

UK Implementation of the Prospectus Directive 2003/71/EC

A consultation document

October 2004



HM TREASURY





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EXECUTIVE SUMMARY

This consultation document sets out HM Treasury's proposals for implementing the Prospectus Directive (2003/71/EC). The Prospectus Directive (the Directive) forms part of the EU Financial Services Action Plan, which aims to create a single market in financial services.

The Directive aims to improve market efficiency by enabling companies to gain access to financial markets across the EU through the production of a single approved prospectus. The Directive also seeks to protect investors by requiring high standards of disclosure within prospectuses. The key aspects of the Directive can be summarised as follows:

- The Directive requires a prospectus to be produced in circumstances of:
 - i) an offer of securities to the public; or
 - ii) the admission of securities to trading on a regulated.
- All prospectuses must meet specified disclosure standards and be approved by the issuer's relevant competent authority.
- An approved prospectus will provide issuers with a single "passport" for use throughout capital markets in the EU, without additional approval or administrative arrangements from other Member States.
- The existing UK regulatory regime covering offers of securities to the public, the Public Offer of Securities Regulations 1995, is superseded by the Directive. Currently these Regulations contain an exemption from the obligation to produce a prospectus for offers of less than £100,000. Under the Prospectus Directive regime, offers below 2.5 million euros are similarly exempt. Therefore, in the absence of a successor domestic regime to the Regulations, there will be a new population of public offers which will no longer be required to produce any form of a prospectus.

The implementation of the Directive will require significant amendments to primary legislation in the Financial Services and Market Act 2000 (FSMA). These changes will be effected by draft Regulations amending Part VI and schedules 7-11 to FSMA to include offers of securities to the public and securities seeking admission to trading on a regulated market. Other aspects of the implementation will require changes to the Financial Services Authority Handbook.

The Directive is a 'maximum harmonisation' Directive, in relation to the format and contents of a prospectus. Consequently, there is limited scope for EU member states to apply discretion in the way in which it is implemented. The document considers the relatively few areas in which the UK has implementation options under the Directive.

This document has been prepared for consultation together with the Financial Service Authority's consultation paper on amendments to the Listing Rules.

INTRODUCTION

1.1 On 4 November 2003 the European Parliament and the Council of the European Union adopted a Directive on the prospectus to be published when securities are offered to the public or admitted to trading. This Directive is known as the Prospectus Directive (The Directive).¹

PROSPECTUS DIRECTIVE

1.2 The EU has emphasised the importance of access to capital as a key factor for job creation, raising productivity, entrepreneurship and growth in Europe. The Prospectus Directive was introduced to build on existing legislation regarding prospectuses for public offers of securities and admission of securities to listing, in particular the Public Offers Directive and the Consolidated Admissions and Reporting Directive.² It was recognised that this existing prospectus regime provided a number of obstacles to raising capital across the EU, including an absence of harmonised procedures and interpretations across Member States.

1.3 The Prospectus Directive aims to improve market efficiency through the issue of a single approved prospectus that will enable issuers to raise capital across the EU without further approval or administrative arrangements. In addition the Directive aims to enhance investor protection by requiring harmonised high standards of disclosure for issues of securities that are offered to the public or admitted to trading on a regulated market in the EU.

FINANCIAL SERVICES ACTION PLAN (FSAP)

1.4 The Prospectus Directive is one of the key measures adopted in the EU as part of the Financial Services Action Plan (FSAP).³ The FSAP is the legislative framework for developing the Single Market in financial services. Its programme of measures intends to fill gaps and remove the remaining barriers in order to provide a legal and regulatory environment that supports the integration of financial markets across the EU.

1.5 In May the Treasury, the FSA and the Bank of England published a paper regarding the implementation of FSAP directives in the UK.⁴ That paper sets out the UK's approach to implementing the FSAP in three key areas: internal arrangements within the public authorities, working with business and cooperation with authorities in other Member States. This consultation document has been produced in a manner consistent with that approach by working with the FSA and the financial services sector.

¹ Prospectus Directive 2001/71/EC

² Public Offer of Securities Directive 89/298/EEC and Consolidated Reporting and Admissions Directive 2001/34/EC

³ Published by the Commission in May 1999. Between the FSAP's endorsement by the European Council in Lisbon in March 2000 and the end of April 2004, 38 out of 42 measures in the FSAP were adopted by the EU.

⁴ The EU Financial Services Action Plan: Delivering the FSAP in the UK. It is available at www.hm-treasury.gov.uk and www.fsa.gov.uk.

DIRECTIVE CONSULTATION AND IMPLEMENTATION

1.6 This document has been prepared for consultation together with the FSA's consultation on amendments to the Listing Rules. This work also includes guidance on key issues (Annex A) and consideration of different implementation options as set out in the Regulatory Impact Assessment (Annex E).

1.7 In implementing the Directive, the Government's objectives are to create a regime that is:

- Proportionate;
- Comprehensible;
- Effective; and
- Consistent with our obligation to implement the Directive.

1.8 During the pre-consultation period, the Treasury has had regular contact with industry including two roundtables of informal discussion held in May and June 2004. In addition there have been frequent trilateral and individual meetings between the Treasury, industry and the FSA. UK representatives from the Treasury and the FSA have also attended transposition meetings with the European Commission, representatives of other Member States and the Committee of European Securities Regulators (CESR) in order to discuss the implementation of the Directive and to seek a degree of consistency in implementation across Member states.

1.9 It is clear from the transposition meetings that the issues addressed in this document are also faced by other EU Member States. A number of other Member States are not particularly well advanced in determining their implementation approach. However, the proposed approach set out in this document is consistent with the views expressed by several large Member States.

1.10 The Prospectus Directive has been subject to the "Lamfalussy" process for financial services legislation in the EU. This introduced a new four level legislative approach, namely framework principles, implementing measures, regulatory co-operation and enforcement.⁵ The Prospectus Directive is a framework directive ("Level 1" text), with further details provided in implementing measures ("Level 2" or comitology measures).

1.11 This consultation deals with the implementation of the framework Directive (Level 1) through Treasury Regulations and FSA Rules. The detailed format and contents of prospectuses is not addressed by the Directive but is specified in an EU (Level 2) implementing regulation.⁶ The EU regulation is directly applicable to Member States and will be partly incorporated into the FSA rules.

1.12 The Treasury proposes to implement the Directive through regulations made under section 2(2) of the European Communities Act 1972, effecting relevant amendments to primary and secondary legislation as discussed in this document.

⁵ Baron Lamfalussy chaired a Committee of Wise Men who in February 2001 delivered a report on 'The Regulation of European Securities Markets'. This process introduced a new four level approach to legislative techniques

⁶ Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council

1.13 The FSA will be making amendments to its Handbook as discussed in Annex D – FSA Implementation of the Prospectus Directive. Annex D replicates Chapter 2 of the FSA’s separate Listing Review consultation paper. The references to the FSA’s section of the consultation contained in this document refer to the numbering in Annex D.

NEXT STEPS

1.14 Member States are required to implement the Directive by 1 July 2005. This consultation document seeks comments on the proposed Regulations to effect implementation. The proposed timetable for implementation includes a three-month consultation period ending 28 January 2005.

Please send your comments on the HM Treasury section in writing to Simon Cubley by 28 January 2005 to: HM Treasury, Capital Markets & Governance Team, 4/22, 1 Horse Guards Road, London SW1A 2HQ

Email: simon.cubley@hm-treasury.x.gsi.gov.uk

It is government policy to make all responses to formal consultation documents available for public inspection unless the respondent requests otherwise. Any responses or parts of responses which you do not wish published should be clearly marked as confidential.

This document can be accessed via the Treasury’s website (www.hm.treasury.gov.uk). To obtain further information about publication of this document, please contact:

HM Treasury, Correspondence and Enquiry Unit, HM Treasury, 1 Horse Guards Road, London SW1A 2HQ.

2

OVERVIEW OF THE DIRECTIVE

2.1 This chapter sets out the main aims of the Directive and seeks to highlight:

- how the Directive works;
- the scope of the Directive;
- the format and content of prospectuses;
- the approval by competent authorities; and
- other communications.

AIMS

2.2 The aims of the Directive are to enhance investor protection through the production of high quality prospectuses and to improve the efficiency of the internal market through the issue of a single approved prospectus, which will be valid for use across the EU.

HOW THE DIRECTIVE WORKS

2.3 The Directive identifies two circumstances where a prospectus is required; firstly, when an offer of securities is made to the public and secondly when securities are admitted to trading on a regulated market. The existing legislative framework for listed securities will remain and Member States will be able, but not obliged, to impose additional obligations on listed issuers.¹

2.4 The Directive introduces the concept of a single “passport” for issuers, where a prospectus approved by one competent authority is available for use throughout the EU, without additional approval or administrative arrangements from competent authorities of other Member States. The effect of this means that once the competent authority in one relevant Member State has approved the prospectus, it will then be accepted elsewhere in the EU.

2.5 The relevant Member State is determined by the issuer’s home (or host) Member State. Once this has been determined, the competent authority for that Member State is responsible for vetting the prospectus and for ensuring that the obligations for issuers and others under the Directive are met. The host member state is identified when an offer to the public or admission to trading is sought outside the home member state, (in certain circumstances at the issuer’s choice).

2.6 The Directive seeks to improve the efficiency of the capital raising process in a number of ways, for example by introducing a new procedure for a more flexible, tripartite format of a prospectus and by applying differing disclosure requirements for equity and non-equity securities. In addition the Directive seeks to enhance investor protection by requiring harmonised high standards of disclosure and requiring competent authorities approval of prospectuses in all circumstances.

¹ Consolidated Admissions and Reporting Directive (2001/34/EC) (CARD) in 2001 sets out the current EU framework for listing and many of the current Listing Rules are derived from the requirements and powers laid out in CARD.

2.7 The Directive, as a piece of framework legislation, does not specify the detailed form and contents of prospectuses. Instead, these are prescribed in a detailed EU Level 2 implementing regulation which will be directly effected, largely through FSA Rules. The implementing regulation is therefore not considered in this document.²

2.8 An important requirement of this Level 2 regulation is that all EU issuers, and (post 1 January 2007) all non-EU issuers, will have to present their historical financial information in accordance with International Accounting Standards or “equivalent” accounting standards.³ The Committee of European Securities Regulators, CESR, has been charged by the Commission with providing advice on the issue of equivalence to International Accounting Standards of US, Canadian and Japanese accounting standards.⁴

2.9 The Directive is a ‘maximum harmonisation’ directive in relation to the form and content of prospectuses. This restricts the ability of Member States to impose directly or indirectly, any additional prospectus content requirements on those making public offers or seeking admission to trading on a regulated market. However, there are certain provisions within the Directive which do afford options to Member States. These options are considered in this document.

SCOPE OF THE DIRECTIVE

2.10 The Directive determines the circumstances in which a prospectus must be produced and the manner in which a prospectus needs to be approved by the competent authority. Member States will not be able to allow a public offer or admission to a regulated market within their territories without prior publication of a properly approved prospectus.⁵

2.11 A prospectus will need to be filed for approval with the competent authority and published in one of two circumstances; when there is an ‘offer of securities to the public’ or when an application for ‘admission to trading on a regulated market’ is made.

Offer of securities to the public

2.12 Under the existing prospectus regime, there are differing definitions across the EU as to what constitutes a ‘public offer’. This situation was viewed as discouraging firms from raising capital on an EU-wide basis as a transaction might be considered as a public offer in one Member State (and therefore requiring a prospectus) but as a private placement in another Member State. In order to encourage common interpretations across the EU, the Directive introduces for the first time, a pan-European definition of an offer of securities to the public⁶:

“a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries”

² Article 7 2003/71/EC and Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council

³ Article 34(5) Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council

⁴ In accordance with Article 24 2003/71/EC

⁵ Article 3(1) and 3 (3)

⁶ Article 2 1(d)

2.13 This definition is very broadly worded and potentially captures a broad range of transactions, especially when taken together with the provisions regarding resale of securities. Under the Directive, any subsequent resale of securities, which were previously the subject of one or more of the exemptions (see paragraph 2.18), shall be regarded as a separate offer and the above definition re-applied in determining whether the resale is a ‘public offer’.⁷

2.14 Our implementation approach in relation to the definition of a public offer is discussed at paragraph 4.7.

Admission to trading on a regulated market

2.15 The Directive imposes the requirement upon those persons seeking admission of securities to trading on a regulated market to produce a prospectus. The regulated markets in the UK are set out below, analysed between those operated by the London Stock Exchange (LSE) and others. The LSE also operates a range of non-regulated markets. It should be noted that the London Stock Exchange announced that the Alternative Investment Market (AIM) ceased to be a regulated market from 12 October 2004.

Regulated Markets	
Operated by the LSE	Other regulated markets
Domestic Equity Market	The London International Financial Futures and Options Exchange (LIFFE)
European Equity Market	virt-x
Gilt Edged and Sterling Bond Market	EDX
International Retail Service	
International Order Book	
Dutch Trading Service	
International Bulletin Board	

2.16 It has been noted that the Directive requirements largely govern the form and contents of prospectuses. However, it continues to be the case that ‘eligibility’ requirements can continue to be imposed on companies seeking admission to trading on regulated markets.⁸ These requirements, such as the need for a three-year trading record, are considered further in the FSA Review of the Listing rules.

Subsequent Admission to another Regulated Market

2.17 The Directive contains various exemptions from the obligation to publish a prospectus for certain types of securities, for example where the shares represent less than 10 per cent of the number of shares of the same class already admitted to trading.⁹ In addition, there is an exemption for securities that have already been admitted to trading on another regulated market for 18 months.¹⁰ In order to take advantage of this exemption, the person seeking admission to trading (which need not be the company) must produce a summary document.

⁷ Article 3(2)

⁸ Recital 15 Directive 2001/71/EC

⁹ Article 4(2)

¹⁰ Article 4(2)(h)

Exempted Public Offers **2.18** There are also a number of exemptions from the obligation to publish a prospectus for certain types of offer. A number of these exemptions are similar to those which exist under the current Public Offer of Securities regime.¹¹ The following types of offer are exempt from the obligation to file and publish a prospectus:

- an offer of securities addressed solely to qualified investors (see paragraph 2.20);
- an offer of securities addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors;
- an offer of securities addressed to investors who acquire securities for a total consideration of at least 50,000 euros per investor, for each separate offer;
- an offer of securities whose denomination per unit amounts to at least 50,000 euros;
- an offer of securities with a total consideration of less than 100,000 euros, which limit shall be calculated over a period of 12 months.¹²

Our implementation in relation to the 100 natural or legal persons exemption is discussed further at paragraph 4.18.

2.19 The most significant change introduced by the Directive in relation to public offers is that any offer of securities to the public where the consideration is less than 2.5 million euros, calculated over a 12-month period, is outside the scope of the Directive.¹³ This exemption is further discussed at paragraph 4.13.

Qualified Investors **2.20** The Directive allows ‘Qualified Investors’ to be exempt from the obligation to publish a prospectus. Such investors are no longer simply financial institutions as the Directive allows Member States to choose to authorise natural persons who are resident in the Member State and who expressly ask to be considered, as qualified investors.¹⁴ As noted in paragraph 2.18, public offers solely to ‘Qualified Investors’ are exempt from the obligation to publish a prospectus. If a Member State decides to take up this option, the competent authority is required to ensure that mechanisms are in place for a register of these investors.¹⁵ These persons must meet at least two of the following criteria:

- the investor has carried out transactions of a significant size on securities markets at an average frequency of, at least, ten per quarter over the previous four quarters;
- the size of the investor's securities portfolio exceeds 0.5 million euros; or
- the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment.¹⁶

The implementation of this regime is discussed further at paragraph 4.24 and in Annex D - paragraph D.30).

¹¹ Public Offer of Securities Regulations (POS Regulations) SI 1995/1537

¹² Article 3(2)(a), (b), (c), (d), (e)

¹³ Article 1(2)(h)

¹⁴ Article 2(1)(e)

¹⁵ Article 2(3)

¹⁶ Article 2(2)

FORMAT AND CONTENT OF PROSPECTUS

Implementing Regulation

2.21 Detailed measures regarding the format and contents of prospectuses are not contained in the Directive. Instead, an EU Level 2 implementing regulation, approved by Member States in accordance with the terms of the Directive,¹⁷ prescribes in detail the information that will need to be contained in a prospectus. This includes historical financial information and risk factors, as well as the format and publication requirements for the documents.¹⁸

2.22 The Directive does not propose a "one-size fits all" model for prospectuses. Instead, the Regulation sets out different minimum disclosure requirements for different products being offered or admitted to trading, depending on the type of information needed by investors in each case.

2.23 The Regulation is directly applicable in UK law and will be largely effected through FSA rules. The Regulation is therefore not discussed in this consultation.

Separate Documents

2.24 Under the existing FSA Listing Rules, a set of Listing Particulars (equivalent to a prospectus) is prepared and submitted to the FSA as a single document. Under the Directive, prospectuses can be drawn up as a single or separate documents comprising the following:

- a registration document, which must contain information relating to the issuer;
- a securities note, which must provide details of the securities to be offered or admitted to trading; and
- a summary note, which briefly conveys the essential characteristics and risks associated with the issuer and the securities.¹⁹

2.25 An issuer which already has a registration document approved by the competent authority is only required to draw up the securities note and the summary note when securities are offered to the public or admitted to trading on a regulated market. The securities and summary notes are subject to separate approval. The securities note shall also provide information on any significant change since the registration document was approved, if this could affect the investors' assessment of the securities.

Supplementary documents

2.26 A supplementary document must be filed with the competent authority if a significant new factor, mistake or inaccuracy in the information included in the prospectus, which is capable of affecting the assessment of the securities, arises between the time when the prospectus is approved and the final closing of the offer or commencement of trading.²⁰

Incorporation by reference

2.27 The existing UK legislation does not allow issuers to incorporate information by reference in prospectuses. Incorporation by reference enables references to existing documents to be made in the prospectus without inclusion of the full text. Under the Directive, references are allowed in the prospectus to information which is contained in

¹⁷ Article 24(2) 2003/71/EC

¹⁸ Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council

¹⁹ Article 5(3) and 12

²⁰ Article 16

one or more previously or simultaneously published documents, that have been approved by or filed with the competent authority of the home Member State.²¹

Responsibility Statement **2.28** The Directive prescribes that Member States shall ensure the responsibility for the information given in a prospectus attaches to at least one of:

- the issuer; or
- its administrative, management or supervisory bodies; or
- the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be.²²

The Directive does not prevent Member States from attaching responsibility to parties other than those specified.

2.29 The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices. The statement shall also include declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its importance.

2.30 The Directive requires Member States to ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus.²³

2.31 The Directive also prescribes that responsibility is attached to those persons who have tabled the summary of the prospectus. However, this liability extends to the summary, but only if the summary is misleading, inaccurate or inconsistent when read together with the rest of the prospectus.²⁴

2.32 Our implementation of these issues is discussed at **paragraph 4.21**.

APPROVAL BY THE COMPETENT AUTHORITY

Home and Host Member State **2.33** Central to the Directive is the concept that the competent authority of a single Member State is responsible for the approval of a prospectus. Identification of the responsible Member State is determined by who is the ‘home’ or ‘host’ Member State for that issuer. Once a prospectus has been approved, it provides the issuer with the ability to access markets in other EU Member States, using the same prospectus without other competent authorities imposing additional obligations.

2.34 The Directive defines Home Member State for EU issuers as the Member State where the issuer has its registered office.²⁵ A distinction is made for issuers of non-equity securities where the denomination per unit amounts to at least 1,000 euros (or near in another currency). For these securities, the home competent authority is determined on a case by case basis where the issuer, the offeror or the person asking for

²¹ Article 11

²² Article 6(1)

²³ Article 6(2)

²⁴ Article 5(2)(d)

²⁵ Articles 2(1)(m)(i)

admission to trading can choose the home Member State.²⁶ The availability of choice in these circumstances reflects the nature of these types of securities and their investors.

2.35 The Directive also determines the home Member state for non-EU issuers. This is defined as where the securities are first offered to the public or where admission to trading is first sought following the date of entry into force of the Directive.²⁷

2.36 Host Member State' is defined as the Member State where an offer to the public is made or admission to trading is sought, when different from the home Member State.²⁸

2.37 The competent authority of the home Member State may transfer the approval of a prospectus to the competent authority of another Member state if, in all circumstances, it is considered to be in the best interests of the investors.²⁹

OTHER COMMUNICATIONS

Advertisements **2.38** The FSA rules, which currently apply to advertisements for Listed securities, will be superseded by the Prospectus Directive. The Directive does not explicitly prescribe the content of advertisements but does state that certain principles should be observed, namely that:

- advertisements shall state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it; and
- advertisements shall be clearly recognisable as such. The information contained in an advertisement shall not be inaccurate, or misleading. This information shall also be consistent with the information contained in the prospectus, if already published, or with the information required to be in the prospectus, if the prospectus is published afterwards; and
- advertisements shall be consistent with that contained in the prospectus.³⁰

2.39 Further details regarding dissemination of advertisements are set out in the EU Level 2 implementing regulation.³¹

2.40 The FSA will continue to have rules in relation to advertisements under the Prospectus Directive regime reflecting the principles documented above and these are discussed in Annex D – Paragraph D.21. The FSA regime governing the regulation of Financial Promotions will not apply to advertisements where securities are the subject of a public offer or are admitted to trading on a regulated market under the Directive.³²

²⁶ Article 2(1)(m)(ii)

²⁷ Article 2(1)(m)(iii)

²⁸ Article 2(1)(n)

²⁹ Article 13(5)

³⁰ Article 15

³¹ Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council

³² The Financial Promotion Order

**Annual
information
updates**

2.41 The Directive requires that issuers whose securities are admitted to trading on a regulated market shall, at least annually, provide a document that contains or refers to all information that they have published or made available to the public over the preceding 12 months in one or more Member states or third countries in compliance with their obligations under Community and national laws and rules. The document must be filed with the competent authority.³³

2.42 This issue is discussed further at paragraph 4.29 and in Annex D – Paragraph D.27.

³³ Article 10

3

IMPACT OF THE DIRECTIVE

3.1 This chapter outlines the existing UK legislative framework for public offers and admission of securities to trading on regulated markets and highlights the key effects of the Directive on the:

- Public Offer of Securities Regulations;
- Financial Services and Markets Act 2000, Part VI;
- Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001; and
- FSA Listing Rules.

3.2 The Directive builds on existing legislation regarding admission of securities to Listing and publication of prospectuses in relation to public offers.¹ The existing UK regime, which implements these Directives, differentiates between Listed and non-Listed securities. Where an offer is made of Listed securities or they are admitted to Listing on the London Stock Exchange, issuers must comply with the FSA's Listing Rules which are derived from FSMA Part VI. The POS Regulations govern the production of prospectuses for offers to the public of non-Listed securities.

3.3 The Implementation of the Prospectus Directive will supersede the existing POS Regulations regime in its entirety. Instead, Part VI of FSMA will be amended to extend the relevant sections to include public offers and admission of securities to trading on a regulated market. In this way, Part VI will continue to establish the overall legislative framework through which the Listing Rules will be revised to effect the detailed implementation of the Directive.

PUBLIC OFFER OF SECURITIES REGULATIONS

3.4 The existing UK framework in relation to public offers is derived from the Public Offers Directive, which sets out the requirements for prospectuses for public offers of securities which are not listed on a stock exchange of any Member State. The Directive was implemented in the UK through the POS Regulations.²

3.5 The POS Regulations address the issue of what is an “offer to the public” and the content of the prospectus if such an offer is made. Unless such an offer falls within one of the exemptions contained within the POS Regulations, a prospectus must be prepared and filed with Companies House.

¹ In particular, the Public Offers Directive (89/298/EC) and the Consolidated Admissions and Reporting Directive (2001/34/EEC)

² The Public Offer of Securities Regulations (SI 1995/1537)

Effect of the Directive:

The Public Offers Directive is superseded by the implementation of the Prospectus Directive as of 1 July 2005. Consequently the POS Regulations will no longer apply to the public offer of securities.

One key effect of the POS Regulations regime being superseded is that, if a prospectus is required, it will now, in all circumstances, need to be approved by the competent authority. In addition different exemptions under the Directive will apply for all public offers of securities or securities where admission is sought to trading on a regulated market.

The consequences of these changes are discussed further at paragraph 4.7.

FINANCIAL SERVICES AND MARKETS ACT (FSMA) 2000 PART VI

3.6 The Public Offers Directive requires each Member State to nominate or create a competent authority to maintain an official list of securities, to regulate the admission of securities to the Official List, and to monitor issuers' adherence to the Listing Rules thereafter.³ In the UK these requirements are effected through Part VI of the Financial Services and Markets Act (FSMA), together with schedules 7 to 11 to FSMA which contain provisions relating to official listing, the competent authority and public offers. In the United Kingdom the functions of the competent authority are exercised by the FSA which sets out the detailed requirements for issuers, including prospectus content, in its Listing Rules.

Effect of the Directive:

Part VI of FSMA, which currently sets out the requirements for Listed securities, will be amended to reflect the Directive requirements for public offers of securities and securities where admission is sought to trading on a regulated market (See Chapter 4 Proposed Implementation Approach).

THE FINANCIAL SERVICES AND MARKETS ACT 2000 (OFFICIAL LISTING OF SECURITIES) REGULATIONS 2001

3.7 The Financial Services and Markets Act (FSMA) states that the persons responsible for the Listing Particulars will be determined in accordance with regulations made by the Treasury.⁴ Those regulations state responsibility may be attached to directors or those persons accepting responsibility for a document and how, in addition, persons may accept responsibility for specific parts of a document.⁵

³ The Listing Directives (Admissions Directive 79/279/EEC, Listing Particulars Directive 80/390/EEC and the Interim Reports Directive 82/121/EEC) initially implemented by the Stock Exchange (Listing) Regulations 1984 (the "Regulations")

⁴ Section 79(3) Part VI of the Financial Services and Markets Act 2000

⁵ Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001 (The 2001 Regulations)

Effect of the Directive:

The 2001 Regulations relating to responsibility will be extended (through changes to Part VI) to make them applicable to prospectuses produced for public offers and for securities admitted to trading on a regulated market.

FSA LISTING RULES

3.8 As noted above, Part VI of FSMA contains provisions which prescribe how the competent authority should carry out its functions. These include making rules which govern the admission of securities to listing (including prospectuses), the continuing obligations of issuers, the enforcement of those obligations and the suspension and cancellation of listing. The rules, which enact these provisions and which are published by the competent authority, are collectively known as "Listing Rules" or the "Purple Book".

Effect of the Directive:

The FSA as the competent authority will be revising their rules to take account of the Directive requirements, as discussed in their Listing Review Consultation Paper and Annex D of this document.

The implementation of the Directive will not result in the removal of the existing Listing regime. Under the surviving provisions of the Consolidated Admission and Reporting Directive, Member States will continue to have an obligation to maintain the official list and will be able but not obliged, to impose additional obligations on issuers whose securities are admitted to the Official List.

4.1 In this section we provide an overview of our approach towards implementation of the Directive and highlight particular issues for consultation. This section discusses key implementation issues and the relatively few areas where the Directive provides Member States with options.

OVERALL IMPLEMENTATION

4.2 As noted previously, implementation of the Directive will supersede the existing UK POS Regulations regime and the Directive itself is largely a ‘maximum harmonisation’ directive. As a result, there is relatively little scope available to the UK in how to implement the Directive. The majority of the implementation will be effected through a copy-out of the relevant parts of the text of the Directive.

4.3 Chapter 3 states that the main area of legislative drafting relates to Part VI of FSMA which has been extended to include offers of securities to the public and admission of securities to trading on a regulated market. The remaining sections of Part VI, which relate to Official Listing, are retained. In addition certain specific provisions within the Directive are also reflected in Part VI (See Draft Regulations Annex C).

4.4 The amendments to Part VI will determine the legislative framework within which the FSA operates as the competent authority in approving all prospectuses and carrying out their obligations under the Directive. The amendments enable the FSA to make new rules to implement the Directive’s requirements; these changes are discussed in Annex D.

4.5 The references to Part VI of FSMA in the draft Prospectus Directive regulations (Annex C) are to Part VI as it was proposed to be amended in the Market Abuse Directive (MAD) Consultation document which was published by HM Treasury in June 2004. The amendments to Part VI required by MAD will be given effect to before the implementation of the draft regulations contained here.¹

4.6 The implementation of the Directive will result in two fundamental changes to the existing regime in relation to:

- what constitutes a public offer; and
- the effect of the removal of the Public Offer of Securities Regulations 1995.

This chapter also considers a number of other issues arising out of the implementation which, whilst important, will not result in significant changes from our existing regime.

DEFINITION OF A PUBLIC OFFER

4.7 Under the Prospectus Directive regime all prospectuses in relation to public offers will need to be approved by the FSA. This is a fundamental change from the existing regime which requires that for all non-listed securities, prospectuses needed to be filed at Companies House but did not require approval.

4.8 The need to have a prospectus approved by the FSA heightens the importance of determining what constitutes a public offer under the Directive. In this context, the

¹ UK Implementation of the EU Market Abuse Directive (Directive 2003/6/EC) - A consultation document

definition within the Directive of what constitutes an offer to the public is extremely broadly defined. It refers to:

“a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities”.

4.9 The significance of this definition is reinforced by another provision within the Directive which addresses the “resale” of securities. The Directive states that any subsequent resale of securities, which were previously the subject of one or more of the exemptions, should be regarded as a separate offer by reference to the original definition.²

4.10 During EU Level 1 discussions it proved challenging to obtain a satisfactory pan-European definition. As a result, the final text of the Directive was very broad in order to accommodate different models of public offer across the EU. The definition is therefore capable of a wide variety of interpretations and is potentially ambiguous. It is proposed, therefore, that some clarification is provided in relation to the definition; in particular to address the concern that the scope of the definition could result in an interpretation that could capture screen trading.

4.11 It is proposed that the definition in the Directive is incorporated directly into Part VI, together with a clarification that a public offer does not include a communication in connection with screen trading on:

- a regulated market; or
- a multilateral trading facility; or
- any market prescribed for Market Abuse under section 118 (FSMA 2000).

(See the Draft Regulations at Annex C for the full text)

4.12 The breadth of the definition means that a clarification, seeking to identify how it will be applied in all circumstances, is not possible. Nevertheless, the proposed clarification seeks to provide some certainty in this important area.

Q 1. Do you agree that the Directive definition of a public offer benefits from this clarification?

Q 2. Do you anticipate particular issues regarding the application of the definition of a public offer in other circumstances?

PUBLIC OFFER OF SECURITIES REGULATIONS

4.13 As previously noted, under the POS Regulations regime, public offers in excess of £100,000 require a prospectus to be produced and filed at Companies House (although not approved by the competent authority). These regulations will no longer apply.

4.14 In what will be a major change to the UK regulatory regime, the Prospectus Directive states that a public offer below 2.5million euros is outside the scope of the Directive. The effect of this provision is that there is no obligation upon an issuer or any

² Article 3(2)

other person to produce a prospectus where the consideration for the public offer is below the threshold of 2.5million euros. This is an important change as, going forward, there will be a population of public offers (between £100,000 and 2.5 million euros) which will no longer be required to produce any form of a prospectus.

4.15 The benefit of this increase in threshold in relation to production of a prospectus will be to reduce the costs and administrative burden associated with smaller offers and should encourage companies to consider such offers as a source of external capital. This should particularly benefit SME's (Small and Medium Enterprises) where the costs associated with production of a prospectus are recognised as a notable disincentive to equity capital raising.

4.16 However, the quantum of increase in threshold from £100,000 to 2.5 million euros is significant. There may be concerns that the size of potential offers now outside the scope of the Directive is such that reckless or unscrupulous promoters will be encouraged to undertake capital raising in the knowledge that a prospectus will not be required, to the detriment of investor protection. Despite the incremental costs to small companies, there may be arguments that investors should be protected by an additional UK prospectus regime beneath the 2.5 million euros threshold.

Q 3. Do you consider the 2.5 million euros threshold to be an appropriate level at which the production and approval of a prospectus is required under UK law?

And if not:

Q 4. What form of additional UK prospectus regime should apply below the 2.5 million euros threshold?

4.17 Depending upon the results of the consultation exercise and further research, we may carry out a further consultation exercise relating to a potential UK prospectus regime for offers outside the scope of the Directive. It is anticipated that such an exercise could be completed and any legislative changes made to coincide with the implementation of the Directive in July 2005.

OTHER IMPLEMENTATION ISSUES

Exemptions 4.18 The Directive identifies several exemptions from the obligation to publish a prospectus.³ One of those exemptions refers to where the offer of securities is addressed to fewer than 100 natural or legal persons per Member State. The approach adopted has been to implement this exemption on an aggregated basis calculated over a 12-month period.⁴ This approach is consistent with that set out in the Directive for the exemption where the consideration, over the same 12-month period, is less than 100,000 euros.⁵

³ Article 3 and 4

⁴ Article 3(b)

⁵ Article 3(e)

4.19 The proposed approach requires that the exemption be taken together with any other offer of securities of the same class:

- which was made by the same person; and
- which was open at any time within the period of 12 months ending with the date on which the offer is first made.⁶

4.20 Implementation in this way seeks to avoid the circumstances where successive offers of the same securities are made by the same person to fewer than 100 people in order to avoid the obligation to publish a prospectus. This approach is consistent with that adopted by the FSA for the Listing particulars under the existing Listing regime.

Q 5. Do you agree with our approach to implementing the exemption where the offer of securities is addressed to fewer than 100 persons?

Responsibility and Compensation

4.21 The approval adopted towards implementation of the responsibility provisions within the Directive is designed to be consistent with the way in which the existing UK regime operates. The Directive requires that ‘at least’ one of several specified persons (such as the offeror) be identified as responsible for a prospectus.⁷ Currently FSMA acknowledges the need for responsibility to be attached to a prospectus for Listing by stating that the persons responsible for Listing Particulars are to be determined in accordance with regulations made by the Treasury.⁸ These regulations specify which persons are responsible and, for which parts of the Listing Particulars they are responsible.

4.22 Our proposed implementation of the Directive leaves the structure and identification of responsibility for the prospectus unchanged compared to the existing regime. In Part VI of FSMA, the section on Listing Particulars remains unchanged and an additional section relating to prospectuses is introduced (See our draft Regulations Annex C).⁹ This section also states that the persons responsible for prospectuses are to be determined in accordance with regulations made by the Treasury (in the same way as for Listing Particulars).

4.23 The Directive states that responsibility must be taken by the offeror (or other relevant person) for the summary. However, any such persons shall be subject to civil liability only if the summary is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.¹⁰

Q 6. Do you agree with our proposed implementation approach for attaching responsibility to the prospectus?

Qualified Investors

4.24 The Directive states that a Member State may choose to authorise natural persons and SMEs as “qualified investors” if they meet certain criteria.¹¹ Where Member States exercise this choice, offers of securities addressed solely to these

⁶ Draft Regulations 85(4)

⁷ Article 6(1)

⁸ FSMA 2000 section 79(3) and Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001

⁹ Draft Regulation 4 - s85 FSMA

¹⁰ Article 5(2) and 6(2)

¹¹ Article 2(1)(e)(iv) and (v)

‘qualified investors’ are exempt from the obligation to publish a prospectus. The UK intends to allow the authorisation of such persons to encourage smaller issuers in approaching private investors and others when seeking to raise capital.

Q 7. Do you agree that the UK should have a Qualified Investor regime?

4.25 The details regarding the determination of the criteria for becoming a ‘qualified investor’ and maintenance of a register of those persons are discussed in Annex D – Paragraph D.30.

Publication of a Prospectus

4.26 The Directive states that a prospectus shall be deemed to be available to the public when it has been published in one of the following ways:

- inserted in one or more newspapers, circulated in the Member State in which the securities are to be offered publicly or admitted to trading; or
- in printed form, free of charge; or
- in electronic form on the issuer’s or financial intermediaries website; or
- in electronic form on the website of the regulated market; or
- in electronic form on the website of the competent authority.¹²

4.27 The draft Regulations allow the competent authority to make rules with regard to the publication and availability to the public of a prospectus once it has been approved.¹³ Under their rules, the FSA will require issuers which have published their prospectuses in newspapers or printed form, also, to publish their prospectuses on their website.

4.28 The Directive also states that a home Member State may require an issuer to publish a notice stating how the prospectus has been made available and where it can be obtained by the public.¹⁴ The FSA intends to require publication of such a notice for equity issuers, as currently required under the Listing regime.

Q 8. Do you agree that a prospectus should be made available on an issuer’s website in addition to in printed form?

Q 9. 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?

Further details of both these proposals are discussed in Annex D – Paragraph D.18 and D.20.

¹² Article 14(2)

¹³ Draft regulation 4

¹⁴ Article 14(3)

**Annual
Information
Update**

4.29 The Directive includes a provision whereby issuers whose securities are admitted to trading on a regulated market shall at least annually provide either:

- a document that contains all information that they have published or made available to the public over the proceeding 12 months in Member States or third countries;
- or refers to this information and where it is available.

4.30 This is a change from the existing UK regime and is discussed in more details in Annex D – Paragraph D.27.

A

GUIDANCE ON KEY ISSUES

Issue	Directive/ EU Regulation	UK Legislation	FSA Rules
When do I need to draw up a prospectus?	Article 1(1) sets out the scope of the Directive. A prospectus is required when securities are offered to the public or admitted to trading on a regulated market in the EU and none of the exemptions apply	FSMA s85(1) implements Article 1(1) of the Prospectus Directive	1.1R Sets out the circumstances when the FSA rules apply and when a prospectus is required
Where is a Public Offer defined?	Article 2(1)(d) provides the broad definition, a subsequent resale of securities is referred back to this definition by Article 3(2)	FSMA s103 contains the definition as contained in the Directive but adds clarity to avoid the inadvertent capture of secondary trading through the resale provision	FSA rules refer back to the definition in FSMA and consequently require a prospectus to be published and approved by the FSA before a person can offer securities to the public
How are 'Home' and 'Host' Member State determined?	Article 2(1)(m) and (n) provides the definitions. This includes different definitions for when an issuer is from a third country and or offering/ seeking admission to trading of debt.	FSMA s103 contains the definitions, s72 notes the FSA as the competent authority applicable to those issuers where the UK is their Home Member State	FSA rules include the definitions and state that they are the competent authority where the UK is an issuer's Home Member State
How does a passport work?	Article 17 and 18 set out the requirements that apply to an issuer who wishes to use a prospectus approved in one Member State to raise capital or admit securities to trading on a regulated market in another Member State	FSMA s87C and 87D describe the procedures for requesting a certificate of approval in order to use a prospectus	5.3R Reproduces FSMA
Who is responsible for the contents of a prospectus?	Article 6(1) sets out an 'at least' list of those persons to whom responsibility should attach e.g. Directors, issuer or offeror	FSMA s85(9) refers to persons responsible being detailed in regulations made by HMT. The 2001 Regulations ¹ prescribe the issuer, directors, persons stated as accepting responsibility in the document and those who authorised the contents as responsible or responsible for certain specific parts.	PR 2.1.7R and PR 2.1.8R No real changes in respect of who takes responsibility for a prospectus except that the FSA rules now cover Public Offers and securities seeking admission to trading on a regulated market as well as Listing

¹ FSMA 2000 (Official Listing of Securities) Regulation 2001

Issue	Directive/ EU Regulation	UK Legislation	FSA Rules
Who is liable for the contents of a prospectus?	Article 6(2) prescribes that Member States laws on civil liability shall apply to those persons responsible for a prospectus	FSMA s90 attaches liability to those responsible for a prospectus (as detailed above). Prescribes that compensation is due for false or misleading information in the document.	No real change in respect of who is liable for a prospectus except that the FSA rules now cover Public Offers and securities seeking admission to trading on a regulated market as well as Listing
What offers are exempt?	Article 3(2) states for what types of offer there is no obligation to publish a prospectus. This includes offers to fewer than 100 persons, securities with a denomination over 50,000 euros and Qualified Investors (see below).	FSMA s85(2) to (4) includes the exemptions from the Directive with the exemption where the offer of securities is made to fewer than 100 persons being aggregated over a 12-month period.	1.2R The exemptions from the Directive are re-iterated in the FSA rules
How does the Qualified Investor regime operate?	Article 2(1)(e) provides definitions and states that for natural persons to qualify, two of the criteria contained in Article 2(2) must be satisfied i.e. certain size and frequency of transactions, size of portfolio and previous work experience or knowledge of securities. Should Member States decide to implement the regime Article 2(3) prescribes the duties of the competent authority to provide a register of natural persons and SME's as Qualified Investors.	The definition from the Directive and the criteria to become a Qualified Investor are included in FSMA s103(3) and s103(4)	5.4R Requires persons wishing to be registered to obtain certification that they meet the criteria. Charges will be imposed for those wishing to be added or view the register and registration will be valid for a year
Where are the contents of a prospectus determined?	Article 5(1) outlines what information should be included in a prospectus. Detailed measures regarding format are contained in an EU Implementing Regulation² with differing content and format schedules for equity, debt and other types of securities.	FSMA s84(3)(a) allows for the competent authority to make Public Offer and Admission to trading rules with regard to the content of prospectuses	The EU Regulation will be partly transposed into FSA rules. It sets out items of information which may be required to be included in the prospectuses. The requirements vary according to the nature and circumstances of the issuer and the type of security to be listed

² Commission Regulation (CE) 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council

Issue	Directive/ EU Regulation	UK Legislation	FSA Rules
What is the Annual Information Update?	Article 10 requires issuers whose securities are admitted to trading on a regulated market to file a document annually containing or referring to all the information the issuer has published within and outside the EU		1.1R Sets out the circumstances when the FSA rules apply and when a prospectus is required
What determines the format of a prospectus?	Article 5(3) and 12 allows for a prospectus to be a single or separate documents consisting of a registration document, securities note and summary note.	FSMA s84(3)(a) allows for the competent authority to make Public Offer and Admission to trading rules with regard to the form of prospectuses	2.2R Sets out the rules for the format options that are available for an issuer as a single or three separate documents
What offers are outside the scope of the Directive?	Article 1(2) states the circumstances where this Directive will not apply, the most important being offers with a total consideration lower than 2.5 million euros over 12 months.	FSMA s85(5)(a) states that the obligation to publish a prospectus does not apply to the securities listed in Schedule 11A which includes the 2.5 million euros threshold.	No rules, and no legislation covering these offers except the financial promotion order

B

SUMMARY OF QUESTIONS

Q 1. Do you agree that the Directive definition of a public offer benefits from this clarification?

Q 2. Do you anticipate particular issues regarding the application of the definition of a public offer in other circumstances?

Q 3. Do you consider the 2.5 million euros threshold to be an appropriate level at which the production and approval of a prospectus is required under UK law?

And if not:

Q 4. What form of additional UK prospectus regime should apply below the 2.5 million euros threshold?

Q 5. Do you agree with our approach to implementing the exemption where the offer of securities is addressed to fewer than 100 persons?

Q 6. Do you agree with our proposed implementation approach for attaching responsibility to the prospectus?

Q 7. Do you agree that the UK should have a Qualified Investor regime?

Q 8. Do you agree that a prospectus should be made available on an issuer's website in addition to in printed form?

Q 9. 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?



DRAFT REGULATIONS

STATUTORY INSTRUMENTS

2005 No.

FINANCIAL SERVICES AND MARKETS

The Prospectus Regulations 2005

<i>Made</i>	2005
<i>Laid before Parliament</i>	2005
<i>Coming into force</i>	1st July 2005

The Treasury are a government department designated^(a) for the purposes of section 2(2) of the European Communities Act 1972^(b) in relation to listing of securities on a stock exchange and information concerning listed securities and also in relation to measures relating to prospectuses on offers of transferable securities to the public;

The Treasury, in exercise of the powers conferred on them by section 2(2) of that Act, hereby make the following Regulations:

Citation, commencement and interpretation

1.-(1) These Regulations may be cited as the Prospectus Regulations 2005 and come into force on 1st July 2005.

(2) In these Regulations, “the Act” means the Financial Services and Markets Act 2000^(c).

Amendments to primary and secondary legislation

2.-(1) Schedule 1 (which contains amendments to the Act) has effect.

(2) Schedule 2 (which contains Schedule 11A to the Act (securities)) has effect.

(3) Schedule 3 (which contains miscellaneous amendments to secondary legislation) has effect.

^(a) S.I. 1992/1315, regulation 9.

^(b) 1972 c. 68. By virtue of the amendment of section 1(2) made by section 1 of the European Economic Area Act 1993 (c. 51) regulations may be made under section 2(2) to implement obligations of the United Kingdom created by or arising under the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 (Cm 2073) and the Protocol adjusting that Agreement signed at Brussels on 17th March 1993 (Cm 2183).

^(c) 2000 c.8.

[Date]
of Her Majesty's Treasury

Two of the Lords Commissioners

SCHEDULE 1

Regulation 2(1)

AMENDMENTS TO THE ACT

1.-(1) Subsection (2) of section 73A (Part 6 rules) is amended as follows.

(2) At the end of paragraph (b), insert-

“
 ³
 (c) prospectus rules”.

2. In subsection (5) of section 74 (the official list), omit the definition of “security”.

3. In subsection (1) of section 79 (listing particulars and other documents) omit the words “(other than new securities)”.

4. Section 83 (registration of listing particulars) is repealed.

5. For sections 84 to 87 (prospectuses), substitute-

“Public offers and admission to trading

84.-(1) The competent authority may make rules (“prospectus rules”) for the purposes of this Part in relation to offers of securities to the public and admission of securities to trading on a regulated market.

(2) In this Part, “prospectus” means a document in such form and containing such information as may be required by or under-

- (a) this Part; or
- (b) the prospectus directive.

(3) Prospectus rules may, in particular, make provision—

- (a) for the form and content of a prospectus (including a summary);
- (b) for the period of validity of a prospectus;
- (c) where the final offer price or the amount of securities to be offered to the public is not included in the prospectus, for disclosing the maximum price or the criteria or conditions according to which these matters are to be determined;
- (d) for cases where a summary need not be included in a prospectus;
- (e) for the form and content of other summary documents relating to a prospectus;
- (f) for making public a prospectus once it has been approved;

- (g) for the disclosure of such information as the Authority may reasonably require;
 - (h) for the languages in which a prospectus (including a summary) and other summary documents are to be written;
 - (i) for attaching conditions to the approval of a prospectus which has been approved by a non-EEA State;
 - (j) for advertisements relating to an offer of securities to the public or admission of securities to trading on a regulated market.
- (4) “Prospectus” includes a supplementary prospectus.

Approval of a prospectus by the competent authority

85.-(1) No person may—

- (a) offer securities to the public in the United Kingdom, or
- (b) seek the admission of securities to trading on a regulated market in the United Kingdom,

unless a prospectus which has the prior approval of the competent authority has been published in relation to those securities.

(2) Subsection (1) does not apply where any of the conditions in subsection (3) is satisfied.

(3) The conditions are—

- (a) where the offer is addressed only to qualified investors;
- (b) where the offer is addressed to fewer than 100 persons, other than qualified investors, per EEA State;
- (c) where the minimum consideration which may be paid by any person for securities acquired by him pursuant to the offer is at least 50,000 euros (or an equivalent amount);
- (d) where the securities being offered are denominated in amounts of at least 50,000 euros (or an equivalent amount);
- (e) where the total consideration payable for the securities being offered cannot exceed 100,000 euros (or an equivalent amount); or
- (f) where a prospectus has already been approved in relation to the securities by the competent authority of a home Member State other than the United Kingdom and the conditions mentioned in section 87C(2) have been satisfied.

(4) In determining whether the condition in subsection (3)(b) or (e) (“the relevant condition”) is satisfied, the offer is to be taken together with any other offer of securities of the same class—

- (a) which was made by the same person;

(b) which was open at any time within the period of 12 months ending with the date on which the offer is first made; and

(c) which had previously satisfied the relevant condition.

(5) Subsection (1) does not apply to –

(a) the securities listed in Schedule 11A;

(b) such securities as may be specified in prospectus rules.

(6) But a person who proposes to offer to the public in the United Kingdom or admit to trading on a regulated market in the United Kingdom securities which fall within any of paragraphs 3, 5, 7(3) or 9 of Schedule 11A may publish a prospectus and the provisions of this Part shall apply notwithstanding subsection (5).

(7) For the purposes of subsection (3)(b), the making of an offer of securities to trustees of a trust or members of a partnership in their capacity as such, or the making of such an offer to any two or more persons jointly, is to be treated as the making of an offer to a single person.

(8) For the purposes of this section, an amount (in relation to an amount denominated in euros) is an “equivalent amount” if it is an amount of equal value, calculated at the latest practicable date before (but in any event not more than 3 working days before) the date on which the offer is first made or approval is granted (whichever is the earlier), denominated wholly or partly in another currency or unit of account.

(9) For the purposes of this Part, the persons responsible for prospectuses are to be determined in accordance with regulations made by the Treasury.

(10) A person who contravenes subsection (1) is guilty of an offence and liable–

(a) on summary conviction, to imprisonment for a term not exceeding three months or a fine not exceeding the statutory maximum;

(b) on conviction on indictment, to imprisonment for a term not exceeding two years or a fine, or both.

(11) Any contravention of subsection (1) is actionable, at the suit of a person who suffers loss as a result of the contravention, subject to the defences and other incidents applying to actions for breach of statutory duty.

Application for approval

86.-(1) Applications to the competent authority for approval of a prospectus must be made in such manner as may be required by prospectus rules.

(2) The competent authority must not approve a prospectus unless it is satisfied that any requirement imposed by or under this Part or otherwise by or under the prospectus directive (so far as any such requirement applies to the application) is complied with.

(3) A prospectus submitted to the competent authority for approval must contain all such

information presented in an easily analysable and comprehensible form which, having regard to the particular nature of the securities and their issuer, is necessary to enable investors to make an informed assessment of-

- (a) the assets and liabilities, financial position, profits and losses, and prospects of the issuer of the securities and of any guarantor thereof; and
 - (b) the rights attaching to the securities.
- (4) Save where prospectus rules require otherwise, a prospectus must include a summary which, briefly and in non-technical language, conveys the essential characteristics and risks associated with the issuer, any guarantor and the securities to which the prospectus relates.
- (5) Where a prospectus for which approval is sought does not include the final offer price or the amount of securities to be offered to the public, the applicant must inform the competent authority in writing of that information once it is finalised.
- (6) Where a person agrees to buy or subscribe for securities in circumstances where the final offer price or the amount of securities to be offered to the public is not included in the prospectus, he may withdraw his acceptance at any time before the end of the period of 2 working days beginning with the date on which the competent authority is informed of the information in accordance with subsection (5).
- (7) The competent authority may transfer the function of approving a prospectus to the competent authority of another EEA State subject to the latter's agreement.
- (8) Where it does so, the competent authority must inform the applicant within 3 working days beginning with the date of the transfer.
- (9) Where an application for approval of a prospectus is made to the competent authority of another EEA State and the competent authority of that EEA State transfers the function of approving the prospectus to the competent authority, the latter must notify the applicant of its decision before the end of the period of 10 working days beginning with the date of the transfer.
- (10) "Prospectus" (save in subsection (4)) includes a supplementary prospectus.

Supplementary prospectus

87.-(1) If, at any time after a prospectus is approved and before the final closing of the offer of securities to the public (or, as the case may be, when trading on a regulated market begins), there arises or is noted a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus, the issuer, offeror or person seeking admission to trading on a regulated market must, in accordance with prospectus rules, submit a supplementary prospectus containing details of the new factor, mistake or inaccuracy ("supplementary details") to the competent authority for its approval and, if the supplementary prospectus is approved, publish it.

(2) "Significant" means significant for the purpose of making an informed assessment of the kind mentioned in section 86(3).

(3) Any person responsible for the prospectus who is aware of such supplementary details must give notice of them to the issuer.

(4) Subsection (1) applies also to matters contained in any supplementary prospectus published under this section.

(5) Where a supplementary prospectus has been published and, prior to the publication, a person agrees to buy or subscribe for securities, he may withdraw his acceptance at any time before the end of the period of 2 working days beginning with the date on which the supplementary prospectus was published.

(6) Section 86(1) and (2) applies to a supplementary prospectus as it applies to a prospectus.

Exemptions from disclosure

87A.-(1) The competent authority may, whether generally in prospectus rules or in a particular case, authorise the omission from a prospectus of any information, the inclusion of which would otherwise be required, on the ground-

(a) that its disclosure would be contrary to the public interest;

(b) that its disclosure would be seriously detrimental to the issuer, provided that the omission would be unlikely to mislead the public with regard to any facts or circumstances which are essential for an informed assessment of the kind mentioned in section 86(3); or

(c) that the information is only of minor importance for a specific offer to the public or admission to trading on a regulated market and unlikely to influence an informed assessment of the kind mentioned in section 86(3).

(2) The Secretary of State or the Treasury may issue a certificate to the effect that the disclosure of any information (including information that would otherwise have to be included in a prospectus) would be contrary to the public interest.

(3) The competent authority is entitled to act on any such certificate in exercising its powers under subsection (1)(a).

(4) This section does not affect any powers of the competent authority under prospectus rules.

(5) “Prospectus” includes a supplementary prospectus.

Decision on application

87B.-(1) The competent authority must notify the applicant of its decision on an application for approval of a prospectus before the end of the period of 10 working days beginning with the date on which the application is received.

(2) The period mentioned in subsection (1) is to be extended to 20 working days where the applicant does not have securities admitted to trading on any regulated market and has not previously offered securities to the public.

(3) Where the competent authority reasonably requires further information in connection with an application, it must notify the applicant to that effect before the end of the period of 10 working days beginning with the date on which the application is received and the time-limits mentioned in subsections (1) and (2) apply only from the date on which such further information is received.

- (4) The competent authority must notify the applicant of its decision on an application for approval of a supplementary prospectus before the end of the period of 7 working days beginning with the date on which the application is received.
- (5) If the competent authority fails to comply with the time-limits mentioned in subsection (1), (2) or (4), this is not to be deemed to constitute approval of the application.
- (6) If the competent authority decides to approve a prospectus, it must give the applicant written notice.
- (7) If the competent authority proposes to refuse to approve a prospectus, it must give the applicant a warning notice.
- (8) If the competent authority decides to refuse to approve a prospectus, it must give the applicant a decision notice.
- (9) If the competent authority decides to refuse to approve a prospectus, the applicant may refer the matter to the Tribunal.
- (10) In subsections (6) to (9), “prospectus” includes a supplementary prospectus.

Prospectus approved in another EEA State

87C.-(1) In this section and in section 87D—

“W” means the issuer, offeror or person seeking admission to trading on a regulated market;

“X” means the competent authority;

“Y” means the competent authority of a relevant home Member State other than the United Kingdom;

“Z” means the competent authority of a relevant host Member State other than the United Kingdom.

(2) X must not take any steps to approve a prospectus under this Part where a prospectus has already been approved by Y provided that Y has supplied X with—

(a) a copy of the prospectus as approved;

(b) a certificate stating that the prospectus has been drawn up in accordance with the prospectus directive; and

(c) a summary of the prospectus (including a translation), where required by X.

(3) The certificate mentioned in subsection (2)(b) must mention where Y has authorised, pursuant to section 87A, the omission of information which would otherwise have been required, together with its justification for that omission.

(4) X may, in any case where it becomes aware of any significant new factor, material mistake or inaccuracy relating to the information included in a prospectus which has already been approved by Y, inform Y accordingly.

(5) The powers conferred on X by Part XIII are exercisable in relation to issuers, offerors and persons seeking admission to trading on a regulated market in the United Kingdom as if-

- (a) such persons were incoming firms within the meaning of that Part, and
- (b) the prospectus directive were a single market directive.

(6) "Prospectus" includes a supplementary prospectus.

Provision of information to host Member State

87D.-(1) Where a prospectus has been approved under this Part, X must, at the request of W, supply Z with the information mentioned in subsection (2) within the timescales mentioned in subsection (3).

(2) The information is-

- (a) a copy of the prospectus as approved;
- (b) a certificate stating that the prospectus has been drawn up in accordance with the prospectus directive; and
- (c) a summary of the prospectus (including a translation), where requested by Z.

(3) The timescales are-

- (a) 3 working days beginning with the date of the request; or
- (b) if the request is submitted together with a draft prospectus, 1 working day beginning with the date of the approval of the prospectus.

(4) The certificate mentioned in subsection (2)(b) must mention where X has authorised, pursuant to section 87A, the omission of information which would otherwise have been required, together with its justification for that omission.

(5) "Prospectus" includes a supplementary prospectus.

Powers of the competent authority

87E.-(1) The competent authority may, as a condition of approving a prospectus-

- (a) require an issuer, offeror or person seeking admission to trading on a regulated market to include in the prospectus such supplementary information necessary for investor protection as the competent authority may require;
- (b) require any such person mentioned in paragraph (a) or any person controlling, or controlled by, any such person to provide such information or documents as the competent authority may require;
- (c) require an auditor or manager of any such person mentioned in paragraph (a), or any

financial intermediary commissioned to assist either in carrying out the offer to the public or in seeking admission to trading on a regulated market, to provide such information or documents as the competent authority may require.

(2) The competent authority may-

(a) require an issuer, offeror or person seeking admission to trading on a regulated market to suspend the public offer during the period when it is available to be accepted (or, as the case may be, the process of seeking admission to trading on a regulated market) for a period not exceeding 10 consecutive working days on any single occasion if it has reasonable grounds for knowing or suspecting that any provision of the prospectus directive has been infringed;

(b) if it has reasonable grounds for knowing or suspecting that any provision of the prospectus directive has been infringed-

- (i) prohibit, or
- (ii) suspend for a period not exceeding 10 consecutive working days on any single occasion,

any advertisement published in connection with a prospectus;

(c) prohibit a public offer if any provision of the prospectus directive has been infringed or if it has reasonable grounds for knowing or suspecting that any such provision is likely to be infringed;

(d) require a market operator to suspend trading on a regulated market for a period not exceeding 10 consecutive working days on any single occasion if it has reasonable grounds for knowing or suspecting that any provision of the prospectus directive has been infringed;

(e) require a market operator to prohibit trading on a regulated market if any provision of the prospectus directive has been infringed;

(f) where it considers that any person has failed to comply with his obligations under this Part, publish a statement to that effect.

(3) A requirement, prohibition, suspension or other action under subsection (2) takes effect-

(a) immediately, if the notice under subsection (4) states that that is the case;

(b) in any other case, on such date as may be specified in that notice.

(4) If the competent authority-

(a) proposes to exercise any of the powers in subsection (2) in relation to any person, or

(b) exercises any of the powers in subsection (2) in relation to any person with immediate effect,

it must give that person written notice.

(5) The notice must—

- (a) give details of the Authority's action or proposed action;
 - (b) state the competent authority's reasons for taking the action in question and for choosing the date on which it took effect or takes effect;
 - (c) inform the recipient that he may make representations to the competent authority within such period as may be specified in the notice (whether or not he has referred the matter to the Tribunal);
 - (d) inform him of the date on which the action in question took effect or takes effect; and
 - (e) inform him of his right to refer the matter to the Tribunal.
- (6) The competent authority may extend the period within which representations may be made to it.
- (7) If, having considered any representations made to it, the competent authority decides to maintain, vary or revoke its earlier decision, it must give written notice to that effect to the person mentioned in subsection (4).
- (8) A notice given under subsection (7) must inform that person, where relevant, of his right to refer the matter to the Tribunal.
- (9) If a notice informs a person of his right to refer a matter to the Tribunal, it must give an indication of the procedure on such a reference.”.
6. After subsection (10) of section 90 (compensation for false or misleading particulars), insert–
- “(11) This section applies in relation to a prospectus as it applies to listing particulars; and references to listing particulars, supplementary listing particulars and sections 80, 81 and 82 are to be read, respectively, as references to prospectuses, supplementary prospectuses and sections 86, 87 and 87A.
- (12) But no person is liable to pay compensation solely on the basis of a summary included in a prospectus unless the summary is misleading, inaccurate or inconsistent when read with the rest of the prospectus.”.
- 7.-(1) Section 91 (penalties for breach of listing rules) is amended as follows.
- (2) At the end of subsection (1)(b), insert–
- “or
- (c) an offeror, person seeking admission to trading on a regulated market, any other applicant for approval of a prospectus or a supplementary prospectus or any other person to whom the prospectus directive applies,”.
- (3) For subsection (2), substitute–
- “(2) If, in the case of a contravention by a person (“P1”) referred to in subsection (1)(a), (1)(b)(i) or (1)(c), the competent authority considers that a person (“P2”) who was at the material time a director of P1 was knowingly concerned in the contravention, it may impose

on him a penalty of such amount as it considers appropriate.”.

8. In subsection (9) of section 95 (competition scrutiny), after paragraph (aa) insert–

“(ab) prospectus rules,”.

9. In subsection (1) of section 97 (appointment by competent authority of persons to carry out investigations)–

(a) at the end of paragraph (a), insert “or any requirement otherwise imposed by or under the prospectus directive”;

(b) after paragraph (b)(iii), insert–

“or

(iv) an offeror, person seeking admission to trading on a regulated market or any other applicant for approval of a prospectus or supplementary prospectus (“relevant body”),”;

(c) in paragraph (b) for the words from “and who has been” to “applicant for listing” substitute–

“has been knowingly concerned in a breach of Part 6 rules, or any requirement otherwise imposed by or under the prospectus directive, by that issuer, applicant for listing or relevant body”;

(d) in paragraph (d), after “85” insert “, 87”.

10. Section 98 (advertisements etc. in connection with listing applications) is repealed.

11. After subsection (1A) of section 99 (fees), insert–

“(1B) Prospectus rules may require the payment of fees to the competent authority in respect of–

(a) applications for approval of a prospectus or a supplementary prospectus;

(b) applications for registration as a qualified investor;

(c) the continued inclusion of qualified investors in the register of qualified investors;

(d) access by issuers to the register of qualified investors.”.

12. For subsection (2) of section 100 (penalties), substitute–

“(2) The competent authority must prepare and operate a scheme for ensuring that the amounts paid to it by way of penalties imposed under this Part are applied for the benefit of–

(a) issuers of securities admitted to the official list;

(b) issuers who have requested or approved the admission of financial instruments to trading on a regulated market; and

(c) issuers of securities offered to the public or admitted to trading on a regulated market.”.

13. For section 103 (interpretation of Part VI), substitute-

“**103.-**(1) In this Part, save where the context otherwise requires–

“disclosure rules” has the meaning given in section 73A;

“financial instrument” has the meaning given in Article 1.3 of Directive 2003/6/EC of the European Parliament and the Council of 28 January 2003 on insider dealing and market manipulation;

“home Member State” and “host Member State” have the meaning given in Article 2.1 of the prospectus directive;

“inside information” has the meaning given in section 118C;

“issuer”, in relation to anything which is or may be admitted to the official list, has such meaning as may be prescribed by the Treasury, and in any other case means a legal person who issues or proposes to issue securities;

“listed securities” means anything which has been admitted to the official list;

“listing” has the meaning given in section 74(5);

“listing particulars” has the meaning given in section 79(2);

“listing rules” has the meaning given in section 73A;

“market operator” means a person who manages or operates the business of a regulated market;

“multilateral trading facility” means a multilateral system, operated by an investment firm (within the meaning of Article 1.2 of the investment services directive) or a market operator, which brings together multiple third-party buying and selling interests in financial instruments in accordance with non-discretionary rules so as to result in a contract;

“non-equity securities” means all securities that are not equity securities within the meaning of Article 2.1(b) of the prospectus directive;

“offer of securities to the public” has the meaning given in subsection (2);

“the official list” means the list maintained by the Authority as that list has effect for the time being;

“prospectus” has the meaning given in section 84(2);

“the prospectus directive” means Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading;

“prospectus rules” has the meaning given in section 84(1);

“qualified investor” has the meaning given in subsections (3) and (4);

“regulated market” has the meaning given in Article 1.13 of the investment services directive;

“securities” means-

(a) for the purposes of sections 84 to 87E, transferable securities within the meaning of Article 4 of Directive 2004/ /EC of the European Parliament and of the Council on markets in financial instruments, with the exception of money-market instruments (as defined therein) having a maturity of less than 12 months,

(b) for the remainder of this Part (except in section 74(2)), anything which has been, or may be, admitted to the official list;

“small or medium-sized enterprise” has the meaning given in Article 2.1 of the prospectus directive;

“supplementary prospectus” has the meaning given in section 87(1);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 (c.80) in any part of the United Kingdom.

(2) For the purposes of this Part-

(a) an offer of securities to the public means a communication in any form and by any means to any person, presenting sufficient information on the terms of the offer and the securities to be offered as to enable an investor to decide to buy or subscribe for those securities;

(b) paragraph (a) includes the placing of securities through any financial intermediary but does not include a communication in connection with trading on-

(i) a regulated market;

(ii) a multilateral trading facility; or

(iii) any market prescribed by an order under subsection (3) of section 118; and

(c) “offer” and “offeror” are to be read accordingly.

(3) “Qualified investor” means-

(a) any entity within the meaning of Article 2(1)(e)(i) to (iii) of the prospectus directive; or

(b) any small or medium-sized enterprise or natural person registered as a qualified investor upon an application being made to the competent authority in a form and manner specified by the competent authority.

(4) But the competent authority may only register as a qualified investor-

(a) a natural person who is resident in the United Kingdom and demonstrates that he meets at least two of the criteria mentioned in Article 2.2 of the prospectus directive;

(b) a small or medium-sized enterprise which has its registered office in the United Kingdom.

(5) In relation to any function conferred on the competent authority by this Part, any reference in this Part to the competent authority is to be read as a reference to the person by whom that function is for the time being exercisable.

(6) If, as a result of an order under Schedule 8, different functions conferred on the competent authority by this Part are exercisable by different persons, the powers conferred by section 91 are exercisable by such person as may be determined in accordance with the provisions of the order.”.

14. In subsection (4)(b) of section 195 (exercise of power in support of overseas regulator) omit “in relation to the listing of shares”.

15. In subsection (13) of section 395 (the Authority’s procedures), after paragraph (b) insert-

“(ba) 87E(4);”.

SCHEDULE 2

Regulation 2(2)

“SCHEDULE 11A

Section 85(5)

SECURITIES

1. For the purposes of section 85(5)(a), the securities are the following.
2. Units (within the meaning in section 237(2)) in an open-ended collective investment scheme.
3. Non-equity securities issued by–
 - (i) the government of any EEA State;
 - (ii) the local or regional authority of any EEA State;
 - (iii) any international organisation of which an EEA State is a member;
 - (iv) the European Central Bank;
 - (v) the central bank of any EEA State.
4. Shares in the share capital of the central bank of any EEA State.
5. Securities unconditionally and irrevocably guaranteed by the government, or the local or regional authority, of any EEA State.
6. Securities issued by–

- (a) a charity within the meaning of-
 - (i) section 96(1) of the Charities Act 1993, or
 - (ii) section 35 of the Charities Act (Northern Ireland) 1964;
- (b) a recognised body within the meaning of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990;
- (c) a housing association within the meaning of-
 - (i) section 5(1) of the Housing Act 1985,
 - (ii) section 1 of the Housing Associations Act 1985, or
 - (iii) Article 3 of the Housing (Northern Ireland) Order 1992;
- (d) an industrial or provident society registered in accordance with-
 - (i) section 1(2)(b) of the Industrial and Provident Societies Act 1965, or
 - (ii) section 1(2)(b) of the Industrial and Provident Societies Act (Northern Ireland) 1969; or
- (e) a non-profit making association or body recognised by an EEA State with objectives similar to those of a body falling within any of sub-paragraphs (a) to (c);

and the proceeds of the offer will be used for the purposes of the issuer's objectives.

7.-(1) Non-equity securities, issued in a continuous or repeated manner by a credit institution, which satisfy the conditions in sub-paragraph (2).

(2) The conditions are that the securities-

- (a) are not subordinated, convertible or exchangeable;
- (b) do not give a right to subscribe to or acquire other types of securities and are not linked to a derivative instrument;
- (c) materialise reception of repayable deposits; and
- (d) are covered by a deposit guarantee under directive 94/19/EC of the European Parliament and of the Council on deposit-guarantee schemes.

(3) Non-equity securities, issued in a continuous or repeated manner by a credit institution, which satisfy the conditions in sub-paragraph (4).

(4) The conditions are-

- (a) that the total consideration of the offer is less than 50,000,000 euros (or an equivalent amount); and
- (b) those mentioned in sub-paragraph (2)(a) and (b).

(5) In determining whether the condition in sub-paragraph (4)(a) is satisfied, the offer is to be taken together with any other offer of securities of the same class—

(a) which was made by the same person;

(b) which was open at any time within the period of 12 months ending with the date on which the offer is first made; and

(c) which had previously satisfied that condition.

(6) An amount (in relation to an amount denominated in euros) is an “equivalent amount” if it is an amount of equal value, calculated at the latest practicable date before (but in any event not more than 3 days before) the date on which the offer is first made or approval is granted (whichever is the earlier), denominated wholly or partly in another currency or unit of account.

(7) “Credit institution” means a credit institution as defined in Article 1.1(a) of the banking consolidation directive.

8. Non-fungible shares of capital whose main purpose is to provide the holder with a right to occupy any immovable property or a part thereof and where the shares cannot be sold without this right being given up.

9.-(1) Securities included in an offer where the total consideration of the offer is less than 2,500,000 euros (or an equivalent amount).

(2) Sub-paragraphs (5) and (6) of paragraph 7 also apply for the purposes of this paragraph subject to the reference in sub-paragraph (5) to “sub-paragraph (4)(a)” being read as a reference to “sub-paragraph (1)”.’.

SCHEDULE 3

Regulation 2(3)

MISCELLANEOUS AMENDMENTS TO SECONDARY LEGISLATION

The Public Offers of Securities Regulations 1995 (S.I. 1995/1537)

1. The Public Offers of Securities Regulations 1995 are revoked.

The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 (S.I. 2001/1335)

2.-(1) The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001 is amended as follows.

(2) In paragraph (1)(d) of article 3 (interpretation: unlisted companies) omit the words “or Part II of the Public Offers of Securities Regulations 1995”.

(3) Paragraph (1)(b) of article 8A (interpretation: outgoing electronic commerce communications) is revoked.

(4) Paragraph (1)(c) of article 68 (promotions in connection with admission to certain EEA markets)

is revoked.

(5) Article 70 (promotions in connection with listing applications) is revoked.

(6) For sub-paragraphs (c) and (d) of paragraph (1) of article 71 (promotions included in listing particulars etc), substitute-

“(c) a prospectus or supplementary prospectus approved in accordance with prospectus rules made under Part VI of the Act;”.

(7) In sub-paragraph (e) of that paragraph, after “listing rules” insert “or prospectus rules”.

(8) In paragraph (2) of article 71-

(a) for “and” substitute “,”;

(b) after “listing rules” insert “and “prospectus rules””.

(9) Articles 72 (promotions included in prospectus for public offer of unlisted securities) and 73 (material relating to prospectus for public offer of unlisted securities) are revoked.

The Financial Services and Markets Act 2000 (Official Listing of Securities) Regulations 2001 (S.I. 2001/2956)

3. Sub-paragraph (a) of regulation 4(2) and regulations 10 to 12 are revoked.

The Financial Services and Markets Act 2000 (Offers of Securities) Order 2001 (S.I. 2001/2958)

4. The Financial Services and Markets Act 2000 (Offers of Securities) Order 2001 is revoked.

EXPLANATORY NOTE

(This note is not part of the Regulations)

OVERVIEW

D.1 The background and the scope of the Prospectus Directive (PD), its impact on the UK capital market and the key structural changes will be discussed in the forthcoming HM Treasury consultation document to be released shortly. HM Treasury will be consulting on implementing the PD by amending Part VI of the FSMA and extending our rule-making powers. This chapter sets out our proposals for those elements of the PD which will be implemented through our rules, rather than legislation. We have developed our proposed rules in close consultation with HM Treasury and they are based on what we expect to be contained in their consultation document. Our rules may need to change to reflect the final legislative text, but we do not expect substantial changes. The focus of this chapter is on the rules in Annex 5, which we are proposing to introduce to implement the provisions of the PD that do not relate to the contents of a prospectus. The provisions relating to the contents of a prospectus are stated in Regulation EC/809/2004 (the PD Regulation) which will have direct effect in the UK.

D.2 The PD is implemented through:

- the revised Part VI of the FSMA;
- the PD Regulation; and
- our proposed rules set out in Annex 5

The provisions of these documents should be considered together in order to determine a person's responsibilities and obligations under the PD.

D.3 Due to the maximum harmonisation nature of the PD, we have little discretion in making most of the rule changes. The proposed rules are not fundamentally different from our current rules that are derived mainly from CARD. Although a number of new rules have been introduced to reflect the PD provisions, where possible we have endeavoured to keep the substance of the existing rules, such as the procedures relating to the approval of documents, and the rules in respect of supplementary prospectuses and the omission of information. Furthermore, in line with FSA policy we propose to implement rule changes with minimal departure from the wording used in the PD, except where we consider that the text needs some clarification.

D.4 Two fundamental changes reflected in our proposed rules are:

- the extension of the scope of our rules to apply to public offers of securities where no application has been made for admission to trade on a regulated market, currently governed by the Public Offers of Securities Regulations 1995 (the definition of public offer will be discussed in the HM Treasury consultation); and
- the ability to passport prospectuses on a pan-European basis implemented through the introduction of the concept of home/ host member state.

D.5 Other areas where we propose to introduce rule changes relate to:

- the ability to draw up prospectuses in several parts;
- the requirement to include a summary;
- the requirement to file an annual information update;
- the approval of prospectuses drawn up in accordance with the regulations of a non-EU state; and
- the incorporation of information by reference into prospectuses.

D.6 This chapter of the CP focuses on describing areas of change and not the justification for those changes, since our rules in this area are being altered in response to a maximum harmonisation EU directive. However, there are some provisions where an option in relation to implementation exists, for instance, in the implementation of the Notice under Article 14(3), the publication of prospectuses on the issuer's website and the establishment of a qualified investor register¹. Our approach to the implementation of these Articles is discussed in more detail below.

CHAPTER I – PRELIMINARY²

Exemptions from the obligations to publish a prospectus³ (PR 1.2R)⁴

D.7 These exemptions are similar to the existing exemptions in relation to listing particulars and prospectuses. There are separate – and in some cases different – exemptions that apply to public offers, compared with the rules that govern admission to trading on a regulated market. We have provided some guidance on the nature and content of the summary document referred to in Article 4(2)(h) of the PD.⁵

Responsibility⁶

D.8 On the assumption that HM Treasury retains the existing legislative structure relating to who takes responsibility for documents under Part VI we are not proposing to make any changes in this area.

CHAPTER 2 – DRAWING UP THE PROSPECTUS

General contents of Prospectus (PR 2.1R)

D.9 All prospectuses must now include a summary⁷ – with the exception of those relating to non-equity securities having a denomination of €50,000 or more, provided the securities are being admitted to trading on a regulated market. The introduction of a

¹ Article 2(3) of the PD

² The chapter numbers denote the chapters in our proposed rules in Annex 5

³ Article 4 of the PD

⁴ The rule numbers are references to our proposed rules in Annex 5

⁵ I.2.4G of the PR

⁶ Article 6 of the PD

⁷ Article 5(2) of the PD

requirement for a summary in most prospectuses will make it easier for investors to understand the core provisions before they make an investment decision. Consequently, we do not consider that the existing rules⁸ on mini prospectuses, offer notices and summary particulars are relevant any longer, as the function they fulfil should be satisfied by the summary. In any event, we do not believe there is scope for the publication of mini prospectuses and summary particulars under the PD.

Q1: Do you agree with this approach? If not, please state your reasons.

Format of prospectus (PR 2.2R)

D.10 The introduction of the tri-partite document system is designed to give regular issuers a flexible procedure for the publication of prospectuses.⁹ Issuers contemplating an issue of securities are able to file a registration document, which is valid for 12 months. This contains information, which we vet and approve, relating to the issuer. Such issuers are then required to file the security note containing information about the securities when they make a public offer and/or admit securities to trading on a regulated market. Only the security note and the summary will be vetted and approved at that later stage. The effect of having a tri-partite prospectus is to shorten the timetable for vetting and approval of the security note and summary, compared to vetting and approving a single prospectus. Issuers have a choice whether to continue to produce a single prospectus.

Base prospectuses (PR 2.2.7R)¹⁰

D.11 Although the terminology has changed, the substantive rules relating to issuance programmes remain the same. The programme is now described as a base prospectus and the pricing supplement is called final terms. They are subject to the same approval and publication process as a prospectus. In principle, there is no reason why a single base prospectus cannot be produced by multiple issuers. Where the home competent authority of the issuers differ, it will be possible to use the transfer mechanism described in PR 3.1.11R to transfer approval to a single competent authority subject to the consent of the relevant competent authorities. We will allow issuers to submit draft base prospectuses for approval before 1 July 2005 to enable a seamless transfer to the PD disclosure regime.

Minimum information to be included in a prospectus¹¹ (PR 2.3R)

D.12 The PD Regulation sets out the rules relating to the content requirements of prospectuses. Consequently, we propose to delete all the existing rules relating to the contents of prospectuses (chapters 6 and 18 to 26). The provisions of the Regulation are not fundamentally different from our existing rules, since both were derived from International Organisation of Securities Commissions (IOSCO) disclosure standards and CARD. The annexes in the PD Regulation are based on a building block approach,

⁸ Rules 8.10, 8.11 and 8.12 of the existing Listing Rules

⁹ Article 12 of the PD

¹⁰ Article 5(4) of the PD

¹¹ Article 7 of the PD

whereby issuers combine the information contained in several annexes based on the nature of the securities¹² to determine the disclosure requirements of the prospectus they are drawing up. The Regulation includes a ‘road map’ designed to assist issuers on how to combine the annexes. The PD Regulation, which has already been consulted on by the EU Commission and is not discussed in detail in this CP, is directly applicable in the UK when the implementation becomes effective.

Incorporation by reference¹³ (PR 2.4R)

D.13 At present, we do not permit issuers to incorporate information by reference in listing particulars. This will now be permitted in limited circumstances under the PD, on the basis that it will facilitate the process of drawing up a prospectus and make it less costly. Issuers may incorporate information by reference in a prospectus only if such information has been approved by or filed with us, for instance, in accordance with Article 10 of the PD. The summary may not incorporate information by reference.

Omission of information (PR 2.5R)¹⁴

D.14 The rules relating to omission of information have not changed in substance. Accordingly, we will continue to allow omission of information where we consider the disclosure of such information would be contrary to the public interest, seriously detrimental to the issuer or the information is of minor importance in the specific situation. In addition, the PD allows omission of information where that information is inappropriate to the issuer’s activity, the legal form of the issuer or the securities the prospectus relates to. Currently, we will allow the omission of this type of information where in our judgement it is inappropriate to include it.

CHAPTER 3 – APPROVAL AND PUBLICATION OF PROSPECTUS

Approval of Prospectus¹⁵ (PR 3.1R)

D.15 We do not propose to make substantial alterations to the rules relating to the procedures for the approval of prospectuses, since the only significant relevant change is the introduction of the tri-partite prospectus.

D.16 Issuers who wish to apply for approval of their prospectuses will be required to submit the draft prospectus, registration document or securities note and the summary (as the case may be) together with all the required documents stipulated in the proposed PR 3.1.1R. The relevant application form will be finalised and available before implementation.

Transfer to another competent authority¹⁶ (PR 3.1.1IR)

D.17 We will only transfer the approval of a prospectus to a competent authority in another member state if, in all the circumstances, we consider it to be in the best interests of investors. The request for transfer may be initiated by the issuer, the person

¹² For instance, equity or non-equity and wholesale (non-equity with a denomination of €50,000 or more) or retail securities (non-equity with a denomination of less than €50,000).

¹³ Article 11 of the PD

¹⁴ Article 8 of the PD

¹⁵ Article 13 of the PD

¹⁶ Article 13(5) of the PD

seeking admission to trading on a regulated market or the competent authority of the member state where the transfer is intended to be made.

Filing and publication of prospectus¹⁷ (PR 3.2R)

D.18 The requirement to publish a prospectus may be satisfied by using one of the means specified in Article 14 of the PD (PR 3.2.4R). In addition, where the issuer has chosen only to publish the prospectus in a newspaper or make it available at its offices or the offices of its advisers, we will require it to also publish it on its website or the website of its financial intermediary (if applicable). This achieves our policy aim to facilitate electronic publication of the prospectus. We do not consider this should be excessively costly for issuers. Furthermore, we believe that electronic publication will make access to the prospectus easier for investors.

Q2: Do you agree with the proposal that issuers should publish prospectuses on their website? If not, please state your reasons.

D.19 We have the option to publish prospectuses on our website. Due to changes being made to our information technology systems, we are not proposing to publish prospectuses on our website at present. We will consider this issue again in conjunction with our other obligations relating to information dissemination under the TD. Nevertheless, we are required to publish on our website a list of all the prospectuses we approve. We propose to implement this by providing a list of approved prospectuses with a hyperlink to the websites of their specific issuers.

Notice¹⁸ (PR 3.2.8R)

D.20 We have decided to implement Article 14(3) of the PD by requiring the publication of a notice. This notice will replace the formal notice in chapter 8 of our existing rules. The content, form and manner of publication of the notice are set out in Article 31 of the PD Regulation. The requirement to publish the notice in a newspaper will only apply to issuers of equity securities. Issuers of non-equity securities are only required to make a Regulatory Information Service announcement. This conforms with our existing practice.

Advertisements¹⁹ (PR 3.3R)

D.21 We propose to delete all our current rules relating to advertisements that will now be superseded by the rules introduced by the PD. We envisage that most advertisements will be in the form of the notice referred to in paragraph D.20 above. An issuer may advertise an offer of securities to the public, or their admission to trading on a regulated market, using one of the means specified in Article 34 of the PD Regulation (subject to meeting the requirements stipulated in PR 3.3.2R). We would normally expect all advertising to contain at least the information referred to in Article 31(3) of the PD Regulation in order to meet the criteria stipulated in rule PR 3.3.2R.

¹⁷ Article 14 of the PD

¹⁸ Article 14(3) of the PD

¹⁹ Article 15 of the PD

D.22 The Financial Promotions regime²⁰ exempts advertisements in connection with public offers and admission to trading on relevant EEA markets. We are proposing that this approach continues and the relevant sections under the Financial Promotions regime be amended by HM Treasury to reflect the PD.

Q3: Do you agree with our proposal on advertisements? If not, please state your reasons.

Supplementary prospectus²¹ (PR 3.4R)

D.23 The rules relating to publishing supplementary prospectuses are similar to those in respect of supplementary listing particulars in our existing rules. Therefore, issuers will be expected to publish a supplementary prospectus when there has been a significant new factor, or a material mistake or inaccuracy relating to the information included in the prospectus that is capable of affecting the assessment of the securities before the final closing of the offer or before admission to trading on a regulated market. The approval process is similar to that of prospectuses.

CHAPTER 4 – USE OF LANGUAGES AND THIRD COUNTRY ISSUERS

Languages²² (PR 4.1R)

D.24 Under our existing rules, we require all listing particulars to be in English and we expect that the majority of prospectuses submitted to us for approval will continue to be in English. This will facilitate speedy and effective vetting. It is possible that some prospectuses will be in another language that is customary in the sphere of international finance, especially where there is a cross-border offering of securities. But we are proposing that the summary, where required, must nevertheless always be in English.

D.25 Where the issuer wishes to take advantage of the passport procedures to make a public offer or to seek admission to trading on a regulated market, we may require that issuer to translate the summary into English where the prospectus has been originally approved in another language.²³ However, we propose only to require the translation of the summary into English if the issuer is making a public offer of its securities. We consider that for reasons of market efficiency, we should not require a summary in English of prospectuses that are passported only for trading on a regulated market depending on the circumstances.

Q 4: Do you agree with the approach in paragraph 2.25 that only summaries produced in relation to a public offer should be required to be translated into English? If not, please state your reasons.

²⁰ The Financial Services and Markets Act 2000 (Financial Promotion) Order 2001

²¹ Article 16 of the PD

²² Article 19 of the PD

²³ Rule 4.1.6 of the PR

Third country issuers²⁴ (PR 4.2R)

D.26 The PD gives us the ability to approve prospectuses drawn up in accordance with the legislation of a third country, provided that certain criteria are met. We are permitted to approve such prospectuses if they are drawn up to International Standards e.g., IOSCO disclosure standards and if the information, including financial information, included in them are equivalent to the requirements of the PD. We propose to implement this provision by determining whether a prospectus meets those criteria on a case-by-case basis and judge each application on its merits.

Q5: Do you agree with our approach?

Q6: Do you consider other factors should be taken into account when determining whether an issuer meets these criteria?

CHAPTER 5 – OTHER PROVISIONS

Annual information update²⁵ (PR 5.2R)

D.27 The PD requires issuers whose securities are admitted to trading on a regulated market to submit a document that contains or refers to all regulated information that they have published within and outside the EU over the preceding 12 months. We propose to do this by permitting issuers to file a list of such information with us (Annual Information Update List). The list would then state where the actual information may be obtained, the date of publication and a short description of the information. We have provided some guidance on the information we would expect to be on such a list in the Prospectus Rules.²⁶

D.28 We expect issuers to file only a list with us because we are aware of the cost implications for issuers of filing all the information they have published in the preceding 12 months. The list is to be filed through a Regulatory Information Service within 20 days of the date when the issuer files its annual accounts with us.

Q7: Do you agree with the requirement for a list of information only?

Q8: Do you agree with the guidance provided on the content of the list?

²⁴ Article 20 of the PD

²⁵ Article 10 of the PD

²⁶ 5.2.3G of the PR

Certificate of approval²⁷ (PR 5.3R)

D.29 The introduction of the rule relating to certificates of approval is one of the major changes resulting from the PD. This underpins the ability to passport prospectuses between member states and the mechanics are quite straightforward. An issuer wishing to take advantage of the passport capability may either:

- request a certificate of approval simultaneously with the application for approval of its prospectus; or
- request a certificate after the approval of its prospectus.

In the former case, the certificate will be issued within one day of the approval of the relevant prospectus and in the latter case, it will be issued within three days of the request being made. The certificate is provided to the competent authority in the host member state.

Qualified investors register (PR 5.4R)

D.30 The PD gives member states an option to establish a qualified investor regime for individuals or small and medium sized enterprises (SMES) that meet the criteria described in the directive²⁸. HM Treasury will be consulting on whether to implement this option. In the expectation that this option is adopted we propose to implement this provision²⁹ by requiring those persons wishing to register to obtain certification from their solicitor or accountant that they meet these criteria. We recognise that the effectiveness of the certification system under the Financial Promotion Order is being reviewed and a response to the HM Treasury consultation³⁰ is due to be published at the end of the year. However, we believe that the criteria for determining whether a person or SME is a qualified investor under the PD is more objectively verifiable and therefore we do not believe that this should pose a problem for those wishing to register. The alternative approach would be to require self-certification by those persons.

Q9: Do you consider that prospective qualified investors should be certified by their solicitors or accountants that they are qualified investors or should there be self-certification? Please provide the reasons for your preferred option.

D.31 We are also proposing to charge persons who wish to register and issuers who request to view the register. Registration will be valid for a year and renewable after then. We will only be able to set the appropriate levels of charges once we determine the number of potential users of this register. We will consult on the proposed level of charges in our general fees consultation in January 2005. In the meantime, we propose the following options for funding the register:

²⁷ Article 18 of the PD

²⁸ Article 2(1)(f) and 2(2) of the PD

²⁹ Article 2(3) of the PD

³⁰ www.hm-treasury.gov.uk/media/1/195FI/changesFPOCondoc240103.pdf

- Option A
 1. A non-refundable fee payable by qualified investors seeking registration (whether new registration or renewal); and
 2. An annual fee, payable in advance, by issuers of securities wishing to access the register.
- Option B
 1. A non-refundable fee payable by qualified investors seeking registration (whether renewal or new registration); and
 2. A fee payable in advance by issuers of securities for each request to view the register.

D.32 We are presently unable to gauge the numbers of persons who wish to register and anticipate that the initial take-up for the qualified investor register will be low. We therefore propose initially to establish a manual register. When we have a better idea of numbers, we may establish an electronically-based register. We welcome expressions of interest relating to such a register to ensure that the register we establish is appropriate.

Q10: Which charging options would you prefer? Please provide reasons.

Guidance

D.33 Once they are finalised, we propose to adopt the Committee of European Securities Regulators (CESR) Level 3 recommendations, which are currently being consulted upon. These are expected to be finalised by the end of this year or early next year. When completed, they will provide guidance on the interpretation of some of the provisions in the PD and the PD Regulation in order to facilitate the consistent implementation of the PD in all the EU member states. We propose to follow the CESR recommendations in our interpretation of the PD Regulation and are not intending to undertake a separate consultation on the recommendations.

D.34 We would encourage market participants to review and respond to this consultation, which can be found at: www.cesr-eu.org (Consultations).

TITLE OF PROPOSAL

E.1 The Financial Services and Markets Act 2000, the Prospectus Regulations 2005, (“the Prospectus Regulations 2005”).

PURPOSE AND INTENDED EFFECT OF MEASURE

Objective E.2 The purpose of the measure is to implement the EU Prospectus Directive,¹ which came into force on 31 December 2003, in the most cost effective and proportionate way. The aims of the Directive are to enhance investor protection through the production of high quality prospectuses and to improve the efficiency of the internal market through the issue of a single approved prospectus, which will be valid for use across the EU.

E.3 The Directive describes two broad areas where a prospectus is required; firstly, when an offer of securities is made to the public and secondly when securities are admitted to trading on a regulated market. In seeking to increase investor protection, the Directive requires that any prospectus meets specified disclosure standards and that all prospectuses are approved by a competent authority (the FSA in the UK) when produced.

E.4 The Directive introduces the concept of a single “passport” for issuers where a prospectus approved by one competent authority is available for use throughout the EU, without additional approval or administrative arrangements from other member states. This means that once the competent authority in the relevant Member State has approved the prospectus, it will then be accepted elsewhere in the EU. An issuer’s home or host member state will determine the competent authority that is responsible for approving the prospectuses and for ensuring that the obligations of issuers and others under the Directive are met.

E.5 In order to aid efficiency, the Directive seeks to improve the efficiency of capital raising by, for example, introducing a new procedure for a more flexible, tri-partite format of a prospectus and by applying differing disclosure requirements for equity and non-equity securities. The disclosure requirements are not specified in the Directive, which is a piece of EU framework legislation, but are prescribed in a detailed implementing Regulation. The disclosures required are very consistent with the existing requirements of the UK listing regime.

Background E.6 The Directive builds on existing legislation regarding admission of securities to listing and publication of prospectuses in relation to public offers; in particular, the Public Offers Directive (89/298/EC) and the Consolidated Admissions and Reporting Directive (2001/34/EEC). It was required because the existing mutual recognition mechanism in relation to prospectuses across the EU continued to be fragmented and complex and was considered to be an obstacle to achievement of an efficient internal market.

¹ Directive 2003/71/EC (OJ L [], 31.12.2003, [])

E.7 The Directive is one of the key measures adopted in the EU as part of the Financial Services Action Plan (FSAP)². The FSAP is the legislative framework for developing the Single Market in financial services. Its programme of measures intends to fill gaps and remove the remaining barriers to provide a legal and regulatory environment that supports the integration of financial markets across the EU.

E.8 In May the Treasury, the FSA and the Bank of England published a paper regarding the implementation of FSAP directives in the UK³. This set out the UK's approach to implementing the FSAP in three key areas: internal arrangements within the public authorities, working with business and cooperation with authorities in other member states. Our consultation document has been carried out in a manner consistent with that approach by working with other public authorities (FSA) and the financial services sector.

E.9 The UK's existing regime dealing with the issue and content of prospectuses is contained mainly in Part VI of the Financial Services and Markets Act, 2000 (FSMA) together with schedules 7, 8, 9, 10 and 11 to FSMA, which contain provisions relating to official listing, the competent authority and public offers. The Treasury proposes to legislate through regulations made under section 2(2) of the European Communities Act 1972, making relevant amendments to primary and secondary legislation as discussed in this paper. The FSA will be making amendments to its handbook as detailed in their consultation paper which includes a Cost/Benefit Analysis.

New regime for prospectuses

E.10 The Directive introduces a new regulatory regime that requires, amongst other things, the production of prospectuses in relation to securities "admitted to trading on a regulated market". This change largely replaces the existing regime for listed securities in the UK. However the overall effect is likely to be relatively small. This is due to the fact that companies that previously had to produce Listing Particulars by virtue of being listed will generally now be required to produce a prospectus in relation to admission of their securities to trading. The exemptions contained within the Directive are similar to those previously applying to listed companies and (as noted previously) the prescribed content of the prospectus is very closely aligned with that of a set of Listing Particulars. Consequently listed companies will not be required generally to produce prospectuses more or less regularly or in a different form under the new regime.

E.11 The Directive also introduces important changes in relation to when "an offer of securities to the public" is made. Under the existing UK Public Offer of Securities regime, any such offer to the public of non-listed securities would require the production of an (unapproved) prospectus. Under the new regime any offer to the public will require a prospectus to be approved by the relevant competent authority (the FSA in the UK). Most of the exemptions contained within the Directive are similar to those that exist under the current Public Offer of Securities regime. One important difference is that any offer of securities to the public where the consideration is less than 2.5 million Euros, calculated over a 12-month period, is outside the scope of the Directive. This compares to the equivalent threshold of £100,000 under the current UK regime.

E.12 The entities most directly affected by the Directive are largely the same ones affected by the existing laws and regulations, namely those companies offering

² Published by the Commission in May 1999. Between the FSAP's endorsement by the European Council in Lisbon in March 2000 and the end of April 2004, 38 out of 42 measures in the FSAP were adopted by the EU.

³ The EU Financial Services Action Plan: Delivering the FSAP in the UK. It is available at www.hm-treasury.gov.uk and www.fsa.gov.uk.

securities to the public or seeking admission of securities to trading on a regulated market. There may be circumstances in which other parties (such as financial intermediaries and investors) are affected by the Directive but these will be limited and may often be positive; for example, investors will be able to take advantage of the qualified investor provisions described below.

Member state options

E.13 The Directive is a “maximum harmonisation” Directive in relation to the format and content of prospectuses; this means that Member States are not allowed to impose additional requirements regarding prospectuses beyond those specified in the Directive. The intention of the Directive is that harmonisation of the information contained in the prospectus should provide a high standard of investor protection consistently applied across the EU.

E.14 In relation to areas other than the content of prospectuses, there are only three areas in which there is a Member state option as to whether to implement a particular provision or not:

- **Qualified investors.** The Directive states that a Member state may choose to authorise natural persons and SMEs as “qualified investors”. The definition of such investors within the Directive enables a potentially broader range of individuals to qualify compared to the equivalent existing requirements. The UK intends to allow the authorisation of such persons to encourage particularly smaller issuers in approaching private investors and others when seeking to raise capital.
- **Electronic publication of the prospectus and related notice.** The Directive introduces a new option that a home Member state may require an issuer to publish its prospectus in electronic form on its website in addition to publication in printed form. The UK intends to require publication on issuers’ websites in order improve access to this information for potential investors. This approach is wholly consistent with the Government’s e-commerce strategy. The Directive also states that a home Member state may require an issuer to publish a notice stating how the prospectus has been made available and where it can be obtained by the public. The UK intends to require such publication; this is a current requirement under the Listing regime.
- **Summary of debt document in English.** The Directive introduces a new option that a Member state may require an issuer of a prospectus relating to admission to trading on a regulated market of high-denomination non-equity securities to produce a summary in their home language. The UK does not intend to require issuers in these circumstances to produce a summary in English.

New ongoing requirements

E.15 The Directive imposes few new obligations on companies with securities admitted to trading on a regulated market compared to the existing Listing regime. The main ones are as follows:

- **Annual information.** The Directive requires issuers who are traded on a regulated market shall provide to the competent authority at least annually a document that contains or refers to all information that they have published or made publicly available within and outside the EU over the preceding 12 months. It is expected that this requirement will be met by a filing with the

FSA which would refer to where the actual information may be obtained, the date of publication and a short description of the information.

- **Summary of Prospectus.** The Directive requires that all prospectuses include a summary with the exception of prospectuses relating to non-equity securities having a denomination of €50,000 or more if the securities have been admitted to trading on a regulated market.

E.16 As noted previously, those companies most directly affected by the Prospectus Directive regime (with securities admitted to trading on a regulated market) will not generally notice significant changes compared to the existing regime. In relation to those companies (and others) making offers of securities to the public, the changes brought about by the Prospectus Directive will have implications, not least in that any prospectus will need to be approved by the competent authority. However, the change in the exemptions available under the Prospectus Directive affords those persons with greater flexibility with which to structure offers in order for them to be exempt or outside the scope of the Directive.

**Risk
assessment**

E.17 The Prospectus Directive does seek to improve and harmonise the required content of prospectuses. However, the existing EU legislation already provides protection to investors by specifying when, and in what form, prospectuses should be produced. The predecessor Directives to the Prospectus Directive govern the requirements for the preparation, scrutiny and distribution of prospectuses (or their equivalents) both in relation to offers of securities to the public and to admission of securities to listing on an official stock exchange. As noted elsewhere, the disclosure requirements that will apply under the Prospectus Directive are not markedly different to those that currently apply when securities are admitted to trading on a listed stock exchange.

E.18 A more important focus of the Directive is on achieving improvements to the efficiency of the capital-raising process across the EU. The existing prospectus regime provides a number of obstacles to companies seeking to raise capital cross-border. Notably, there is no single definition of an “offer to the public”; this means that, for the same transaction, a company might need to produce a prospectus in one Member State (where it is deemed to be a public offer) but not in another Member State (where it is deemed to be a private placement). In addition, the different procedures and interpretations in Member States when prescribing and checking the information given in a prospectus increase the difficulties faced by companies in raising capital across the EU. The requirement, for example for companies to provide a full translation of a prospectus into the local language of a Member State is a powerful disincentive, even for relatively large companies.

E.19 One of the main ways in which the Directive addresses these difficulties is the introduction of a single definition of public offer, which whilst broad, seeks to reduce the differences across the EU as to whether a transaction constitutes a public offer (as opposed to a private placement) and therefore requires a prospectus. In addition, the “passport” regime set out in the Directive is one in which responsibility for approval of a prospectus clearly rests with one Member State and other Member States will not be able to impose additional content requirements once that approval has been obtained.

E.20 It is generally recognised that moving towards a single market in financial services throughout Europe will benefit businesses by providing access to deeper and more liquid capital markets and benefit investors by providing them with more and wider investment opportunities. A broad indication of the potential benefits of

improved cross-border activity is given by the fact that it has been estimated that the macro-economic benefit of a single EU financial market could be as much as 1.5% of GDP. A report for the European Commission by London Economic estimated that single market integration could reduce the cost of capital for companies by 0.5%.

E.21 The specific benefits to companies carrying out multi-jurisdictional transactions are difficult to estimate. Companies should be able to avoid much of the additional prospectus costs currently associated with such transactions but other related costs (for example, in relation to taxation and deal structuring) will remain. In addition, powerful obstacles to cross-border capital raising will remain, reflecting the different stages of development across EU Member States, for example in relation to the strength of the equity culture and the depth of investment capital available. It will also remain the case that cross-border transactions will tend to appeal to larger companies as the capital needs of smaller businesses can often be satisfied by their domestic markets. Commentators do not expect the number of 1,230 overseas companies listed on EU stock exchanges at 31 December 2003 (only 12% of the total number) to increase significantly.

E.22 To the extent that there are significant improvements in cross-border capital raising in the EU, the UK is likely to benefit particularly, given its strong position in the international securities markets. There were 2,692 listed companies on the London Stock Exchange at 31 December 2003 compared to the next most significant European stock exchange, Euronext (comprising France, Belgium and Netherlands) which had 1,392 listed companies. Within these totals, London had been successful in attracting 381 overseas companies compared to 346 such companies on Euronext.

POLICY OPTIONS

Option 1 E.23 Do nothing. Taking no action to implement the Directive would mean that the UK would still have a legislative regime relating to the issue and content of prospectuses and there would be no additional costs for industry. However, there is no suggestion that continuation of the existing regime could be argued to fulfil the UK's obligations under the Directive. The scope and effect of the Directive is fundamentally different from the UK's existing regime in a number of areas; for example, in determining an offer to the public and in the requirements for securities admitted to trading on a regulated market.

E.24 There is a high probability that this option would lead to the UK being infringed by the Commission for failure to implement the Directive. We judge that if such proceedings started they would have a strong likelihood of success. The UK would then be forced to alter the existing UK regime to align it with that in the Directive.

Option 2 E.25 Implement the draft Regulations and use the Member state option not to apply the provisions relating to qualified investors, electronic publication and summary of debt document in English (see B.14). The draft Regulations seek to meet the UK's objectives by incorporating the Directive's provisions through changes to the Financial Services and Market Act 2000 and related Regulations, providing certainty that the UK had complied with its implementation obligations.

Option 3 E.26 Implement the draft Regulations and use the Member state option to apply the provisions in relation to qualified investors and electronic publication. Option 3 would provide the same certainty as Option 2 that the UK had complied with its implementation obligations. The application of the additional provisions would result in costs and benefits as described below.

BENEFITS AND COSTS

E.27 The sections below on benefits and cost do not take into account any environmental or social impacts arising out of the options considered. The operation of financial markets may have significant implications for sustainable development, but the Directive does not directly impact on the environment or our natural resources. Likewise the operation of financial markets may have significant implications for the distribution of wealth and income, but the Directive does not directly impact on the distribution of wealth and income. The focus of the analysis set out below is therefore on the economic costs and benefits associated with the options.

E.28 There are good grounds for believing that having an effective prospectus regime brings significant benefits to companies, investors and others (such as market operators). The aim of the Directive is to improve investor protection by harmonising high-quality disclosure requirements across the EU to the benefit of investors. The Directive is designed to allow issuers to have a passport to raise capital across the EU which should encourage issuers to raise capital cross-border who were previously discouraged by different information and disclosure regimes. However; it is not straightforward to compare the (often unquantifiable) benefits of an improved regime with the more tangible costs to companies and others of complying with the regime.

BENEFITS

Option 1 E.29 This option would involve no change to the existing requirements and therefore companies, market participants and others could continue to work with a familiar regime. However, there is no suggestion that continuation of the UK's existing regime could be argued to give effect to the Directive. Consequently, it appears highly probable that the UK would be successfully infracted by the Commission for its failure to implement the Directive. At that point the UK would have to change its regime and choose Option 2 or Option 3.

Option 2 E.30 Replacing the UK's existing regime with that in the Directive would eliminate any risk of proceedings by the Commission for failure to implement properly. It would also leave the UK with a similar prospectus regime to other Member States, which should remove certain obstacles to cross-border capital raising. Implementing the Directive in the UK and elsewhere will narrow the differences between the prospectus regimes in EU member states. This should reduce compliance costs for those offering securities, issuing securities or admitting them to trading in more than one Member State.

Option 3 E.31 Option 3 would also eliminate the risk of proceedings by the Commission for failure to implement properly and provide the same benefits. The proposed qualified investor regime is designed to provide greater opportunities for particularly smaller companies to access capital from private investors and SMEs without necessarily triggering the need for a prospectus. The requirement for electronic publication of the prospectus is designed to provide improved access to prospectuses, especially for the smaller investor and is wholly consistent with the government's e-business strategy.

COSTS

Option 1 E.32 There would be no new costs for companies in the short term. However it is likely that the government would have to bear the costs of infraction proceedings. Such proceedings would involve policy and legal input within government and use of

external legal resources. The internal input might require 200 hours of policy input and 200 hours of legal input. At an average cost of £30 an hour this would cost £12,000. Approximately 50 hours of external legal advice might be required which, at an average cost of £250 an hour, result in total costs of £12,500.

E.33 If the infraction proceedings proved successful, there would be unquantifiable damage to the reputation of the UK government in relation to ignoring its obligations to implement the Directive. In addition, the European Court of Justice could levy unlimited infraction fines for each day that the Directive is not implemented. At this point companies would then need to bear the costs associated with Option 2 or Option 3, bringing the UK into compliance with the Directive.

Option 2 E.34 Adapting to a new regime will involve a certain level of costs. However, the compliance costs for those companies admitted to trading on a regulated market should be relatively small. The UK has an existing regime for listed companies that is largely consistent with the regime proposed by the Directive for companies whose securities are admitted to trading on a regulated market. The FSA has estimated that familiarisation with the new prospectus rules will require two days of compliance officer (or equivalent) time, costed at approximately £400 per day. This results in a total one-off cost of some £2.3m for the 2,910 companies currently listed.

E.35 There is a new ongoing obligation for these companies relating to the provision of annual information. These companies will need to provide to the FSA at least annually a filing that would refer to where information published or made publicly available in the last year may be obtained, the date of publication and a short description of the information. The compliance costs arising out of this requirement have been estimated by the FSA as £1.85m. It is estimated that preparing the update will take, on average, 1.5 days of compliance officer time which results in total recurring costs of some £1.7m. The FSA also estimate that companies will each incur £50 of costs for filing the update with the Regulatory News Service, resulting in total costs of £150,000.

E.36 The main area of incremental costs associated with implementing the Directive relates to the production of prospectuses and is, therefore, of a “one-off” nature rather than ongoing. However, as noted in B10 above, most listed issuers will not be required to produce prospectuses more or less regularly or in a different form from previously. The Directive does require that all prospectuses (except those for high-denomination debt) include a summary but there is anecdotal evidence that this will not require significant additional work beyond existing market practice and should not result in significant incremental costs.

E.37 Companies whose securities are not admitted to trading on a regulated market will feel more noticeable effects of the proposed changes to the prospectus regime. These companies will include those with securities traded on the Alternative Investment Market (AIM) and OFEX, the two most successful junior equity markets in Europe (in terms of the number of companies traded on the markets). More than 700 UK companies have securities trading on AIM whilst more than 150 UK companies have securities trading on OFEX. These companies, together with any company not publicly traded, may bear incremental costs as a result of making “offers to the public” as captured by the Directive and hence requiring a prospectus approved by the FSA.

E.38 The incremental costs could potentially fall into two categories:

- **An approved prospectus compared to no prospectus.** There may be circumstances in which an offer is not an “offer to the public” under the existing UK regime but is one under the Directive. This is not likely to be typical as the exemptions available under the Directive are more generous than those available under the existing regime. It is most likely that companies and their advisers when structuring their offers will ensure that the offer falls clearly within an existing exemption. Anecdotal evidence suggests that most offers currently made are so structured. The likely rarity of these circumstances means the associated costs are not expected to be significant.
- **An approved prospectus compared to an unapproved prospectus.** This is the circumstance where an offer (made outside a regulated market) currently requires an unapproved prospectus under the Public Offers of Securities (POS) Regulations but would require a prospectus approved by the FSA under the Directive. The incremental cost of preparing an approved prospectus compared to an unapproved prospectus has been estimated by the FSA as £50,000, largely comprising legal and professional costs. During 2003, some 688 POS prospectuses were produced. However, it would be likely that far fewer prospectuses under the Directive would be required, because many of these documents would have been required by virtue of the AIM Rules anyway or would have been exempt under the more generous exemptions that apply under the Directive. The FSA estimates that some 75% of these documents will be exempt and that, of the remaining 175 non-exempt public offers, approximately two thirds (115) would now need to be approved. The total costs are therefore estimated as £5.7 million, representing an incremental cost of £50,000 for 115 public offers.

E.39 There may be circumstances in which issuers decide not to make a public offer or seek admission to trading on a regulated market in the EU in order to avoid the resultant costs associated with production of a prospectus. Such companies may go to more lightly regulated markets in order to raise capital and/or obtain greater liquidity in their securities. However, companies currently have the choice as to whether to seek admission to either a regulated or a non-regulated market and will weigh up the costs and benefits as appropriate. Equally companies and their advisers typically structure offers under the current POS Regulations regime in order to avoid production of a prospectus.

Option 3 E.40 Option 3 will involve the same incremental costs described above in relation to Option 2. In addition, the UK intends to require companies to publish prospectuses electronically on their websites in order to improve access to this information for potential investors. It is assumed that companies that are required to publish a prospectus either by virtue of admission to trading on a regulated market or by the size of the public offer will already maintain a public website. In this case, the related incremental costs of publishing a prospectus on the website should be no more than £100. There were some 750 new and further issues on the main market of the London Stock Exchange during the year ended 31 December 2003. As not all of these transactions would have required publication of a prospectus, the incremental costs of electronic publication should not exceed £45,000 on the basis of some 450 prospectuses at an average cost of £100.

E.41 The introduction of the proposed qualified investor regime will not result in any obligatory incremental costs given that the regime is available to issuers and those seeking qualification as qualified investors, but it is not compulsory. If issuers do choose to access the list of qualified investors then we expect the FSA to levy a modest charge. Equally, those seeking qualification as qualified investors will incur professional costs to provide evidence that they meet the requisite criteria.

THE SMALL FIRMS IMPACT TEST

E.42 This is the first consultation being conducted on the Prospectus Regulations 2005 and businesses will be consulted as part of this formal public consultation process. We would particularly welcome the views of small businesses who may be affected by the proposals. Informal consultations have already been held, via a series of round table meetings, with a number of industry associations including some representing smaller companies. During those informal meetings the view was consistently expressed that small companies (as defined by Cabinet Office guidelines) were highly unlikely to be caught by the provisions of the Directive for reasons noted below.

E.43 The Directive captures those companies which have securities admitted to trading on regulated markets and these tend to be substantial businesses which are generally required to have more than 25% of the business owned by third parties. In addition, in relation to public offers of securities, small companies are likely to be able to use the exemptions within the Directive that enable them to avoid production of a prospectus. Companies with a balance sheet total of less than £3.18 million for example (as defined under Cabinet Office guidelines) would generally fall within one of the Directive's exemptions, such as making an offer to less than 100 persons or an offer of less than 2.5 million euro). This view was confirmed by one-to-one discussions held between HM Treasury and a small number of individual companies.

COMPETITION ASSESSMENT

E.44 Given that the draft Regulations would introduce largely incremental change to the existing regime, they should not have a significant effect on competition. Those markets defined as "regulated markets" in the Directive, such as the Main Market of the London Stock Exchange (LSE), will be directly affected, as companies with securities admitted to trading on those markets will be required to comply with the relevant provisions of the Directive. The main competitors to the Main Market will tend to be other EU regulated markets, which will be similarly affected by the Directive, and therefore the effects on the LSE's competitive position should be limited.

E.45 Those markets that are not "regulated markets", such as the Alternative Investment Market (from 12 October 2004) and OFEX, will be indirectly affected. Although companies traded on these markets will not be subject to the rules regarding admission to trading, they will still be affected by the need to produce a prospectus when an offer to the public is made (subject to any applicable exemptions contained within the Directive).

E.46 We do not anticipate that the implementation of the Directive will significantly alter the competitive positions of the regulated and non-regulated markets. There are important distinguishing features between the main market of the London Stock Exchange and other non-regulated markets, such as the differing regulatory emphases, which will continue to exist. This is particularly the case since the London Stock

Exchange announced that AIM would no longer be a regulated market from 12 October 2004.

ENFORCEMENT AND SANCTIONS

E.47 The Government via the Financial Services and Markets Act 2000 (FSMA) delegated the power of enforcement of the prospectus regime to the Financial Services Authority (FSA). The FSA has already taken enforcement under this regime. There is no reason to believe that the regime under any of the options would not be enforced.

Sanctions E.48 Article 25 of the Directive requires that administrative sanctions can be imposed against persons responsible as a minimum but does not prevent Member states from imposing criminal sanctions. The Directive does not alter the range of sanctions currently available in the UK to deal with circumstances where provisions of the Directive have not been complied with.

MONITORING AND REVIEW

E.49 Article 31 of the Directive states that the Commission shall make an assessment of the application of the Directive five years after the date of the Directive coming into force. The Commission will present a report to the European Parliament and the Council accompanied where appropriate by proposals for its review. In addition, under the Lamfalussy process for financial services legislation in the EU, the Commission has a role in ensuring that legislation is enforced properly in Member States, relying, in part, on market evidence that problems exist.

E.50 The UK government has no specific current formal plans to review the effectiveness of legislation introduced as part of the implementation of the EU's Financial Services Action Plan in the UK, and no specific current formal plans to review the effectiveness of the primary legislation in FSMA (although aspects of the impact of FSMA overall are being considered as part of an exercise looking at FSMA two years on from when it came into force).

E.51 The sorts of criteria that the effectiveness of the proposed prospectus regime needs to be judged against might include its impact on the following:

- the incidence of cross-border capital raising by issuers;
- the confidence of investors in the quality of information provided in prospectuses;
- the costs of capital for issuers; and
- the access to capital for issuers including SMEs in the UK and across the EU.

CONSULTATION

E.52 This is the first formal public consultation on the Prospectus Directive Regulations 2005. However, informal consultations have already been held with industry associations, exchanges and advisers. These consultations have helped to shape certain of the proposals that have emerged in the draft Regulations, in particular in relation to definition of an offer to the public. The consultation document includes the proposal that clarification is included in the draft Regulations that certain types of secondary screen trading are not intended to be captured by the definition of an offer to the public.

SUMMARY AND RECOMMENDATION

E.53 Option 3 is recommended. This will enable the UK to comply with its obligations to implement the Directive. In addition, the benefits associated with the proposed optional provisions are expected to exceed the insignificant incremental costs. (See costs and benefits on next page)

Option	Total cost per annum	Total benefit per annum
1. Do nothing.	<p>No incremental change in costs for companies.</p> <p>£12,500 costs of infraction proceedings.</p> <p>Unquantifiable damage to the reputation of the UK government in relation to ignoring its obligations to implement the Directive.</p> <p>Potentially unlimited daily infraction fines levied by the European Court of Justice.</p>	No incremental change in benefits.
2. Implement the Directive and apply none of the optional provisions.	<p>Incremental one-off costs of £2.3m in relation to familiarisation with new prospectus rules.</p> <p>Incremental ongoing costs of £5.7m for companies required to issue approved prospectuses under the Directive which had previously produced unapproved prospectuses.</p> <p>Incremental ongoing costs of £1.85m in relation to filing annual update information.</p> <p>Insignificant incremental costs for companies required to issue approved prospectuses where no prospectus was previously required.</p>	<p>Unquantifiable incremental benefits of a new regime which encourages UK companies to raise capital across the EU.</p> <p>Reduction in costs for those companies offering securities or admitting them to trading in more than one member state. Overall benefit of Single Market in Financial Services estimated as reduction in cost of capital by 0.5%.</p> <p>Unquantifiable incremental benefits from providing UK investors with more and wider investment opportunities across the EU.</p>
3. Implement the Directive and apply the proposed optional provisions.	<p>Same incremental costs as Option 2.</p> <p>Incremental ongoing costs of up to £45,000 in relation to electronic publication of prospectuses.</p>	<p>Same incremental benefits as Option 2.</p> <p>Unquantifiable incremental benefits of providing improved access to prospectuses, especially for smaller investors.</p>

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