

Draft Prospectus Directive Regulation changes published – what are the consequences?

The Prospectus Directive regime in Europe is in the process of being amended by virtue of Directive 2010/73/EU which gives member states until 1 July 2012 to implement the necessary measures by domestic legislation. At the same time, the Prospectus Directive Regulationⁱ, which stipulates the detailed contents of prospectuses under this regime and which does not require implementing legislation but has direct effect in member states, is also in process of amendment. On 30 March 2012, the European Commission published a draft of the first amending regulation (the Draft Amending Regulation)ⁱⁱ. The Draft Amending Regulation is due to have effect from 1 July 2012. This briefing considers its principal consequences.

ESMA mandate

Amongst other things, the Directive which amended the Prospectus Directive (Directive 2010/73/EU) required the European Commission to legislate for certain "delegated acts". For guidance on these provisions, the Commission mandated the European Securities and Markets Authority (ESMA) to provide it with technical advice. The Commission mandate to ESMA was in three parts and Part I related to:

- the format of final terms;
- the format of the prospectus summary and the detailed content of the information to be included in the summary; and
- a proportionate disclosure regime for certain offers and certain issuers.

ESMA provided its final report with technical advice on Part I of the mandate to the European Commission in October 2011.

The Commission's draft amending Regulation

The Commission has now effectively adopted all of ESMA's recommendations on Part I of the mandate in its Draft Amending Regulation published on 30 March 2012.

Likely impact on debt issuance programmes

As described in our briefing in October 2011 on the ESMA final report (see links below), ESMA proposed a restrictive approach, severely limiting the information which might be included in final terms. The

Draft Amending Regulation follows this approach and, similarly, splits information into different categories (A, B or C) and specifies whether such information may be included in final terms or not.

A likely consequence of this approach is that the architecture of many debt issuance programmes will need amendment, either to restrict the types of securities which may be issued under them or to describe with much greater precision the different provisions of the various securities contemplated by the programme. Generally speaking, final terms will no longer be able to contain any significant free text (unless it is simply a repetition of text already appearing in the base prospectus) and will need to become more like a checklist.

An issuer whose final terms contain any significant free text which does not appear in the base prospectus will, in the context of a non-exempt public offer or a listed issue, risk an allegation from a competent authority that it has issued securities not contemplated by the base prospectus. The principal solutions for such an issuer will be to replace its base prospectus with a new one including the new type of issue or to produce a new "product base prospectus" covering these issues going forward (and so in each case allowing the use of final terms only in the future), or to produce a new "drawdown prospectus" or, where possible, a new securities note (and summary) specifically for the issue in question.

In addition, as recommended by ESMA, where the base prospectus contains a summary this will need to be in a standard, prescribed format and the Draft Amending Regulation includes detailed schedules specifying what each summary must contain. Moreover, in line with the ESMA recommendations, the final terms for each specific sub Euro 100,000 issue will need to have annexed to it a copy of that summary appropriately amended to describe the issue in question.

Grandfathering

Many market participants will be very focused on the grandfathering provisions of the Draft Amending Regulation. These provide that certain changes introduced by the Draft Amending Regulation will only apply to prospectuses and base prospectuses approved on or after 1 July 2012. Prospectuses and base prospectuses approved before this date will remain valid for one year from the date of approval. Whilst there remains some debate as to

exactly how competent authorities will interpret grandfathering, issuers with annual programme updates falling shortly after 1 July 2012 may be well-advised to consider moving their update forward (before the grandfathering cut-off date) – if only to avoid the likely lengthy delays as new provisions and structures have to be designed and agreed with competent authorities. In fact, even for those issuers seeking to rely on grandfathering, there may be something of a "bottle-neck" in the approval process in the run up to the end of June 2012 if many issuers seek to take advantage of these provisions and competent authorities may well specify deadlines for the initial submission of draft documentation in order to receive approval before the grandfathering deadline. Either way, issuers are likely to have to factor in more time than usual for the update process this year.

Furthermore, as grandfathering ceases to be available, issuers will have to give some considerable thought to their programmes, what types of securities they are likely to want to issue under them and the desirability of various types of issuance process. Depending upon their conclusions, issuers are then likely to want to make significant changes to the documentation of their programmes during 2012/13 to reflect the parameters of the new Prospectus Directive regime.

Useful links

Clifford Chance briefing "Prospectus Directive: Significant changes for summaries and final terms", October 2011: http://www.cliffordchance.com/publicationviews/publications/2011/10/prospectus_directivesignificantchangesfo.html

http://www.esma.europa.eu/system/files/2011_323.pdf

ESMA Final Report, October 2011: http://www.esma.europa.eu/system/files/2011_323.pdf

Amending Directive (Directive 2010/73/EU) of 24 November 2010: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF>).

Draft Amending Regulation: http://ec.europa.eu/internal_market/securities/docs/prospectus/20120330-delegated-regulation_en.pdf

European Commission website – Prospectus Directive page: http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm

ⁱ Commission Regulation (EC) No 809/2004.

ⁱⁱ Draft Commission Delegated Regulation (EU) amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus, the base prospectus, the summary and the final terms and as regards the disclosure requirements. The delegated regulation is not yet in force and the draft is subject to the right of the European Parliament and the Council to express objections. Directive 2010/73/EU provides that if the Parliament and Council do not object within a three month period (or, in some cases, an extended period), the acts are adopted and published in the Official Journal of the European Union.

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