The Amending Directive


The Amending Directive was published in final form in the Official Journal on 11 December 2010 and will come into force on 31 December 2010. Once in force, the Amending Directive must be implemented by Member States into national law within 18 months (i.e. by 1 July 2012).

Changes to Documentation

Standalone Bond Issues

It will be necessary before issuing any securities, to check whether the Amending Directive has been implemented in any jurisdictions in which a non-exempt offer is proposed to be made, or any securities are proposed to be admitted to trading. If the Amending Directive has been implemented in those jurisdictions, additional changes may need to be made to the documentation (see below for further details).

In addition, from 31 December 2010, issuers wishing to avoid the financial reporting requirements of the Transparency Directive will need to ensure that any securities admitted to trading on a regulated market have a minimum denomination of €100,000 (or equivalent).2

Similarly, issuers should ensure that new issues of securities have a minimum denomination of €100,000 (or equivalent) should they potentially wish to re-open any such issue. By re-opening issues with lower denominations (including those which were originally issued as “wholesale” securities) after implementation of the Amending Directive, issuers will be deemed to be issuing “retail” securities, and will therefore be required to comply with retail disclosure and financial reporting standards.

1 Click here to view the text of the Amending Directive, as published in the Official Journal.
2 This is typically the case for non-EEA issuers which do not produce IFRS accounts and which have only wholesale debt securities listed, if any.

Appendix 1 Qualified Investor Comparison Table
Appendix 2 ICMA Public Offer Selling Restrictions under the Prospectus Directive
Programme Establishment or Update

Issuers wishing to avoid updating their programmes once the Amending Directive is implemented, may want to consider making the following changes to their programme documentation now:

(i) **Increase in wholesale debt denominations:** Under the current regime, issuers of debt securities who limit the denominations of those securities to a minimum of €50,000 (or equivalent) may offer such securities to the public without publishing a prospectus. In addition, issuers wishing to list such debt securities may produce a prospectus in accordance with the lighter "wholesale" disclosure regime under Annexes IX and XIII of the Prospectus Regulation. The Amending Directive increases the €50,000 threshold to €100,000. Accordingly, for programmes that take advantage of these wholesale exemptions, references in the documentation to “€50,000 (or its equivalent in other currencies)” should be changed to “€100,000 (or its equivalent in other currencies)”.

(ii) **Change to Selling Restrictions:** Appendix 2 sets out the new ICMA selling restrictions as recently amended by ICMA. The wording has been amended to allow for the fact that different Member States are likely to implement the Amending Directive into national law on different dates during the 18 month implementation period. Therefore, rather than referring to specific changes (such as the increase of the 100 person exemption to 150 persons), the wording is generic and should work both in jurisdictions that have implemented the changes, and those that have not.

(iii) **Summary:** Article 5(2) of the Prospectus Directive (which provides details of the summary) has been amended by the Amending Directive to clarify its purpose. The summary, as amended, will now also need to contain ‘key information’ which is defined by an amendment to Article 2(1).

Another new requirement for the summary is that it should be drawn up in a certain format. This effectively means that equivalent information should appear in the same position in summaries for similar products. CESR (shortly to become ESMA) will produce a common format in due course. Until it does so, issuers of “retail” securities should consider whether the concept of key information (as interpreted by the relevant competent authority) will require further amendments to any existing summaries.

However, Article 6(2), as amended by the Amending Directive, states that the summary shall contain a warning that no civil liability shall be incurred solely on the basis of the summary unless it is misleading, inaccurate or inconsistent when read together with other parts of the prospectus, or it does not provide when read together with the other

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3 ‘Key information’ is defined to include the essential characteristics and risks associated with the issuer/guarantor, the reasons for the offer, the general terms of the offer and any rights attaching to the securities.
parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. The wording in italics has been added by the Amending Directive and should be included in the summary once the Amending Directive is implemented. Whilst at this point the position is unclear, our view is that a summary should not be amended to include the additional warning language in a prospectus which is approved in a home Member State which has not yet implemented the Amending Directive.

Issuing under an Unamended Programme

Issuers who haven’t updated their programmes to comply with the Amending Directive can still issue notes under an unamended programme after 31 December 2010, but prior to implementation in the relevant jurisdiction.

The amendments to the Transparency Directive made by the Amending Directive apply from 31 December 2010. As amended, the exemption in the Transparency Directive from the financial reporting requirements will apply to an issuer of debt securities only having a minimum denomination of €100,000 (or equivalent) for the life of the securities.⁴

An issuer wishing to avoid the financial reporting requirements of the Transparency Directive will therefore need to ensure that securities it issues and admits to trading on a regulated market after 31 December 2010 have a minimum denomination of €100,000 (or equivalent). Such issuers should therefore specify a minimum denomination of at least €100,000 (or equivalent) in the Final Terms for each issue of notes. This is particularly important where the notes being issued may be re-opened at a subsequent date, as explained above under the heading “Standalone Bond Issues”.

For “retail” issuers which already comply with the financial reporting obligations under the Transparency Directive, issuing securities with a minimum denomination of less than €100,000 (or equivalent) on or after 31 December will not have similar consequences. However, they should consider whether the summary in the base prospectus contains the key information described above, as it may be necessary to supplement the prospectus for the purposes of offering “retail” securities in Member States which have implemented the Amending Directive.

We would also recommend that issuers include the amended selling restriction wording in their Final Terms.

Other Changes

The following changes will also apply once the Amending Directive is implemented, although they do not directly affect bond documentation. For further details on these points please see our June briefing note (click here to view that note).

(i) Retail Cascades: Article 3(2) has been amended to clarify that financial intermediaries selling securities on to retail investors, may use

⁴ Securities with a minimum denomination of €50,000 which are admitted to trading before the entry into force of the Amending Directive benefit from grandfathering provisions.
the issuer’s prospectus only if the issuer (or offeror who prepared the prospectus) consents in writing to such use.

(ii) **Time period for prospectus validity:** The Amending Directive retains the current 12 month validity period, but Article 9 has been amended to clarify that such period runs from the date of approval of the prospectus, rather than the date of its publication.

(iii) **Annual information update:** Article 10 has been repealed as it was considered unnecessary in light of the obligations imposed under the Transparency Directive.\(^5\) Article 11 which sets out which documents can be incorporated by reference has been amended to include information filed under the Transparency Directive. This therefore now includes “Regulated Information”\(^6\) such as filings with non-EEA listing authorities.

(iv) **Publication:** Under the revised Article 14(2) an issuer which displays a prospectus on its website alone will be deemed to have validly published that prospectus without the need to also publish on the website of any financial intermediaries and agents. An issuer who chooses to publish by physical means will however also be required to publish by electronic means on its website, or that of any relevant financial intermediaries or paying agents.

(v) **Supplements and withdrawal rights:** The Amending Directive clarifies that an issuer’s obligation to publish a supplement under Article 16 only applies until the close of the offer or the admission of the securities to trading whichever is the later. This is how the requirement is currently interpreted in the UK and so is a welcome clarification.

A more important change to Article 16 is the amendments made to Article 16(2) the ‘walk away right’. The amended wording clarifies that investors may only exercise the walk away right if the prospectus being supplemented relates to a public offer of securities - which, in our view, means a non-exempt offer. On this basis, the walk away right does not apply if a supplement is published in respect of a prospectus which has been prepared for admission purposes only. The walk away right will only be available where the circumstances which gave rise to the publication of the supplement arose before the close of the public offer.

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\(^5\) Article 10 required issuers to file a document on an annual basis containing or referring to all information published or made available to the public over the preceding 12 months in compliance with obligations under EU and national securities laws.

\(^6\) “Regulated Information” is defined in the Transparency Directive to include all information which the issuer, or any other person who has applied for the admission of securities to trading on a regulated market without the issuer’s consent, is required to disclose under the Transparency Directive, under Article 6 of the Market Abuse Directive, under the laws, regulations or administrative provisions of a Member State adopted under Art 3(1) of the Transparency Directive or under Art3(3) of the Transparency Directive which captures foreign filings e.g. with the SEC.
The period within which walk away rights must be exercised is to be set at two working days following publication of the supplement. The final date upon which walk away rights can be exercised must be specified in the supplement.

(vi) **Definition of “qualified investor”:** The Amending Directive has replaced the definition of “qualified investor” set out in Article 2(1)(e) of the Prospectus Directive in order to align it with the concept of a “professional” under the Markets in Financial Instruments Directive ("MiFID"). The key elements of the two definitions are broadly aligned, so for the large part, a person who was a qualified investor under Article 2(1)(e) of the Prospectus Directive will continue to be so under the revised definition. The new wording introduced by the Amending Directive also encompasses those persons under MiFID who are “treated on request as professional clients” or who are “eligible counterparties”. However, it is expected that issuers and the banks will seldom rely on these two limbs for the purposes of QI-only offers. A comparative table of the differences is set out in Appendix 1.
Appendix 1
Qualified Investor Comparison Table

Set out below is a table comparing the differences between the revised definition following the amendments in the Amending Directive and the definition of “qualified investor” in the Prospectus Directive (as first enacted).

The column on the left sets out the various limbs of the definition of “qualified investor” under the Amending Directive, including any relevant provisions from Annex II of MiFID. The column on the right sets out the equivalent provision (if any) under the Article 2(1)(e) of the Prospectus Directive as it was first enacted. Paragraph numbering has been included for the purposes of this comparison only.

<table>
<thead>
<tr>
<th><strong>Amending Directive/MiFID</strong></th>
<th><strong>Prospectus Directive equivalent</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td>“Qualified investors” means</td>
<td></td>
</tr>
<tr>
<td>1 persons or entities that are described in Annex II paragraphs I (1) to (4) of Directive 2004/39/EC:</td>
<td>“legal entities which are authorised or regulated to operate in the financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities” (Article 2(1)(e)(i) PD)</td>
</tr>
<tr>
<td>1.1 Entities which are required to be authorised or regulated to operate in the financial markets. The list below should be understood as including all authorised entities carrying out the characteristic activities of the entities mentioned: entities authorised by a Member State under a Directive, entities authorised or regulated by a Member State without reference to a Directive, and entities authorised or regulated by a non-Member State: (a) Credit institutions; (b) Investment firms; (c) Other authorised or regulated financial institutions; (d) Insurance companies; (e) Collective investment schemes and management companies of such schemes; (f) Pension funds and management companies of such funds; (g) Commodity and commodity derivatives dealers; (h) Locals; and (i) Other institutional investors.</td>
<td>Conditions in paragraph (f):</td>
</tr>
<tr>
<td>1.2 Large undertakings meeting two of the following size requirements on a company basis:</td>
<td>“other legal entities which do not meet two of the three criteria set out in paragraph (f)” (Article 2(1)(e)(iii) PD)</td>
</tr>
<tr>
<td>- balance sheet total: EUR 20 000 000,</td>
<td>- an average number of employees during the financial year of less than 250;</td>
</tr>
<tr>
<td>- net turnover: EUR 40 000 000,</td>
<td>- a total balance sheet not exceeding EUR 43 000 000; and</td>
</tr>
<tr>
<td>- own funds: EUR 2 000 000.</td>
<td>- an annual net turnover not exceeding</td>
</tr>
</tbody>
</table>
Amending Directive/MiFID

1.3 National and regional governments, public bodies that manage public debt, Central Banks, international and supranational institutions such as the World Bank, the IMF, the ECB, the EIB and other similar international organisations.

1.4 Other institutional investors whose main activity is to invest in financial instruments, including entities dedicated to the securitisation of assets or other financing transactions.

2 those who are treated on request as professional clients in accordance with Annex II to Directive 2004/39/EC;

3 those who are recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC, unless they have requested that they be treated as non-professional clients.

Prospectus Directive equivalent

EUR 50 000 000.

“national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations” (Article 2(1)(e)(ii) PD)

See paragraph opposite 1.1 above.

“certain natural persons: subject to mutual recognition, a Member State may choose to authorise natural persons who are resident in the Member State and who expressly ask to be considered as qualified investors if these persons meet at least two of the criteria set out in paragraph 2” (Article 2(1)(e)(iv) PD)

“certain SMEs: subject to mutual recognition, a Member State may choose to authorise SMEs which have their registered office in that Member State and who expressly ask to be considered as qualified investors” (Article 2(1)(e)(v) PD)
Appendix 2

ICMA Public Offer Selling Restrictions under the Prospectus Directive

Part A – MTN Programmes

In relation to each Member State of the European Economic Area which has implemented the Prospectus Directive (each, a **Relevant Member State**), each Dealer has represented and agreed, and each further Dealer appointed under the Programme will be required to represent and agree, that with effect from and including the date on which the Prospectus Directive is implemented in that Relevant Member State (the **Relevant Implementation Date**) it has not made and will not make an offer of Notes which are the subject of the offering contemplated by [the][this] [Offering Circular][Prospectus] as completed by the final terms in relation thereto to the public in that Relevant Member State except that it may, with effect from and including the Relevant Implementation Date, make an offer of such Notes to the public in that Relevant Member State:

(a) if the final terms in relation to the Notes specify that an offer of those Notes may be made other than pursuant to Article 3(2) of the Prospectus Directive in that Relevant Member State (a **Non-exempt Offer**), following the date of publication of a prospectus in relation to such Notes which has been approved by the competent authority in that Relevant Member State or, where appropriate, approved in another Relevant Member State and notified to the competent authority in that Relevant Member State, provided that any such prospectus has subsequently been completed by the final terms contemplating such Non-exempt Offer, in accordance with the Prospectus Directive, in the period beginning and ending on the dates specified in such prospectus or final terms, as applicable and the Issuer has consented in writing to its use for the purpose of that Non-exempt Offer;

(b) at any time to any legal entity which is a qualified investor as defined in the Prospectus Directive;

(c) at any time to fewer than 100 or, if the Relevant Member State has implemented the relevant provision of the 2010 PD Amending Directive, 150, natural or legal persons (other than qualified investors as defined in the Prospectus Directive), subject to obtaining the prior consent of the relevant Dealer or Dealers nominated by the Issuer for any such offer;

(d) at any time in any other circumstances falling within Article 3(2) of the Prospectus Directive, provided that no such offer of Notes referred to in (b) to (d) above shall require the Issuer or any Dealer to publish a prospectus pursuant to Article 3 of the Prospectus Directive, or supplement a prospectus pursuant to Article 16 of the Prospectus Directive.

For the purposes of this provision, the expression an **offer of Notes to the public** in relation to any Notes in any Relevant Member State means the communication in any form and by any means of sufficient information on the terms of the offer and the Notes to be offered so as to enable an investor to decide to purchase or subscribe the Notes, as the same may be varied in that Member State by any measure implementing the Prospectus Directive in that Member State, the expression **Prospectus Directive** means Directive 2003/71/EC (and amendments thereto, including the 2010 PD Amending Directive, to the extent implemented in the Relevant Member State), and includes any relevant implementing measure in the Relevant Member State and the expression **2010 PD Amending Directive** means Directive 2010/73/EU.
Part B – Standalone Debt Issues – Exempt Offers Only

In relation to each Member State of the European Economic Area which has implemented the Prospectus Directive (each, a Relevant Member State), each Manager has represented and agreed that with effect from and including the date on which the Prospectus Directive is implemented in that Relevant Member State (the Relevant Implementation Date) it has not made and will not make an offer of Notes which are the subject of the offering contemplated by [the][this] [Offering Circular][Prospectus] to the public in that Relevant Member State other than:

(a) to any legal entity which is a qualified investor as defined in the Prospectus Directive;

(b) to fewer than 100 or, if the Relevant Member State has implemented the relevant provision of the 2010 PD Amending Directive, 150, natural or legal persons (other than qualified investors as defined in the Prospectus Directive), as permitted under the Prospectus Directive, subject to obtaining the prior consent of the relevant Dealer or Dealers nominated by the Issuer for any such offer; or

(c) in any other circumstances falling within Article 3(2) of the Prospectus Directive,

provided that no such offer of Notes shall require the Issuer or any Manager to publish a prospectus pursuant to Article 3 of the Prospectus Directive [or supplement a prospectus pursuant to Article 16 of the Prospectus Directive].

For the purposes of this provision, the expression an offer of Notes to the public in relation to any Notes in any Relevant Member State means the communication in any form and by any means of sufficient information on the terms of the offer and the Notes to be offered so as to enable an investor to decide to purchase or subscribe the Notes, as the same may be varied in that Member State by any measure implementing the Prospectus Directive in that Member State, the expression Prospectus Directive means Directive 2003/71/EC (and amendments thereto, including the 2010 PD Amending Directive, to the extent implemented in the Relevant Member State), and includes any relevant implementing measure in the Relevant Member State and the expression 2010 PD Amending Directive means Directive 2010/73/EU.
Part C – Standalone Debt Issues which include Non-Exempt Offers

In relation to each Member State of the European Economic Area which has implemented the Prospectus Directive (each, a Relevant Member State), each Manager has represented and agreed that with effect from and including the date on which the Prospectus Directive is implemented in that Relevant Member State (the Relevant Implementation Date) it has not made and will not make an offer of Notes which are the subject of the offering contemplated by [the][this] [Offering Circular][Prospectus] to the public in that Relevant Member State other than the offers contemplated in the Prospectus in [name(s) of Member State(s) where prospectus will be approved or passported for the purposes of a non-exempt offer] from the time the Prospectus has been approved by the competent authority in [name of Member State where prospectus will be approved] and published [and notified to the relevant competent authorit(y)(ies)] in accordance with the Prospectus Directive until [●], and provided that the Issuer has consented in writing to use of the Prospectus for any such offers, except that it may, with effect from and including the Relevant Implementation Date, make an offer of such Notes to the public in that Relevant Member State:

(a) to any legal entity which is a qualified investor as defined in the Prospectus Directive;

(b) to fewer than 100 or, if the Relevant Member State has implemented the relevant provision of the 2010 PD Amending Directive, 150, natural or legal persons (other than qualified investors as defined in the Prospectus Directive), as permitted under the Prospectus Directive, subject to obtaining the prior consent of the relevant Manager or Managers nominated by the Issuer for any such offer; or

(c) in any other circumstances falling within Article 3(2) of the Prospectus Directive,

provided that no such offer of Notes shall require the Issuer or any Manager to publish a prospectus pursuant to Article 3 of the Prospectus Directive or supplement a prospectus pursuant to Article 16 of the Prospectus Directive.

For the purposes of this provision, the expression an offer of Notes to the public in relation to any Notes in any Relevant Member State means the communication in any form and by any means of sufficient information on the terms of the offer and the Notes to be offered so as to enable an investor to decide to purchase or subscribe the Notes, as the same may be varied in that Member State by any measure implementing the Prospectus Directive in that Member State and the expression Prospectus Directive means Directive 2003/71/EC (and amendments thereto, including the 2010 PD Amending Directive, to the extent implemented in the Relevant Member State), and includes any relevant implementing measure in the Relevant Member State and the expression 2010 PD Amending Directive means Directive 2010/73/EU.