



**RESPONSE TO THE CONSULTATION ON
UK IMPLEMENTATION OF THE PROSPECTUS DIRECTIVE 2003/71/EC**

INTRODUCTION

We have drafted our response in two sections. Part 1 addresses the particular questions raised in the consultation paper, and Part 2 covers additional issues and drafting points that we would like to make. We have also contributed to the response from the International Primary Market Association and the Law Society's Standing Committee on Company Law.

PART 1 - RESPONSES TO QUESTIONS RAISED

Q1. Do you agree that the Directive definition of a public offer benefits from this clarification?

We agree that the definition in the Directive is so broad as to need clarification. However, it needs to make clear (in accordance with the last paragraph of Art 3.2 in the Directive), that the prospectus requirement on secondary offers only extends to those situations where a previously exempt offer is being made to the public. The Directive does not require that a secondary offer of securities, for which a prospectus has previously been required (as a result of a public offer – whether listed or not), be subject to a prospectus requirement. This distinction needs to be carried through into UK legislation.

Q2. Do you anticipate particular issues regarding the application of the definition of a public offer in other circumstances?

Yes.

(a) As it currently stands, one could interpret it to mean that any person making a communication presenting information about *securities that are available in the market* (e.g. a newspaper column, brokers' circulars, Bloomberg and Reuters screens, on-line brokers) would be making a public offer. This is obviously not the intention. It should be clarified so that (i) the person making the communication must be the person making or procuring the offer of the securities; and (ii) "the terms of the offer" must relate to a specific offer, rather than all publicly traded securities. Other, more general communications, which do not actually offer securities are adequately controlled by the financial promotion regime in S. 21 of FSMA.

(b) Para 4.11 of the CP purports to exempt "screen trading on", whereas S.103(2)(b) says "in connection with trading on". This latter approach is broader and therefore preferable, but is still too vague and should be clarified. Ideally, it should be a blanket exemption and say "with securities admitted to trading on", or make it as wide as possible by including as many markets as possible (see (c) below).

(c) The definition of “regulated market” used in (b)(i) and the new S. 118(3) (amended by MAD and to become S. 130A(1)) only applies to the UK list of regulated markets. This should be extended to include at least all EU regulated markets and preferably worldwide (e.g. NASDAQ)

Please see specific drafting concerns in Part 2 below.

Q3. Do you consider the €2.5m threshold to be an appropriate level at which the production and approval of a prospectus is required under UK law?

Yes. To create any other threshold would undermine the EU-wide threshold in the Directive. The Commission has decided that such a threshold should be set at €2.5m. In addition, this segment of the market is already adequately protected by the financial promotion and conduct of business regimes.

Q4. If not, what form of additional UK prospectus regime should apply below the €2.5m threshold?

N/A.

Q5. Do you agree with our approach to implementing the exemption where the offer of securities is addressed to fewer than 100 persons?

Although we understand why the FSA is keen to prevent issuers/offers from abusing the exemption, the Directive does not specify that it is an annual limit (but could have done if that was the intention). We do not believe that the FSA has the power under a maximum harmonisation directive to create such a super-equivalent requirement. Furthermore, it will result in the UK having a different regime to that across the rest of Europe and prejudice UK investors. There are situations where an issuer may want to legitimately make several distinct offers within a 12 month period, each to less than 100 persons, but in aggregate exceeding 100 persons. For example, a non-EU listed company – which is not eligible for the employee exemption under the Directive - making offers to its European employees. UK employees will be prejudiced if in other European countries the issuer is allowed to make an offer to 60 key employees in say March and another offer in say September, while in the UK it cannot.

If a European-wide restriction is needed/requested, then the correct mechanism is through CESR level 3 guidance – so that it applies across Europe rather than just in the UK. Until then, abuse of the exemption should be prevented by the FSA’s conduct of business rules.

Q6. Do you agree with our proposed implementation approach for attaching responsibility to the prospectus?

It is not clear what the proposed implementation approach is. The CP (para 3.7) says that the FSMA (Official Listing of Securities) Regulations 2001 will be extended (through changes to Part VI of FSMA) to make them applicable to prospectuses produced for public offers and for securities admitted to trading on a regulated market. We cannot see where this extension from listing particulars to prospectuses is

covered as paragraph 10 of the Regulations is to be revoked. It is also not clear from Sch 3 of the draft Regulation is whether the 2001 Regulations will remain (as amended by Sch 3.3), or whether new Regulations will be introduced. Para 4.22 of the CP says that the structure and identification of responsibility for the prospectus will remain unchanged compared to the existing regime (which seems to suggest that the existing Regulation will stay the same). However, the existing Regulation does not cover offers of existing listed securities as there is currently no need for a prospectus on such issues. Therefore, how will the responsibility provisions deal with responsibility for a prospectus on a secondary deal (in the limited circumstances when required – see Q.1)? This needs to be the offeror, but it is not clear how such an offeror will be able to gather the information necessary to compile a prospectus without involving the issuer. The offeror should only be liable to the extent that the information is not properly extracted from publicly available information. If the issuer is involved in the production of the prospectus, will it be jointly liable for the prospectus or not? Please can HMT publish the proposed Responsibility Regulations.

Furthermore, Annex A of the consultation (page 27) says that responsibility for the contents of a prospectus will be dealt with in PR 2.1.7 and PR 2.1.8 of the proposed FSA Handbook. This is not the case.

Q7. Do you agree that the UK should have a Qualified Investor regime?

Yes, and we agree with the proposal to include natural persons and SMEs within the definition of qualified investor. However, qualification should be by self-certification, as is currently proposed under the financial promotion regime.

Q8. Do you agree that a prospectus should be made available on an issuer's website in addition to in printed form?

Yes – subject to (i) the issuer being able to take necessary measures to avoid breaching foreign securities laws; (ii) an equity issuer being able to remove it after an appropriate period (e.g. 12 months, as is envisaged for competent authorities in Article 14.4 of the Directive). There is merit in a debt issuer retaining the information until maturity of the securities; and (iii) the issuer being able to include legends/disclaimers making it clear that the information is out-of-date and is not a *communication* that would trigger a public offer in its own right (i.e. if the prospectus was originally solely for the purpose of admission). It is also not clear what the position is if an issuer (e.g. an SPV) does not have a website?

By way of comment, it would be interesting to know whether the UKLA currently regards prospectuses posted on foreign websites as being an offer in the UK? The Prospectus Directive certainly seems to assume that it is not, at least in relation to the EU (otherwise every offer would be Europe-wide as the prospectus is obliged to be published on a website), but the question is less clear for offers made outside of the EU.

Q9. Do you agree that a notice should be published stating how the prospectus has been made available and where it can be obtained by the public?

Yes.

PART 2 – DRAFTING CONCERNS AND OTHER ISSUES

1. S. 84(2) – The words “by or” should be deleted in the second line, as nothing is “required by the prospectus directive”. These rules implement the Directive, they should not cross-refer to it. The same issue arises in S. 87E(2)(a) to (e) – use of the phrase “prospectus directive has been infringed” is inappropriate as the Directive has no force of law in its own right – only as implemented by the UK into national legislation.
2. S. 85(1) – Under existing case law (*Governments Stock v Christopher*), an exchange offer is not deemed to involve the "purchase" or "subscription" of shares - and therefore, under the proposed S. 85(1) and S. 103(2) of FSMA, such an offer would not require a prospectus to be produced unless shares (equalling more than 10% of a class already listed) were being admitted to a regulated market. This sits rather uncomfortably with the exemption in 1.2.2(2) of the proposed FSA Prospectus Rules (implementing Art 4.1(b) of the Prospectus Directive), which expressly covers exchange offers. The intention is obviously that exchange offers should be caught, so case law needs to be overridden (e.g. by clarifying the definition of securities). Other clarification/guidance should also be given regarding loan notes, schemes of arrangement and non-transferable share options.
3. S. 85(1)(b) –The wording should be changed to “be admitted to trading on a regulated market in the UK” as it will not be possible to have a prospectus approved and published before even the application for admission is made.
4. S. 85(2) – The reference should be to “subsection (1)(a)” as, under the Directive, the exemptions in S. 85(3)(a) to (e) only apply to an offer to the public not an admission to trading. However, S. 85(3)(f) applies to both offers and admissions, so needs to be dealt with separately.
5. S. 85(3)(a) & (b) – Use of the word “addressed” is confusing. Does this mean made or communicated to? We suggest that you use the financial promotion terminology of “made to or directed at”.
6. S. 85(6) – When a person chooses to produce a prospectus (when they are not legally required to) the Directive uses the term “draw up”. S. 85(6) says they may “publish” a prospectus – which includes all the publication procedures. Is this the intention for “exempt” prospectuses?
7. S. 85(7) – We think that this provision should also include an offer to a nominee.
8. S. 85(8) – Although it is helpful to clarify the meaning of “equivalent amount”, the phrase “latest practicable date” will always be open to argument. As all of the monetary amounts in S. 85 relate to exemptions from the requirement to produce a prospectus, the term “the date on which approval is granted” is inappropriate as there will not be any approval.

9. S. 86(2) – The UKLA will not always be in a position to know whether a non-EU issuer has correctly interpreted Art 2.1(m)(iii) of the Directive in determining its home member state, so may find itself (unwittingly) in contravention of S. 86(2). We would suggest that a provision be included which states that approval, once given, is valid regardless of any subsequent facts that emerge to suggest that it was not the valid home member state.
10. S. 86(6) – This provision does not correctly implement Art 8.1 of the Directive. Under the Directive, where information is omitted, the issuer has 2 options. It must either include the criteria and/or conditions on which the information will be determined, including if applicable, the maximum price, **OR** the investor gets a 2 day withdrawal right. The first option is not represented in S. 86(6).
11. S. 87(1) – The requirement for a supplementary prospectus is said to end at either the final closing of the offer or when trading on a regulated market begins. What happens if these do not coincide and an offer remains outstanding after trading has commenced? We suggest that it be the later of the two. This should be clarified. Also, what if the trading is off-market?
12. S. 87B(2) - The word “applicant” has been substituted for “issuer” – this is wrong because the applicant (if an offeror) may not always have securities admitted to trading.
13. S. 87C(2)(c) - the words “where required by X” should be inside the brackets, as the UKLA only has discretion to exempt an issuer from the translation of the summary not the actual inclusion of the summary.
14. S. 87E – Where has PD Art 21.4 been implemented?
15. Sch 1 6(12) – The extension of the exemption (for liability of the summary) to the translation has not been included.
16. S. 103(1) – The definition of Home Member State cross-refers to the Directive. We think this is a mistake as there is so much ambiguity and confusion with the Directive definition. We think that HMT should seek to clarify the position by re-drafting the definition in the draft Regulations. This could also incorporate Article 30 of the Directive as this is currently not addressed in the Regulation. We think HMT should incorporate Article 30 in a purposive way i.e. the point the Article is trying to make is that “if you have made [i.e. between 31/12/03 and the date the Regulation comes into force] or make an election to the UK competent authority by 31 December 2005, and have equity securities listed in the UK, then you will have chosen the UK as your home member state.”
17. S. 103(2)(b)(iii) – As a result of the implementation of the Market Abuse Directive, the subsection reference should be changed to “subsection (1) of section 130(A)” .
18. Schedule 2 (3)(iii) – Why does the Regulation use the term “international organisation” rather than “public international body” – which is defined in the Level 2 Regulations?

19. Schedule 2 (7)(5) – When calculating the aggregate in a 12 mth period, is this a global aggregate or an EU aggregate? Also applies in S. 85(4).