EuropeanIssuers

aisbl - ivzw
Rue Belliard 4-6
B-1040 BRUSSELS

Tel : +32 (0)2 289 25 70
Fax : +32 (0)2 512 15 60

info@europeanissuers.eu
www.europeanissuers.eu

EUROPEANISSUERS' COMMENTS ON THE PROPOSAL OF A DIRECTIVE AMENDING THE PROSPECTUS DIRECTIVE AND BACKGROUND DOCUMENT OF THE EUROPEAN COMMISSION

Position
12 March 2009

EuropeanIssuers fully support this initiative of the European Commission. Please find below our answers to the Commission's questions included in the background document.

2. Do you agree with the Commission services' preliminary assessment of the functioning of the Prospectus Directive?

We believe that the prospectus regime has facilitated the offering of securities and their admittance to trading across the European Union. However some issues need to be tackled as part of the review of the Prospectus Directive (hereinafter PD).

3.1 Do you agree with this analysis? Do you agree with the change proposed in Article 2.1 (e) of the Prospectus Directive?

We agree with the proposal of the Commission to extend the scope of the definition of "qualified investor" within the Prospectus Directive in order to encompass those natural and legal persons that request to be treated as professional clients in accordance with the definition provided in the Directive 2004/39/EC (hereinafter MiFID). EuropeanIssuers are generally in favor of the alignment of the PD with MiFID, as suggested by the ESME group in its Report.

The category of professional clients or eligible counterparties due to the new article 2(1)(e)(ii) can differ from the qualified investors set out in point (i). It is not clear whether article 2(1)(e)(ii) covers both placements of intermediaries in association with the issuer and placements without the consent of the issuer. This needs clarification and it should also be clarified, for the sake of legal certainty, who would be regarded as qualified investors, from the issuer's point of view in either case. In the first case the definition of qualified investors could diverge for the issuer and the intermediary as it is not clear if the issuer can refer to the category of qualified investors the intermediary has defined.

Following the new definition of "credit institution" referring to Directive 2006/48/EC in paragraph (ii) there should be either an adjustment in article 2(1)(g) that is still referring to

2000/12/EC or a clarification that the reference to Directive 2006/48/EC is only valid for article 2 (1) (e) (ii) of the PD.

3.2 Do you agree with this analysis? Do you agree with the change proposed in Article 3.2 of the Prospectus Directive?

As observed by the ESME group the so called "retail cascade" raised many problems.

Article 3(2) of the PD provides an exemption of the obligation to publish a prospectus for certain types of offers. However a prospectus would still be required for the subsequent placement of securities through financial intermediaries if the latter placement doesn't fall within any of the exempted categories. The consultation document mentions the uncertainty caused by this, since the resale of securities is beyond the issuer's control. For this reason we agree with the proposed deletion of the final sentence of article 3(2) of the PD[1].

However we are unsure that this deletion is sufficient to meet the pursued objective of clarifying the responsibilities of drafting and supplementing a prospectus. We believe that the next to last sentence of article 3(2), if maintained, would leave a doubt concerning the regime that would be applicable in case of subsequent resale, as it could still be regarded as an offer of securities to the public.

Therefore it should be clarified that as the further resale of the securities to retail investors through financial intermediaries is beyond the issuer's control, the issuer should not draw up a prospectus and should not be sanctioned for not doing so. Also, in case the issuer has drawn up a prospectus for its offer, any future offer made by intermediaries cannot be made on the basis of such prospectus if this is not agreed by the issuer. The prospectus can for example have become outdated in the meantime.

Finally, we agree with the statement of the Commission saying that CESR's solution is not satisfactory in the long run. We find unrealistic to expect intermediaries that do not act in association with the issuer, to draw up and update their own prospectus.

3.3 Do you agree with this analysis? Do you agree with the change proposed in Article 4 (1) (e) of the Prospectus Directive?

We fully support the change proposed to article 4(1)(e) resulting in the extension of the exemptions of article 4 to all employee share schemes.

3.4 Do you agree with this analysis? Do you agree with the removal of Article 10 of the Prospectus Directive?

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[1] This problem has been also tackled by the "Study on the impact of the Prospectus Regime on UE Financial markets, June 2008, p. 63 which suggested a clarification of the issue.

The Directive 2004/109/EC (hereinafter the Transparency Directive) established the disclosure of periodic and ongoing information about issuers whose securities are admitted to trading on a regulated market as well as the publication of information according to the Directive 2003/6/EC (hereinafter MAD). Hence, the Transparency Directive already covers the subject matter of article 10. Therefore EuropeanIssuers strongly support the deletion of article 10 of the PD, as proposed by the ESME Report[2].

3.5.1 Do you agree with this analysis?

a) Article 16(1) of the PD provides that "Every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities […]" shall be mentioned in a supplement to the prospectus. This article has been implemented in different ways in the different Member States. We believe that the PD should be more concrete when defining what kind of events trigger the obligation to publish a supplement as it is not clear what the requirement to disclose "every significant new factor" means.

   In addition, the relevance of the facts can vary depending on the type of securities concerned, namely, equity securities or debt securities. While a change in the management of the issuer might be able to affect the stock price, the assessment of debt securities of the same issuer is dependent on other factors. The company-related risk factors that have to be taken into account for the investment decision concerning debt securities will rather be the probability of punctual interest payments and re-payment of the principal, i.e. the issuer's insolvency risk. So, factors that are not relevant for equity securities are not necessarily relevant for debt securities and vice-versa.

b) It should also be clarified that supplements are only required if the "significant new factors" can "negatively" affect the assessment of the securities.

c) In addition, supplements should only be required, following the publication of a first prospectus, in the case that the offer has not been closed or pending the start of trading on a regulated market.

d) In our view, the approval of the supplement by the competent authority should be removed. The competent authority only checks the formal coherency and comprehensibility of the supplement. The need for and benefit from an approval of the supplement in order for the assessment of the investment to be evaluated by investors (Recital 34 of the PD) is not clear to us. This bureaucratic procedure leads

[2] This topic was also underlined by CSES, "Study on the impact of the Prospectus Regime on UE Financial markets",June 2008, p. 50

to a loss of time which is an important factor for issuers when offering securities. The delay of the disclosure of the new information is even in contradiction with investor protection. We believe that it is in the interest of the investors to receive new material information as soon as it becomes available, without having to wait for the competent authorities' formal examination.

e) Finally, supplements to registration documents should be possible in all Member States. Article 12 allows prospectuses that consist of separate documents, comprising a registration document, securities note and summary note. Some competent authorities do not permit updating or supplementing the registration document under article 12(2). In the Member States concerned, the issuer can only update an already approved registration document by including the relevant information in the securities note even if this is information would normally be provided in the registration document, i.e. new information relating to the issuer, article 5(3), 12(2). In our view, it would be more comprehensible for investors to find new information relating to the issuer in the registration document. So, a more consistent shelf registration regime like in the USA could be considered. The shelf registration regime allows a single registration document to be filed with the U.S. Securities and Exchange Commission that permits the issuance of multiple securities. Any filing with the SEC of a "20F" (Annual Report / consolidated financial statements) or of a "6 K" (interim financial statements or ad hoc/insider publications) is directly and automatically valid as a disclosure both for the issuer's equity listing and the debt listing/registration.

3.5.2 Do you agree with this analysis? Do you agree with the change proposed in Article 16.2 of the Prospectus Directive?

a) The Commission proposes to change article 16(2) of the PD in order to harmonise the time frame for investors to withdraw their acceptance after the supplement is published. The amendment 5 of the Commission's proposal establishes a common period of *at least* two working days after the publication of the supplement for investors to withdraw their acceptances.

   We support the objective to address the concerns raised with respect to cross border offers where it is not clear which Member State's time frame should be applied.

   However the proposed amendment does not clarify of which Member State the time frame should apply, nor does it change the already established minimum period. Thus, the current proposal would not suffice to reduce the diversity of time frames within the European Union and achieve the greater harmonisation desired. Therefore we suggest to establish a concrete time frame and to replace article 16(2) of the PD as follows:

"*Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right to withdraw their acceptances within two working days."*

Finally, we suggest clarifying in the PD to which Member State or market the notion of working days refers to, for instance, the regulated market where the investor expressed his investment decision. For instance, the computation of the working days may defer from a regulated market to another.

b) The right to withdraw in article 16 (2) should be reconsidered as we believe that the current provision might create a very unbalanced situation.
(1) Investors who have already agreed to purchase or subscribe for securities before the supplement, are granted the right to withdraw their acceptances even if the new factors had indeed no negative effect or were known to them already. This, of course, is at the very expense and risk of the issuers. For instance, in the case that an inside information has been published, investors can subscribe in this period of time knowing about the new factors and can withdraw when the corresponding supplement is published seven days after, at no risk.

Issuers issuing debt securities will stop launching the offer immediately when a new factor occurs due to the additional risks provided in article 16. Thus, the possible consequences of article 16 may deter issuers from taking advantage of good near-term market conditions. The delays provided in article 16 increase the risk of a stop of the offer in general which is neither in the issuer's nor in the investor's interest.

(2) If there is an IPO with an offering period of, e.g., two weeks, the right to withdraw in the rather unlikely event of the publication of a supplement within this period of time is reasonable as investor protection and the interests of the issuer are in balance.
However some offers might have a much longer availability period, i.e. ongoing offers. As the ESME group has already stated for certain types of securities, the "final closing of the offer" could even be the maturity of the security. So, if there is an ongoing offer over several months it would be possible to buy e.g. debt securities in January and withdraw after a supplement published in June. In this case the investors' and the issuer's interests are unbalanced because of the legal uncertainty this creates for the issuer. Therefore, for ongoing offers, the withdrawal right should exist only for those subscriptions taken place less than "x" working days before the publication of the supplement (the "x" working days being determined for instance by the settlement cycle, i.e. transfer of cash and securities). For ongoing offers the deadline would mark one's "personal" end of an offer from which point on the investment would be considered as being part of the secondary market.

3.6 Do you agree with this analysis? Do you agree with the change proposed in Article 2(1) (m) (ii) of the Prospectus Directive?

According to the ESME Report and to the Study of CSES the threshold seems to be causing many problems to issuers.

Considering the harmonization of powers and procedures for the approval of the prospectus set forth by the PD, the proposal of the Commission is positive as it broadens the scope of the provision to a wider group of issues.

In this context we would like to stress how important it is to have a level playing field among Member States as regards the control of the prospectus.

4.1 Do you agree with this analysis? Do you have any suggestions in this regard?

The problem of the length of the prospectus has been deeply analyzed by the ESME Group which underlined that, according to an internal survey of 31 IPOs carried out between January and June 2007 in two Member States, the average length of the prospectus exceeds 300 pages. It is doubtful whether such lengthy prospectuses are beneficial from an investors' protection point of view. Therefore we would recommend that an assessment be done whether, based on market practices, all information required by the Prospectus Regime is really needed for information or investor protection reasons.

We support the aim to deliver in the summary note of the prospectus an understandable and useful representation of the issuer's and the products' main features for investors.

We believe that the list of items provided in the PD has not proved efficient to achieve that objective and has left the door open for a diversity of requests from competent authorities and therefore for differing practices.

Hence, we recommend that the Commission addresses the issue and reflects on appropriate measures (for instance, at least level 3 guidance) to structure and to describe the essential characteristics associated with the issuer, any guarantor and the securities to be offered to the public or to be admitted to trading on a regulated market. In order to avoid misrepresentations in the summary note and unnecessary/lengthy duplications between the summary note of the prospectus and the prospectus, cross-references to the prospectus should be allowed in the summary note for certain items, in particular risk factors, corporate governance and transactions with shareholders.

The problem of excessive length concerns also the prospectus for rights issues (see response to question 4.5).

4.3 Do you agree with this analysis? Do you support any of the two alternative solutions mentioned? Do you have any other suggestion?

The costs of requiring a prospectus complying with the various relevant EU Directives can be justified in the context of raising large sums of money from the public. Many of these costs are fixed costs and even on a small deal can often exceed €500,000, which as a percentage of the funds raised cannot be justified for modest capital raisings. One size does not fit all. The EU needs not only to ensure that large companies can raise capital but it also must ensure smaller companies have access to capital at an appropriate cost. If a company is raising less than let's say for instance €10m, the costs of having to produce a prospectus (compliant with EU law) could be difficult to justify. We therefore believe the existing level of €2.5m is too low and should be raised in a significant manner.

4.4 Do you agree with this analysis?

EuropeanIssuers strongly agree with this exemption that would save time and costs when drawing up a prospectus.

4.5 Do you agree with this analysis? Do you have any other suggestion?

The problem of the excessive length of prospectuses also exists for rights issues. We agree that there should be an exemption to the publication of the prospectus or of a summary note on rights issues for all issuers already admitted to trading, provided that a company is raising money from its existing shareholders only, with no right for the latter to sell the rights attached to their shares. In this situation the burden on issuers is not justified by any benefits in terms of investor protection. In this case investors are already shareholders and therefore have full access to information about the company (periodic and ongoing information and/or registration document).

This is also in line with the position expressed in the ESME Report.

4.6 Do you agree with this analysis?

We agree with the Commission. No legislative amendment is needed for the definition of offer of securities to the public but guidance from the Commission and from CESR level 3 should be provided.

4.7 Do you agree with this analysis?

We agree with the Commission analysis suggesting that a maximum harmonization of the liability regimes is a broad issue that is deeply embedded in national civil law tradition and cannot be tackled in an isolated manner in the Prospectus Directive.

4.8 Do you agree with this analysis?

We agree with the Commission that the topic of the equal treatment of shareholders is already dealt with by other Directives.

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Other issues for the Commission's attention

We would also like to express our considerations about other issues, as asked by the Commission in the background document (p. 1).

1) Concerning the approval of the prospectus (article 13 (2) of the PD), the different implementation in Member States leaves discretion to competent authorities and causes divergent practices within the European Union. In many cases this situation could extend the timetable and raise costs for issuers.

The amendments we are proposing below provide for clearly determined time lines, in order to avoid uncertainty, ensure the timely and successful issuance of securities and reduce costs.

- *Uncertainty regarding the approval of the prospectus: analysis of the current provision and proposed introduction of a tacit approval by the competent authority*

Currently, according to article 13 (2) of the PD, the competent authority may notify the issuer within 10 working days of the submission of the application. If the competent Authority fails to give a decision within the time limit this is not deemed to constitute approval of the prospectus: this creates uncertainty on the approval of the prospectus.
Consequently article 13 (2) of the PD should be amended to specify that the prospectus is deemed approved in case of silence by the competent authority[3].
The same principle should be applied for the approval after the documents have been corrected or supplementary information has been provided.

- *Definition of more precise conditions as regards requests for supplementary information by competent authorities*

In many cases the delay of publication of the prospectus is due to the fact that competent authorities go beyond the "scrutiny of the completeness of the prospectus including the consistency of the information given and its comprehensibility"[4] or require supplementary information.

We understand that competent authorities may find, on reasonable grounds, that the documents are incomplete or that supplementary information is needed (see article 13 (4) of

[3] In the proposal of the PD, the competent authority had to communicate the approval to the issuer (see 2001/0117 COD).

[4] See also "Study on the impact of the Prospectus Regime on UE Financial markets", June 2008 which states clearly that "some interviewees in Italy suggested that the regulatory authority there regularly exceeded the maximum time limits. Indeed, a Consob consultation document published in December 2007 fixes the maximum time within which the regulator decides on a prospectus application at between 60 and 90 days, which could pose a problem to Italian issuers", p. 36.

the PD). However, we believe that this procedure should only be exercised under well-defined conditions, in particular the following:

- The request of the competent authority should be addressed in writing, indicating the reasons, to the issuer, the offeror or the person asking for admission to trading on a regulated market within 10 working days of the submission of the draft prospectus.
- A further request should be possible only once and only if related to the supplementary information provided. Furthermore this further request should not stop the running of the period of 10 days.

Moreover, it is not clear whether article 13 (4) second indent of the PD applies to the situation of "incomplete documents" only or also to the need for "supplementary information". As the provision is drafted now, it could be interpreted as if no timeline is set forth for the latter situation. This is the reason why we would suggest the amendment of art. 13, par. 4, second indent as follows (amendments are marked in bold): "In the case referred to in paragraph 2 the competent authority should notify the issuer if the documents are incomplete **or that supplementary information is needed** within 10 working days of the submission of the application.

2) Uncertainty about the notification

A tacit confirmation should also be introduced in the notification procedure of article 18. If an issuer wants to make use of the European Passport it has to request the home member state authority to provide the host member state authority with a certificate of approval attesting that the prospectus has been drawn up in accordance with the PD. The notification period is three working days. Some home member state and host member state authorities do not give any confirmation to the issuer of the notification. Therefore, it would be very helpful to clarify that after the expiry of this period the issuer can start offering the securities in the host member state.

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