

# Commission seeks to address shortcomings in prospectus regime

*The EU Commission is anxious to address the obstacles that prevent smaller businesses accessing capital markets, write CONOR HOULIHAN and KATE CURNEEN. The Commission has identified a number shortcomings in the current prospectus framework that is targeting, including the expense and complexity of preparing a prospectus and the inefficiency of the approval process.*

**O**n 18th February the European Commission published a consultation paper on the current prospectus directive regime with a view to substantially reforming the existing framework. The present regime, based on Directive 2003/71/EC (as amended), has been in place for almost 10 years. It was enacted to harmonise the requirements for the drawing up, approval and distribution of prospectuses when securities are offered to the public or admitted to trading on a regulated market in the European Economic Area.

The Directive was due to be reviewed by the Commission by 1st January, 2016 but the Commission has undertaken its review early, in conjunction with its Green Paper on a possible EU Capital Markets Union, which it released on the same date.

The Commission believes there are several shortcomings in the current prospectus framework. The current system is perceived as making the preparation of prospectuses overly expensive and unduly complex and the approval process is thought to be inefficient and unduly lengthy.

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The Commission sees these factors as obstacles preventing many smaller businesses accessing the capital markets. This is particularly important given that the main focus of the Capital Markets Union is on improving access to the capital markets for smaller business entities so that their funding base can be broadened, making them less reliant on traditional bank finance. The Commission considers that this review of the Directive, therefore, is pivotal to the development of a Capital Markets Union.

The consultation seeks to reform the

current framework to make it easier for entities to raise capital throughout the EU, at a lower cost, but also to ensure the retention of appropriate and sensible levels of investor protection.

The consultation also seeks to update and adapt the current framework to recent market and regulatory developments. These include the prevalence of securities trading via multi-lateral and organised trading facilities and the creation of SME growth markets, and also to reflect the upcoming introduction of key information documents for packaged retail investment products under the new capital “PRIIPs” regulation (Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)).

The consultation takes the form of a number of questions, on which the Commission invites the submission of responses by 13th May, 2015. It is clear from the first question that the Consultation poses (“Should a prospectus be necessary for admission to trading on a regulated market, or an offer of securities to the public?”) that no part of the Directive is off-limits and that the process will potentially lead to a substantial overhaul of the current regime.

A number of key areas are considered in the consultation. The first is when a prospectus is actually necessary. The consultation asks whether the current exemption thresholds in the Directive (which exempt certain types of public offers from the prospectus requirement) are still appropriate and also seeks views



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on whether there should be additional exemptions, for example in the case of secondary issuances or in circumstances where there is a substantial amount of information already publicly available about the issuer.

The consultation also examines whether additional harmonisation would be useful in areas that are currently left to the discretion of individual member states, for example, the flexibility given to member states to require prospectuses for offers of securities with total consideration of less than €5 million. In addition, it examines whether there is a need to include a wider range of securities within the scope of the Directive’s remit, other than “transferrable securities”, as defined in Article 2(1)(a).

The second broad area examined is what a prospectus should actually be required to contain. The consultation looks at whether the proportionate disclosure regime (introduced in 2010 by way of amendment to the original Directive) for SMEs and companies with “reduced market capitalisation” has actually fulfilled its purpose, which was to make it less burdensome for such entities to access the capital markets. It seeks views on whether this regime should be modified to improve efficiency and extended to certain other classes of issuers that are not currently covered.

It also looks at whether there should be a simplified prospectus framework for SMEs and companies that have reduced market capitalisation admitted to trading on an SME growth market, again, in order to facilitate their access to capital markets financing.

## Approval process

The consultation also examines the process by which prospectuses are actually approved. It proposes to examine whether there are any material differences in the way that national competent authorities assess inter-alia the completeness and consistency of the draft prospectuses that are submitted to them for approval. It seeks views on how to

make the approval process for prospectuses more streamlined, transparent and workable.

The consultation also seeks suggestions in relation to the extent of involvement that competent national authorities should have in relation to the approval of prospectuses. This would include whether, as is currently the case, there should be a requirement for them to review all prospectuses before the relevant offer or admission to trading, or whether they should review a sample of prospectuses in advance, with other prospectuses being reviewed only after the offer or the admission to trading has actually commenced.

In addition, the consultation addresses whether the current EU passport mechanism is working in an effective and useful way or whether improvements, such as the simplification of the approval notification procedure between home and host member states, could be made.

Finally, the consultation looks at several of the fundamental definitions in the Directive, such as “offer of securities to the public”, as well as the terms “primary market” and “secondary



**The EU Commission's moves to update the Prospectus Directive is expected to improve access to the capital markets for smaller businesses in the EU, a key goal of the Capital Markets Union project which is being spearheaded by EU Commissioner Jonathan Hill.**

market”, and queries whether these terms could be better defined.

It is hoped that the outcome of the consultation will lead to a more streamlined prospectus approval process across the EU, which will make it easier for issuers (particularly SMEs) to raise

capital, while at the same time maintaining measures that are necessary for investor protection.

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