

# Prospectus Directive – Feedback Statement

## Introduction

1. The official text of the Prospectus Directive was published in December 2003 and implementation is required in the UK by 1 July 2005.

2. The Directive describes two broad areas where a prospectus is required; first, 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 shall meet specified disclosure standards and that all prospectuses be approved by a competent authority (the Financial Services Authority in the UK) when produced.

3. 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 significant 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 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.

4. This feedback statement relates to the proposed measures laid out in the Financial Services Authority’s and HM Treasury’s joint consultation document *‘UK Implementation of the Prospectus Directive 2003/71/EC – A consultation document’*, published in October 2004.

## Consultation

5. The consultation document set out details of the Directive’s requirements and the Treasury’s proposed implementation approach, as well as containing the draft regulations and a partial Regulatory Impact Assessment. By virtue of the maximum harmonisation nature of the Directive, there is limited scope for EU Member States to apply discretion in the way in which it is

implemented. Consequently, the questions raised related to the relatively few aspects in which the UK has implementation options under the Directive.

6. The Treasury received 17 responses in total from industry, including from law, accountancy and investment management firms, and professional and industry bodies. Those who responded are listed in Annex A. The majority of responses were broadly supportive of our proposals.

7. This feedback statement addresses the significant policy issues raised by industry.

8. The Treasury would like to thank all those who responded for their time and their valuable comments.

## Summary of Responses

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

1.1 There was an overriding consensus that the Directive's broad definition was in need of a more refined clarification and that the Treasury's proposed approach significantly reduced the potential for ambiguity. The majority of respondents agreed with the Treasury's definition of what constitutes a public offer. **The Treasury has therefore retained this clarification.**

1.2 Some concern was voiced from a number of respondents that the Treasury's intention to exclude from the definition of a public offer a communication in connection with *screen* trading was too narrow an exclusion. The clarification should instead make reference to trading on markets in general, thus giving a wider scope for interpretation.

**1.4 The Treasury has accepted this and will not include the word "screen" in the clarification of the definition of "public offer".**

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

2.1. 3 respondents were concerned that the definition might unintentionally capture parties who were presenting financial information to the public, but *not* in the context of offering securities; for example, a journalist writing for a financial publication.

2.2. Whilst the Treasury accepts that nowhere in the legislation does it specifically state that such parties are not intended to be caught within the definition, it is not convinced that its proposed definition of "public offer" would, in reality, prove problematic in such cases. **The Treasury believes that, in such circumstances, no offer of securities is being made to the public. Rather, information is simply being presented to them for illustrative or informative purposes only. The Regulations have therefore remained unchanged in this respect.**

*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?*

*Q.4. And, if not, what form of additional UK prospectus regime should apply below the 2.5 million euros threshold?*

3.1 Only 2 respondents considered this threshold inappropriate and believed that an additional sub 2.5 million Euros regime was necessary. Both favoured the continuation of a Public Offer of Securities' style regime, if only optional, as a means of regulating the sub 2.5 million Euros market.

3.2 The vast majority of respondents however regarded this threshold as an appropriate level, citing the time and cost-saving benefits, particularly for SMEs. The existence of the FSA conduct of business and the financial promotion regimes were deemed adequate existing measures for dealing with any offers below 2.5 million Euros. It was also thought that any super-equivalent UK requirements would undermine the wider EU regulations, and could even disadvantage the UK, if foreign investors were faced with more stringent rules here than elsewhere in Europe. It was generally thought that a sub 2.5 million Euros regime would serve simply to further complicate an already complex regime, with few or no resulting benefits.

3.3 The Treasury agrees that a sub 2.5 million Euros' regime would not benefit the UK market. **The Treasury will not therefore be legislating to incorporate any additional prospectus requirements for offers below 2.5 million Euros at this stage.**

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

5.1 Respondents were evenly divided on this question.

5.2 Those in favour of the Treasury's proposal to aggregate the number of offerees over a 12-month period considered it a sensible means of avoiding the potential for successive offers of

the same securities being made by an issuer to groups of 99 investors at each time.

5.3 The remaining respondents however did not share this view and put forward two convincing counter-arguments:

- such 'gold-plating' on top of a maximum harmonisation EU Directive was deemed superfluous and therefore disadvantageous for the UK; and
- the difficulties inherent in assessing the number of offerees would make such formal aggregation impractical. The true extent of the document's circulation would be difficult to ascertain, given, for example, that it might be passed on to a number of different people, all of whom may or may not choose to acquire the securities, and given also that the prospectus might be published electronically and thus accessible to an almost infinite number of people.

5.4 The Treasury recognises these disadvantages to aggregating formally the number of offerees and the obvious strength of feeling against this proposal. **The Treasury has therefore decided to abandon this proposal and instead retain the broad approach intended by the Directive.** The issue of whether successive offers of securities constitute a single offer for the purposes of this exemption will need to be determined with reference to the details of each case. It will be for the FSA to ensure that any potential for ambiguity is not abused.

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

6.1 A minority of respondents thought the approach required further clarification.

6.2 Although the majority agreed with the proposed approach, the Treasury nonetheless recognises the difficulties in attaching responsibility to the appropriate parties. **The Treasury has resolved this matter by conferring power on the FSA to make rules determining who should be responsible for prospectuses.**

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

7.1 Without exception, all those who responded to this question were in favour of the UK's adoption of a Qualified Investor regime, which would also include SMEs and natural persons. **The Treasury has therefore retained the provision for such a regime in the UK.**

7.2 The Treasury has also accepted the need voiced by certain respondents, to clarify the treatment of offers made to discretionary private client brokers for the purposes of this exemption. **The Treasury is clarifying the Regulations to ensure the maintenance of the current position whereby offers to discretionary brokers are understood to be addressed to those brokers (and not their clients) and thus are capable of being exempted from prospectus requirements under the Qualified Investor regime.** This will ensure the costs faced by smaller and medium-sized companies in raising funds are not unnecessarily raised.

7.3 The vast majority of respondents were convinced that self-certification as a Qualified Investor was the correct way to proceed. Self-certification would preserve an individual's privacy and avoid the potentially high costs associated with having to engage a professional to carry out the certification process.

7.4 Further details on this subject can be found in the FSA's consultation feedback which is due to be published on the FSA website shortly ([www.fsa.gov.uk](http://www.fsa.gov.uk)).

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

8.1 Whilst most respondents recognised in theory the benefits of an online prospectus (including easy public accessibility and cost-effectiveness), fears were nonetheless voiced that issuers might inadvertently contravene foreign security laws, as any electronic prospectus would then be internationally accessible.

8.2 The overriding concern on this issue however was for those issuers who might not have their own website and this was the source of much of the opposition to this proposal.

**8.3 The Treasury has therefore decided not to require such an obligation.** Instead, the FSA will publish all approved prospectuses on its own website; each individual issuer will not be obliged to do so as well.

8.4 Further details on this subject can be found in the FSA's consultation feedback, which is due to be published on the FSA website shortly ([www.fsa.gov.uk](http://www.fsa.gov.uk)).

*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?*

9.1 This proposal was supported by about two-thirds of those respondents who commented on it.

9.2 The remaining respondents on the other hand viewed this requirement as superfluous, particularly if the obligation to produce an electronic prospectus were to be adopted. It was pointed out that circulation of this proposed notice would only be as far-reaching as distribution of the publication that one chose to advertise in, so that this approach would not necessarily lead to a uniformity amongst issuers anyway.

**9.3 The FSA has indicated that this requirement will no longer be imposed on issuers.**

## **Annex A**

Those who responded to the Treasury's questions in the 'UK Implementation of the Prospectus Directive 2003/71/EC – A consultation document', October 2004, are listed below:

- APCIMS
- Ashurst
- Deloitte
- Freshfields Bruckhaus Deringer
- Institute of Chartered Accountants for England and Wales
- International Primary Market Association
- Investment Management Association
- KPMG
- The Law Society
- London Stock Exchange
- OFEX
- PKF
- PricewaterhouseCoopers
- Quoted Companies Alliance
- Robert Muckle Solicitors
- Slaughter and May
- Wrigleys Solicitors