

Ancillary materials to question 13.1: calibration of exemption thresholds

Public companies are currently prevented from allocating more than €8million to retail investors when raising capital without publishing a prospectus.

The Prospectus Regulation states that the disclosure provided by a prospectus is not required for offers of securities to the public which are limited to qualified investors, i.e. institutions. The practical impact is that publicly listed companies often raise dilutive new financing directly from institutional investors in a process called an “accelerated book-build”.

This Prospectus-exempt capital raise is an efficient form of financing, being fast and cheap to execute, and with funding secured by an issuer overnight and without the requirement to prepare a full Prospectus. It is valuable for investors too, as new shares are typically offered at a discount to the prevailing secondary market share price.

Article 3(2)(b) provides a further exemption to the requirement to publish a Prospectus when the total consideration of an offer being made is less than €8million, calculated over a 12 month period. This exemption is now being used by public companies (in conjunction with the qualified investor exemption) to involve retail investors in what would otherwise be an institutional-only capital raise: in practical terms, a separate “retail tranche” is added to any fundraising up to a maximum of €8 million.

This market practice has arisen for two reasons. First, it is recognised to be good corporate governance to give retail investors the same investment opportunities as institutional investors, particularly during dilutive capital raising exercises. Second, new technologies that enable the rapid aggregation of retail demand alongside an institutional timetable are now making this operation possible without the expense and formality of an extended ‘rights-issue’ structure.

Most recently, in October 2021 French issuer [Ecoslops SA](#) utilised this capital raising technology to include retail investors in its accelerated capital raise for the first time in French history. It was followed by Global Bioenergies.

We would propose re-evaluating the €8 million threshold as it applies to public companies, conducting new market soundings on its appropriateness given relative levels of retail ownership across EU Member States. Per question 22 of the consultation, we also agree with the proposal to remove the requirement for listed issuers admitted to trading on Regulated Markets or MTFs to require a Prospectus for this form of issuance activity up to certain issuance thresholds (thereby obviating the need for issuers to use a Prospectus exemption in order to include retail investors).

Empirical evidence

This practice of including retail alongside institutional investors is most fully developed in the UK, where such issuances are typically multiple times oversubscribed vs. the €8million threshold despite the relative novelty of this investment. This €8million threshold has been imported into UK law under the UK’s European Union (Withdrawal) Act 2018, but is now being reviewed by the UK Treasury in light of empirical evidence.

Table 1: UK deal activity in June 2020 (FTSE)

In June 2020 four fundraisings were conducted for FTSE issuers (3x FTSE 100 issuers, 1x FTSE 250). In each raise retail investor subscriptions were limited by the €8m cap, and therefore significantly and disproportionately scaled back relative to institutional investors.

| Company | Total Deal Size (€m) | Retail Demand (€m) | Retail Allocation (€m) | % Scale Back |
|---------|----------------------|--------------------|------------------------|--------------|
| A | 766.2 | 25.0 | 8.0 (max) | 68% |
| B | 740.4 | 21.1 | 8.0 (max) | 62% |
| C | 252.2 | 27.0 | 8.0 (max) | 70% |
| D | 588.6 | 42.4 | 8.0 (max) | 81% |

As a point of principle, when Regulation prevents retail from participating on equal terms to institutional investors it raises important issues of fairness and equality in our public markets. The trend toward retail inclusion is clear, and the UK experience demonstrates how quickly market practice can evolve.

The UK Treasury recognises that the €8million threshold means issuers have been forced to disproportionately ‘scale-back’ retail investors relative to pro-rata entitlements and prevailing rates of stock market participation, and has proposed eliminating the requirement for listed issuers to publish a prospectus.

This is the first piece of post-Brexit legislation to emerge on the subject of the Prospectus Regulation, and will be achieved through the elimination of the “public offer prospectus requirement” contained in s85(1) FSMA as it applies to public companies. By doing this the UK Government is drawing a clear distinction between public and private companies, and the framework of regulatory protections afforded by these different statuses. Legislation to give this effect is expected in 2022.

We suggest there is an opportunity for the European Commission re-evaluate the €8 million threshold (which was set arbitrarily, having been increased from €5m), and conduct new market soundings on its appropriateness given relative levels of retail ownership across EU Member States and the volume of capital raising.¹ We support the European Commission proposal in question 22 to remove the requirement for a Prospectus for public market issuers of certain pedigree.

In the event that the EU were to adopt a similar approach to the UK, clearly distinguishing between the liquid, Regulated Markets and MTFs from illiquid private markets, it would also be important to ensure that Member States did not replace the Prospectus with supplementary disclosure requirements that might prevent a vibrant cross-border capital raising market from emerging.

¹ Austria has the highest level of direct retail ownership (23%) closely followed by Belgium and Germany, and retail participation may be particularly relevant for SMEs, where ownership data suggests that individual investors play a more significant role.