CLEVELAND & CO

External in-house counsel

CONSULTATION ON AMENDMENTS TO THE EU PROSPECTUS DIRECTIVE

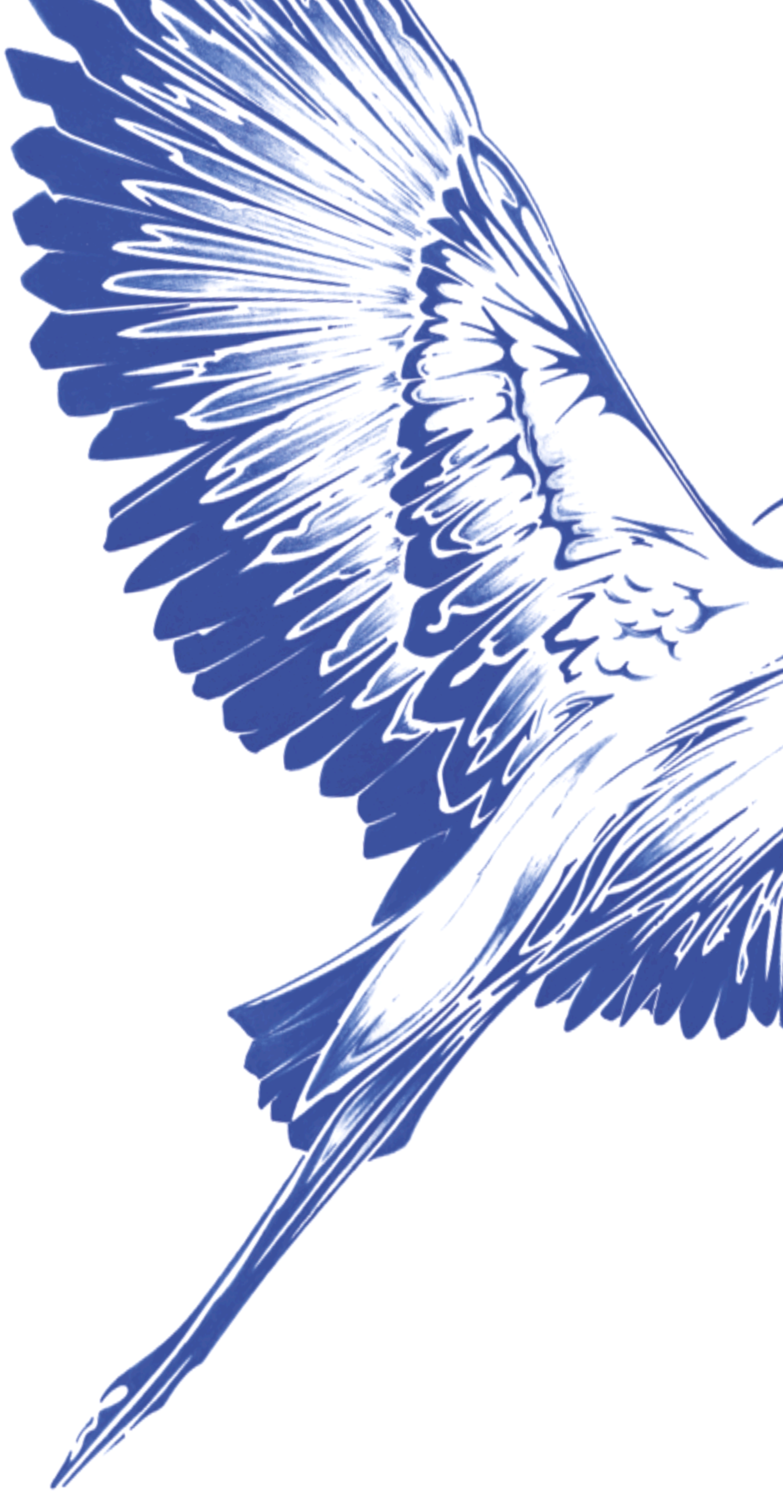
22 April 2015

On 18 February 2015, the European Commission published a consultation paper seeking responses to a number of questions concerning the effectiveness of the Prospectus Directive. The objective of the paper is to reform and reshape the current prospectus regime in order for it to better serve and facilitate capital raising with a particular focus on small and medium sized enterprises (SMEs), while having consumer and investor protection in mind.

Replies to the online questionnaire will be accepted until 13 May 2015 and can be submitted on this link.

To view the full Consultation Document with the specific questions on which responses are sought please follow this link.

Below we have provided summaries of the three key themes discussed in the consultation paper along with the particular points on which responses are sought:



Key Points	Commentary
1. WHEN A PROSPECTUS IS NEEDED	
• **Adjusting the current exemption thresholds**	The scope of the Directive is currently determined by thresholds which exempt certain types of public offers from the prospectus requirement. Given recent developments in financial markets, such as investment-based crowdfunding, these thresholds as well as the non-harmonised area of offers below EUR 5 000 000, need to be reassessed.
• **Creating an exemption for "secondary issuances" under certain conditions**	A company which already has a class of securities admitted to trading on a regulated market is known to the market through the prospectus it prepared and got approved on that occasion. Until now, a proportionate disclosure regime exists only for 'rights issues' but there is no alleviation of prospectus requirements for secondary issuances in general. The paper seeks to evaluate and amend this requirement in order to reflect the current market.
• **Extending the prospectus to admission to trading on an MTF**	Admissions to trading on MTFs are not covered by the Directive hence there is no level playing field between the different MTFs within the EU, which are currently over 150.
• **Exemption of prospectus for certain types of closed-ended alternative investment funds (AIFs)**	The multiple layers of disclosure requirements for certain types of closed-ended alternative investments funds may create overlaps in the information to be disclosed to investors.
• **Extending the exemption for employee share schemes**	A prospectus exemption is granted for securities offered by a firm to its employees (employee shares scheme, "ESS"), provided that a document is made available containing information on the number and nature of securities and the reasons for and details of the offer. However, private companies established outside the EU who wish to offer their securities to their employees in the EU as part of an ESS are still required to prepare a prospectus.

• **Balancing the favourable treatment of issuers of debt securities with a high denomination per unit, with liquidity on the debt markets**	Under the Prospectus and Transparency Directives, a system of exemption thresholds currently creates incentives for issuers to issue debt securities with a denomination per unit of above EUR 100 000. The paper asks for views on whether such a high threshold creates an incentive to only issue in larger denominations, and whether this may inhibit liquidity on the secondary market for corporate bonds.
2. THE INFORMATION A PROSPECTUS SHOULD CONTAIN	
• **Proportionate disclosure regime**	Following the previous review of the Directive, a proportionate disclosure regime was introduced for certain types of issues and issuers, however, this lighter prospectus regime does not seem to have delivered its intended effect and is not widely used in practice by issuers in most Member States. The paper asks for views on why the lighter-touch proportionate disclosure regime has rarely been used in practice and whether there should be a limit on the length of prospectuses.
• **Creating a bespoke regime for companies admitted to trading on SME growth markets**	After the creation of the "SME growth markets" status under MIFID II, It needs to be assessed whether a tailor-made prospectus regime would be beneficial for the development of these markets.
• **Making the "incorporation by reference" mechanism more flexible and assessing the need for supplements in case of parallel disclosure of inside information**	The Transparency Directive and the Market Abuse Directive 2003/6/EC oblige issuers to disclose certain types of information to the public and it needs to be assessed whether duplication in the prospectus and in the supplement respectively could be avoided. An "incorporation by reference" mechanism would allow for information that has already been published and approved or filed with the relevant authority in accordance with the Directives to be used for the purpose of a prospectus by including only a reference therein.
• **Reassessing the objectives of the prospectus summary and addressing possible overlaps with the key information document required under the packaged retail investment and insurance-based investment products ("PRIIPs") Regulation**	The purpose of a prospectus summary is to provide the key information relating to securities and their issuer in a concise manner and in non-technical language. This is for the purpose of helping investors in their investment decisions and enabling them to compare similar securities. However, the summary regime, as reformed by Directive 2010/73/EU, may not have fully achieved its objectives, of being short, simple and clear for investors to understand, and needs to be assessed in the light of the PRIIPs regulation.

• **Imposing a length limit to prospectuses**	Since the adoption of Directive 2010/73/EU a trend towards overly long prospectuses has been observed. The paper seeks views as to whether prospectuses of excessive length still suit the purpose of conveying key information to investors in order to aid their investment decisions. Currently there is only a length limit on the prospectus summary but not the entire prospectus as a whole and imposing such a limit could be considered.
• **Liability and sanctions**	There might be a need for further harmonisation between liability and sanctions regimes to create a level playing field within the EU.
3. HOW PROSPECTUSES ARE APPROVED	
• **Streamlining further the approval process of prospectuses by national competent authorities (NCAs)**	The Paper seeks views on the possibility of streamlining the prospectus approval processes for national competent authorities as they often apply differing processes due to differences in laws between Member States.
• **Extending the base prospectus facility**	The Paper seeks views as to how to make the EU base prospectus facility accessible to more issuers and more types of issuances, and on how to bring additional flexibility to it.
• **The separate approval of the registration document, the securities note and the summary note ("tripartite regime")**	The "tripartite regime" is meant for providing additional flexibility to issuers. The Paper seeks views as to how the "tripartite regime" is used in practice and what improvements could be envisaged.
• **Reviewing the determination of the home Member State for issues of non-equity securities**	Issuers of certain types of non-equity securities can currently choose which Member State should act as the home Member State and approve the prospectus. This right to choose might have led to unnecessary complexity and supervisory divergence, views are sought as to whether the current regime should be amended.
• **Moving to an all-electronic system for the filing and publication of prospectuses**	Prospectuses are currently made available to the public either in printed or electronic form, but there is no comprehensive all-electronic system. The Paper seeks views as to whether creating a single database that would operate as a unique entry point for both investors and persons producing and filing

	prospectuses across the EU Member States would be beneficial.
• **Equivalence of third-country prospectus regimes**	The current Directive doesn't incorporate a single equivalence regime for prospectuses drawn up in accordance with the legislation of third countries, this might result in hindering cross-border investment flows. The Paper seeks views on whether an equivalence regime should be developed and applied for all third countries.

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