In September 2009 the European Commission published its proposals for amending the Prospectus Directive (2003/71/EC) with the laudable aim of reducing the administrative burdens on issuers to the necessary minimum without compromising the protection of investors. As this proposed Directive is subject to the "co-decision procedure", both the Council of Ministers and the European Parliament are now in the process of reviewing it. This briefing reviews the current state of the process following the publication in December of the Council Presidency's compromise proposal and the January publication of the draft report of the Rapporteur to the Committee on Economic and Monetary Affairs of the European Parliament. The apparent intention is to agree and enact an amending Directive some time later this year.

**Prospectus Summary**
The most significant changes proposed relate to the prospectus summary. The Council proposes abolishing the current 2,500 word limit and requiring the summary to provide investors with "key information" – namely, sufficient information to enable them to understand the nature and the risks of the securities and to take investment decisions on an informed basis. But it is not clear how, if at all, this requirement would differ from the requirement for the prospectus as a whole to contain all the information necessary for investors to make an informed assessment of the issuer and the securities.

Much more seriously, the Council also proposes extending the liability for the summary. Currently liability only attaches to the summary if it is misleading when read together with the rest of the prospectus. The Council proposes adding to this the potential for liability to attach to the summary if it omits key information. When taken together with the abolition of the current 2,500 word limit it seems this could well lead to extremely detailed and extensive "summaries" which could come to resemble prospectuses in their own right. While an issuer might be quite relaxed about liability for a summary under the current regime, if this proposal were to be enacted issuers would not want to take the risk of omitting any information that could be "key information" – namely, information necessary to take investment decisions on an informed basis. It is hard to see how lengthy and detailed "summaries" would enhance the protection of investors and they would only increase the administrative burdens on issuers (and competent authorities who have to review them).

Fortunately the Rapporteur does not take the view that the extent of liability for the summary should be changed from the current position. While the Rapporteur does support abolition of the 2,500 word limit and the replacement of the summary with "key information", he leaves it until later (so-called level two measures) to decide what should constitute "key information" for these purposes. Like the Council, he is attracted by the developments relating to Packaged Retail Investment Products (PRIPs) referred to in the Commission Communication of 29 April 2009 (Memo/09/210) but instead of anticipating the outcome of the PRIPs initiative he gives the Commission some breathing space in which to come up with level two measures which might be able to take account of the results of that initiative.

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The Rapporteur’s position appears much more practical and, although the form and content of the “key information document” (KID) likely to result from the PRIPs initiative is currently only dimly visible, it is nevertheless possible to see how the current summary could be replaced by a meaningful, formulaic KID for a specific issuance of securities. However it is much more difficult to see how a meaningful KID could be produced for a base prospectus for a programme. It would seem much more sensible to retain a requirement for a separate KID in appropriate circumstances for individual issuances off the programme depending upon the nature of the particular issuance and the likely investor audience.

Rights Issues
In recent years there has been much criticism of the length of time necessary to complete a rights issue, particularly when combined with fragile market conditions, and one of the recommendations of the Rights Issue Review Group’s report published in November 2008 was that the possibility should exist to issue a short form prospectus in connection with a rights issue and in other appropriate circumstances. The Council seeks to address this by proposing that, for an offering of shares which is restricted to existing shareholders, a full prospectus is not required if the issuer’s shares are already admitted to trading on a regulated market. Instead such offerings would be subject to a “proportionate disclosure regime” – presumably some sort of mini prospectus. The Rapporteur goes even further and proposes an exemption altogether from the requirement to publish a prospectus (or any comparable document) in connection with a rights issue.

These proposals have been generally welcomed as far as they go. However they do not address either the situation where there are existing shareholders outside the EEA (for example, in the United States) or the situation where shares not taken up by existing shareholders need to be placed with other investors. Underwriters will often want the ability to place in the United States and for an offering document to meet appropriate standards for that to take place. Such considerations may lead to full prospectuses (or equivalent documents) still being required for many rights issues and therefore these proposals being of limited impact.

Prospectus Supplements
Since the introduction of the Prospectus Directive there has been some uncertainty over the period during which a new development may trigger the requirement for a prospectus supplement. In the case of a prospectus produced both for a public offer and an admission to trading, the Directive currently requires a supplement if the new development occurs before the admission to trading or the closure of the offer but does not specify whether it is the earlier or the later of these dates.

The Council proposes explicitly stating what has probably always been the more widely held interpretation, namely that the period should end on whichever is the later of these dates. However the Rapporteur takes the opposite view, namely that the period should end on whichever is the earlier of these dates. The principal difficulty with the Rapporteur’s approach is that, when an offer period extends beyond admission to trading and a new development occurs, the prospectus cannot be supplemented and so cannot be used for any further offers, even though the stated offer period is still open. In such circumstances any securities which remain to be placed must either be the subject of an entirely new prospectus (unlikely to be a practical proposition) or must be offered only pursuant to an exemption from the requirement to have published a prospectus containing all information necessary for investors to make an informed assessment of the issuer and the securities.

The Council proposal goes on to restrict the rights of investors to withdraw their acceptances to circumstances where the prospectus is published in connection with an offer to the public, which seems sensible, while the Rapporteur seeks to restrict these rights to circumstances where the supplement is triggered by “adverse developments”, which may be difficult to interpret. Both the Council and the Rapporteur propose prescribing a uniform withdrawal period of two working days, as opposed to the current member state discretion over the length of this period, but both go on to permit the issuer to specify a longer period in the supplement should it wish to.

EUR 1,000 and EUR 50,000 Thresholds
The EUR 50,000 minimum denomination threshold is used in the Prospectus Directive (and the Transparency Directive (2004/109/EC)) as a rough and ready distinction between "retail" and "wholesale" non-equity securities. In particular it is the exemption which is most widely used by issuers when making a public offer of non-equity securities if they do not want to be obliged to publish a prospectus. The Rapporteur does not propose any change to this threshold but the Council proposes raising it to EUR 100,000.

The EUR 1,000 minimum denomination threshold is also used in the Prospectus Directive to distinguish between issuers of non-equity securities. If the minimum denomination is at or above this threshold then the issuer has the ability to choose its home member state on an issue-by-issue basis but if the minimum denomination is below this threshold then the issuer has no choice, if incorporated in a member state, and a once-only choice, if not. While the Rapporteur

1 An industry group established by the UK’s Chancellor of the Exchequer to review the operation of equity capital raising, with particular reference to rights issues
proposes abolishing this threshold, so that all issuers of non-equity securities get to choose on an issue-by-issue basis, the Council proposes retaining it.

Retail Cascades
Both the Council and the Rapporteur support introducing some more clarity into the offering of securities by means of a retail cascade, namely the process by which securities end up in the hands of retail investors after passing through a number of financial intermediaries some of which may be acting in accordance with arrangements made with the issuer and some of which may not. While the Prospectus Directive provides that the prospectus published before the start of the offer period may be valid for 12 months, both the Council and the Rapporteur propose adding an express provision that offers made by anyone in a retail cascade will only benefit from the prospectus if the person responsible for the prospectus consents to its use by the offeror in such circumstances. Indeed the Council go on to require an express statement in the prospectus to that effect. Many market participants will regard this as simply confirming existing best practice for retail cascades.

Employee Share Schemes
Under the Prospectus Directive many corporate schemes to reward employees with shares constitute offers requiring the publication of a prospectus (absent an available exemption). While there is an exemption for companies which already have securities admitted to trading on a regulated market, there is often no exemption available for other companies, such as large multinational companies which do not have any securities admitted to trading on a regulated market – for example, their shares are listed on the New York or Tokyo stock exchange.

The Rapporteur proposes extending the current exemption to all employee share schemes. However, the Council proposes a much more limited extension of the current exemption: in the case of companies whose shares are admitted to trading on multilateral trading facilities (MTF), only if the MTF satisfies certain requirements relating to transparency and market abuse; and in the case of companies from outside the EEA, only if the Commission has made a determination of equivalence between the market on which the company's shares are admitted to trading and a regulated market. In these circumstances it is hard to see what incentive there would be for a member state to seek to procure a determination of equivalence from the Commission.

Validity Period
Currently a prospectus may be valid for up to 12 months after its publication. The Council proposes simply that this 12-month period should instead run from the date of approval of the prospectus. However, the Rapporteur proposes extending the validity period to 36 months for a base prospectus for a programme and to 24 months for any other prospectus. If the Rapporteur's view prevails, many programme base prospectuses which are already subject to regular supplementing may in future require considerable detective work to pick through voluminous supplements in order to arrive at the final text.

Passporting
The simple mechanism, commonly known as passporting, whereby a prospectus approved in one member state can be used in other member states without the need for any amendment or further approval is one of the main pillars of the Prospectus Directive. However, one of the flaws in the passporting mechanism is the lack of certainty over when it has been successfully completed. Both the Council and the Rapporteur propose addressing this by requiring the competent authority of the home member state to notify the applicant for the passport at the same time as it notifies the competent authority of the host member state. While this is welcome, it would seem much more satisfactory instead to require the competent authority of the host member state to notify the applicant when it has received the notification from the home member state and that the passporting has been successful.

Miscellaneous
Both the Council and the Rapporteur have the same position on a number of proposals. For example:

- the proposal to align the definition of qualified investors with that of professional clients for the purposes of Directive 2004/39/EC on markets in financial instruments (MiFID);
- the proposal to repeal Article 10 of the Prospectus Directive requiring an issuer with securities admitted to trading to file an annual information update with the competent authority of the home member state – widely seen as redundant in view of the Transparency Directive;
- the proposal relating to government guarantee schemes whereby a prospectus relating to an issue of securities guaranteed by a member state may omit information about the guarantor;
- the proposal to permit a registration document to be supplemented pursuant to Article 16 of the Prospectus Directive (although the Council proposes more flexibility by also retaining the current ability to supplement a registration document by appropriate disclosure in the securities note pursuant to Article 12(2) of the Prospectus Directive); and
the proposal to grant the Commission powers to adjust thresholds and specify detailed requirements for the form and content of the summary and, in the case of the Council, other parts of the prospectus, to take account of such things as inflation and developments in relevant markets without the need for further primary legislation.

Transitional Measures
At the moment, neither the Council nor the Rapporteur propose any transitional measures to deal with the move from the current regime to that which will prevail once the amending Directive is implemented (beyond providing that member states shall have 12 months or 18 months to implement the amending Directive). Particularly if the amending Directive requires significant changes to the form and content of summaries, it would be highly desirable to provide for some sort of transitional measure to avoid a repeat of the events of 31 July 2005. That is, the situation when the Prospectus Directive was first implemented in many member states such as the UK where every issuer which wanted to maintain the ability to issue under its programme was obliged to update its programme at the same time.