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## The Prospectus Directive



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## Introduction

The Prospectus Directive [2003/71/EC], as supplemented by the Prospectus Regulation (EC No. 809/2004) provides for a single regime throughout the EU governing the content, format, approval and publication of prospectuses. The Prospectus Directive requires a prospectus to be published where either an offer of securities is made to the public or securities are admitted to trading on a regulated market. The Prospectus Regulation prescribes the form and content of a prospectus required by the Prospectus Directive.

## Scope of the Prospectus Directive

The securities to which the Prospectus Directive applies are 'transferable securities' as defined in MiFID, other than money market instruments which have a maturity of less than 12 months (such as treasury bills, certificates of deposit and commercial papers). Transferable securities are defined in MiFID as those classes of securities which are negotiable on the capital market (with the exception of instruments of payment), such as:

- (i) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;
- (ii) bonds or other forms of securitised debt, including depositary receipts in respect of such securities; or
- (iii) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

The Prospectus Directive does not apply to the following:

- (i) non-transferable securities, such as non-transferable employee options;

- (ii) securities included in an offering for a total consideration in the EU of less than €5 million calculated over a 12-month period;
- (iii) units issued by open-ended collective investment schemes;
- (iv) non-equity securities issued by a Member State, public international bodies of which a Member State is a member, the European Central Bank or a central bank of a Member State;
- (v) shares in the capital of a central bank of a Member State;
- (vi) securities that are unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities;
- (vii) securities issued by non-profit making bodies in certain circumstances; or
- (viii) certain non-equity securities issued in a continuous or repeated manner by credit institutions.

## Exemptions

A prospectus is not required for certain offers, including:

- (i) offers made solely to qualified investors (such as professional clients and eligible counterparties);
- (ii) private placements offered to less than 150 persons, other than qualified investors, per Member State;
- (iii) offers with a minimum total consideration per investor of €100,000;
- (iv) offers with a minimum specified denomination per unit of €100,000; and
- (v) offers with a total consideration in the EU of less than €100,000 calculated over a 12 month period.



## Key elements of the Prospectus Directive

In addition to the main requirement for a prospectus to be published where either an offer of securities is made to the public or securities are admitted to trading on a regulated market, the other key elements of the Prospectus Directive can be summarised as follows:

- (i) it provides a harmonised disclosure standards for prospectuses and a requirement for prospectuses to be approved by the relevant competent authority;
- (ii) a requirement to include a summary of the prospectus;
- (iii) a choice as to the format of the prospectus;
- (iv) a requirement for a supplement to be published if any significant new factor arises or a material inaccuracy in the prospectus is noticed between the approval of the prospectus and the closing of the offer or commencement of trading; and
- (v) the exemptions referred to above.

## Proposed repeal and replacement of the Prospectus Directive

The Capital Markets Union (CMU) is a flagship initiative of the European Commission, which was first announced by the Commission on 26 November 2014. The aim of the CMU is to create a single market for capital for all Member States by removing barriers to cross-border investment and to lower costs of funding within the EU. The Commission intends to deliver the CMU by 2019 via a range of steps, or building blocks, in the context of the 'Investment Plan for Europe'. (For a general overview of the CMU, please see our publication entitled 'Capital Markets Union' at: [www.cummingslaw.com/publications](http://www.cummingslaw.com/publications).)

One of the key strategic priorities of the CMU is a review of the Prospectus Directive, as the amount of administrative, human and financial resources needed to draw up prospectuses make it costly and administratively burdensome for SMEs (small and medium-sized enterprises) and start-ups to produce. The aim of the Commission

is to improve the effectiveness of the Prospectus Directive and lower burdens on small firms, which should make it easier for companies to raise capital throughout the EU. It therefore published a consultation paper on the review of the Prospectus Directive in February 2015.

In response to that consultation, the Commission adopted a legislative proposal for a new Prospectus Regulation on 30 November 2015, which is intended to repeal and replace the Prospectus Directive along with its corresponding implementing measures (including the current Prospectus Regulation).

Proposed amendments to be made by the new Regulation include:

- (i) **scope of the prospectus obligation** - the introduction of a higher threshold to determine when companies must issue a prospectus. Under the Regulation, no EU prospectus would be required for capital raisings below €500,000 (as opposed to the current €100,000 threshold). Member States will be able to set higher thresholds for their domestic markets and will also have the choice to exempt offers of securities to the public from the prospectus requirement under the Regulation, provided that the offer is only made in that Member State and the total consideration of the offer is between €500 000 and an amount which cannot exceed €10 million, calculated over a period of 12 months;
- (ii) **specific disclosure regime for SMEs** - the introduction of a "lighter prospectus" for small and medium-sized enterprises. The proposed disclosure regime for SMEs would allow such companies to draw up a distinct prospectus in the case of an offer of securities to the public provided that they have no securities admitted to trading on a regulated market. The prospectus schedules for such companies (which will be set out in detail by delegated acts) will focus on information that is material and relevant for companies of such size. All SMEs with a market capitalisation below €200 million (which represents an increase from the



current limit of €100 million) would qualify for this new regime;

- (iii) **specific disclosure regime for secondary issuances** - the introduction of a new, simplified prospectus for companies that are already listed on the public market that want to raise additional capital by a secondary issuance. The new disclosure regime for secondary issuances would apply to offers or admissions concerning securities issued by companies already admitted to trading on a regulated market or an SME growth market for at least 18 months. In such cases, the 'alleviated prospectus' will only contain minimum financial information covering the last financial year and will include information on inter alia the terms of the offer, use of proceeds, risk factors, board practices, directors' remuneration, shareholding structure or related-party transactions;
- (iv) **prospectus summary** – the introduction of a new prospectus summary, which is closely modelled on the key information document required under the PRIIPS Regulation. As well as the introductory section containing warnings, there will be three main sections in the summary covering key information on the issuer, the security and the offer/admission respectively;
- (v) **universal registration document (URD)** - the introduction of an annual universal registration document, which is an optional "shelf" registration mechanism for use by companies that frequently access the capital markets. The URD contains all the necessary information on a company that wants to list shares or issue debt. Issuers who regularly maintain an updated URD with their supervisors will benefit from a five day fast-track approval when they wish to issue shares, bonds or derivatives; and
- (vi) **single access point** for all EU prospectuses. It is intended that ESMA will provide free and searchable online access to all prospectuses approved in the EEA.

## Next steps

The draft Regulation will now be sent to the European Parliament and the Council of the EU for discussion and adoption under the co-decision procedure. A number of delegated acts will also need to be adopted by the Commission, and draft regulatory and technical standards and guidance will need to be developed by ESMA in respect of various provisions of the Regulation.

**This document is for general guidance only. It does not constitute advice  
January 2016**



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