> See revised Art 14(2).
- <sup>53</sup> [2004] OJ L145/1, 30 April 2004.
- <sup>54</sup> Art 18(1), as amended.
- <sup>55</sup> Art 2(1)(m)(ii) Prospectus Directive.
- <sup>56</sup> Recital 8 Amending Directive.
- <sup>57</sup> See the discussion in the Commission Proposal, *supra* n 4, 6.
- <sup>58</sup> See Recital (19), which states that Member States publish abundant information on their financial situation which is in general available in the public domain.
- <sup>59</sup> See Commission Proposal, *supra* n 4, para 9(a), 17.
- <sup>60</sup> Art 9(1).

<sup>61</sup> *Supra* n 7.

<sup>62</sup> High Level-Group on Financial Supervision in the EU, Chaired by Jacques de Larosière, Report, 25 February 2009.

<sup>63</sup> See Communication from the Commission, European Financial Supervision, COM(2009) 252 final, 27 May 2009 and the package of proposals dated 23 September

2009 (available at [ec.europa.eu/internal\\_market/finances/committees/index\\_en.htm](http://ec.europa.eu/internal_market/finances/committees/index_en.htm)).

<sup>64</sup> Directive 2004/25/EC, [2004] OJ L142/12, 30 April 2004.

<sup>65</sup> COM 2009(207) final, 30 April 2009.

<sup>66</sup> See Consultation background document, *supra* n 4, 15.

<sup>67</sup> Recital 12 Amending Directive.

<sup>68</sup> See Parliament Report, 48.