

PART I

1

General provisions of Community law relating to the prospectus to be published when securities are offered to the public or admitted to trading

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I Introduction

1 European passport

1. In a single market, it should be sufficient to have a prospectus for securities offered to the public or admitted to trading approved by a single authority, even if the offering encompasses several Member States of the European Union (EU). This is what Directive 2003/71 of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the 'Prospectus Directive' or 'Dir. '),¹ amending Directive 2001/34, seeks to achieve by granting a European passport to prospectuses approved in a Member State under legislation implementing the Prospectus Directive. The other Member States must accept such prospectuses and cannot impose additional formalities (other than a requirement to notify the prospectus in accordance with the Prospectus Directive and to translate the summary into their official language). In this respect, the requirements for preparation, approval and distribution of prospectuses have been harmonised (Art. 1(1) Dir.). As explained below, under no. 8 of this report, these rules only apply to offerings having a total value of at least €2,500,000. For smaller public offerings, there is no obligation for the Member States to harmonise their rules in keeping with the Prospectus Directive. This limitation does not apply to the admission of securities to trading on a regulated market, however.

Furthermore, the Prospectus Directive intends to eliminate differences in the methods and timetables used to verify information in the various Member States, so as to better enable investors throughout the EU to assimilate information about securities in order to make wise investment decisions. The Prospectus Directive furthermore aims to ensure investor protection and guarantee market efficiency in accordance with the high regulatory standards used in the international markets.²

Finally, the Prospectus Directive defines the content, format and publication of the prospectus to be made available in the event of a public offering of securities or admission to trading on a regulated market.

The basic rule is that an offer to the public of transferable securities requires a prospectus containing sufficient information to fully inform investors about the securities offered and allow them to make an informed assessment of the associated risks.³ Prior to publication, the prospectus must be approved by the competent authority supervising the offering and admission to trading of securities in that Member State. In this way, the prospectus, together with the applicable rules on the conduct of the

¹ *Official Journal* L 345 of 31 December 2003; see Annex I to this book.

² Tenth recital to the Prospectus Directive.

³ Nineteenth recital to the Prospectus Directive.

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business, will increase investor confidence and contribute to the proper functioning and development of the securities markets.⁴

The Prospectus Directive has been drafted with the following principles in mind:⁵ (1) the introduction of enhanced disclosure standards in keeping with international standards for the public offering and admission to trading of securities; (2) the introduction of a document registration system in order to ensure that key information about the issuer is updated annually; (3) the possibility to offer or admit securities to trading on the basis of a prospectus approved in the home country; (4) the concentration of responsibility in the hands of the home-country authority; and (5) exclusive use of the comitology procedure, which entailed involving Member State representatives in preparing the implementing measures. This procedure was organised in consultation with the Committee of European Securities Regulators (CESR), which issued its recommendations for possible amendments to the Prospectus Regulation (see no. 4 of this report).⁶

2 Brief history

2. The first proposal for a directive on the prospectus to be published for a public offering or admission to trading of securities dates back to 30 May 2001.⁷ At that time, the European Commission expressed its desire to introduce a single passport for the publication of prospectuses for the offering of securities in the EU. This initiative formed part of a broader plan to create a single market for financial services.⁸ In order to facilitate access to investment capital throughout the European Union, the question of a single European passport for issuers was thus raised at the March 2000 European Council meeting in Lisbon.⁹

The European Central Bank (ECB) supported the Commission's initiative by a favourable opinion of 16 November 2001.¹⁰ The Economic and Social Committee rendered its opinion on 17 January 2002.¹¹ The

⁴ Eighteenth recital to the Prospectus Directive.

⁵ See Initial Legislative Document (COD/2001/0117) of 30 May 2001.

⁶ Initial Report of the Committee of Wise Men on the Regulation of European Securities Markets of 9 November 2000, p. 25; Final Report of the Committee of Wise Men on the Regulation of European Securities Markets of 15 February 2001, 94, 104; Annex 5 to both reports sets forth the comitology procedure.

⁷ *Official Journal* C 240 of 28 August 2001.

⁸ This project was made a priority at the European Council meeting in Cardiff on 15 and 16 June 1998 (see no. 24 of the Presidency Conclusions) and was further developed in the Financial Services Action Plan (Commission Communication of 11 May 1999), '[i]mplementing the framework for financial markets' (COM(1999) 232 final; www.europa.eu).

⁹ No. 21 of the Presidency Conclusions of the European Council meeting in Lisbon of 23 and 24 March 2000. ¹⁰ *Official Journal* C 344 of 6 December 2001.

¹¹ *Ibid.*, C 80 of 3 April 2002.

European Parliament proposed sixty-five amendments, which resulted in an Amended Proposal for a Directive of the European Parliament and the European Council of 9 August 2002.¹² Agreement on a new proposal with some changes was obtained in the European Council on 5 November 2002. Further negotiations resulted in Common Position No 25/2003, adopted by the European Council on 24 March 2003.¹³ In a second reading, the European Parliament voted on twenty-one new amendments on 2 July 2003, all of which were accepted by the European Commission. This allowed the final text of the Prospectus Directive to be adopted smoothly.

3 Legal framework and modifications

3. The Prospectus Directive amends Directive 2001/34 of 28 May 2001 on the admission of securities to official stock exchange listings and on information to be published on those securities¹⁴ to the extent the latter also regulated the information to be made available upon admission to trading on a regulated market. Moreover, the provisions of Directive 2001/34 on the publication of listing particulars for admission to trading have been deleted (Art. 27 Dir.); however, this directive continues to regulate the conditions for admission to trading on a regulated market and the publication of information and other obligations following admission to trading.

The Prospectus Directive furthermore repeals Directive 89/298 of 17 April 1989 coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public.¹⁵ Any references to the Directive of 17 April 1989 in other legislative documents should henceforth be construed to refer to the Prospectus Directive (Art. 28 Dir.).

The Prospectus Directive and Directive 2001/34 of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, should be read together as creating a single system. The Prospectus Directive deals with the information that must be published when securities are admitted to trading on a regulated market and when a public offering is made, while Directive 2001/34 of 28 May 2001 regulates the information that must be made available when securities are listed on an official stock exchange. The provisions relating to publication of information in the latter directive have been replaced by Directive 2004/109 of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are

¹² *Ibid.*, C 20 of 28 January 2003. ¹³ *Ibid.*, C 125 of 27 May 2003.

¹⁴ *Ibid.*, L 184 of 6 July 2001.

¹⁵ *Ibid.*, L 124 of 5 May 1989. This directive created an incomplete and complex mechanism of mutual recognition which did not achieve the objective of a single European passport (first recital to the Prospectus Directive).

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admitted to trading on a regulated market.¹⁶ The deadline for transposition of Directive 2004/109 by the Member States was 20 January 2007.

4. The Prospectus Directive is complemented by Commission Regulation 809/2004 of 29 April 2004 (the ‘Prospectus Regulation’) implementing the Prospectus Directive as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (the ‘Prospectus Regulation’ or ‘Reg.’).¹⁷ The Prospectus Regulation defines the minimum information that must be included in the prospectus and related documents. Guidance in applying the Prospectus Regulation can be found in the CESR’s recommendations for consistent implementation of the Prospectus Regulation and in the answers contained in the document ‘Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members’,¹⁸ and the summary records of the Informal Meetings of the delegates of the competent authorities of the Member States which met with the Commission. Two summary records are available on the Internet: (1) the Summary record of the 3rd Informal Meeting of 26 January 2005 on Prospectus Transposition (hereafter, ‘Summary record of the 3rd Informal Meeting of 26 January 2005’); and, (2) the Summary record of the 4th Informal Meeting of 8 March 2005 on Prospectus Transposition (hereafter, ‘Summary record of the 4th Informal Meeting of 8 March 2005’).¹⁹

This legislative technique is in accordance with the Committee of Wise Men’s Final Report on the Regulation of European Securities Markets of 15 February 2001 (the ‘Lamfalussy-approach’), which proposes legislation on four levels: framework principles, implementing measures, cooperation and enforcement.²⁰ Level 1 should be limited to defining broad framework principles to be set forth in a directive. Level 2 focuses on the technical implementing measures to be adopted by the Commission, assisted by a committee of experts, in the form of a regulation. The Commission should be able to change these measures easily in order to ensure that they reflect supervisory and market developments.²¹ Level 3 is focused on ensuring better cooperation amongst the competent authorities (see no. 80 of this

¹⁶ *Ibid.*, L 390 of 31 December 2004. This directive repeals Title IV of Directive 2001/34 (‘Ongoing obligations relating to securities admitted to official listing’).

¹⁷ Published for the first time in *Official Journal* L 149 of 30 April 2004, with an amended version in *Official Journal* L 215 of 16 June 2004; see Annex II to this book. The Prospectus Regulation has been amended twice, by Regulation 1787/2006 of 4 December 2006 (*Official Journal* L 337 of 5 December 2006) and Regulation 211/2007 of 27 February 2007 (*Official Journal* L 61 of 28 February 2007).

¹⁸ Dated 18 July 2006, available at www.cesr.eu.

¹⁹ These summary records can be consulted on internet (www.europa.eu.int/comm/internal_market). ²⁰ Sixth recital to the Prospectus Directive.

²¹ Ninth recital to the Prospectus Directive.

report). At level 4, enforcement is realised by ensuring that the competent authorities wield minimal identical broad powers (see no. 76 of this report). More generally, the forty-seventh recital to the Prospectus Directive announces the establishment of a European Securities Unit to ensure the uniform approval of prospectuses, thus further enhancing the harmonised application of Community law.

In general, the Commission is empowered under the Prospectus Directive to adopt implementing measures concerning the definitions used in the Prospectus Directive in order to take into account technical developments on the financial markets and to ensure uniform application of the Prospectus Directive (Art. 2(4) Dir.).

These implementing measures must be prepared in accordance with Council Decision 1999/468 of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (Art. 24(2) Dir.).²² In doing so, the Commission must take into account Community legislation and recommendations, economic developments, and disclosure measures relating to the registration of qualified individual investors (Art. 2(4) Dir.). It may not modify the essential provisions of the Prospectus Directive (Art. 24(2) Dir.).

In preparing these implementing measures, the Commission will be assisted by the European Securities Committee (ESC), established by a Commission decision of 6 June 2001.²³

The forty-first recital to the Prospectus Directive sets forth the principles which the Commission must observe in preparing a regulation containing technical provisions implementing the framework set forth in the Prospectus Directive. These principles are the following:

- the need to ensure confidence in financial markets amongst small investors and small and medium-sized enterprises (SMEs) by promoting high standards of transparency in the financial markets;
- the need to provide investors with a wide range of competing investment opportunities and a level of disclosure and protection tailored to their circumstances;
- the need to ensure that independent regulatory authorities enforce the rules consistently, especially as regards the fight against white-collar crime;
- the need for a high level of transparency and consultation with all market participants and with the European Parliament and the Council;
- the need to encourage innovation in the financial markets if they are to be dynamic and efficient;

²² *Official Journal* L 184 of 17 July 1999.

²³ *Ibid.*, L 191 of 13 July 2001. This is in accordance with the comitology procedure explained above (see no. 1).

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- the need to ensure systemic stability of the financial system by close and reactive monitoring of financial innovation;
- the importance of reducing the cost of, and increasing access to, capital;
- the need to balance, on a long-term basis, the costs and benefits to market participants (including SMEs and small investors) of any implementing measures;
- the need to foster the international competitiveness of the Community's financial markets without prejudice to a much-needed extension of international cooperation;
- the need to achieve a level playing field for all market participants by establishing Community legislation every time it is appropriate;
- the need to respect differences in national financial markets where these do not unduly impinge on the coherence of the single market;
- the need to ensure coherence with other Community legislation in this area, as imbalances in information and a lack of transparency may jeopardise the operation of the markets and above all harm consumers and small investors.

These principles are reflected in the Prospectus Regulation. If the wording of the Prospectus Regulation is not clear, it should be interpreted in accordance with the above principles.

II Application

5. The deadline for transposition of the Prospectus Directive into national law by the Member States was 1 July 2005 (Art. 29 Dir.). Prospectuses approved before such date do not require a new approval under the Prospectus Directive. In the event of public offers, under an ongoing offering programme approved before such date, constituting separate offers, the prospectus will require approval in accordance with the Prospectus Directive.²⁴

Most Member States were late in enacting implementing legislation, but all, meanwhile, implemented the Prospectus Directive. On 1 January 2007, Romania and Bulgaria acceded to the EU. Consequently, the Prospectus Directive and the Prospectus Regulation also apply in those countries with immediate effect.

The Prospectus Regulation applies as from 1 July 2005. As it has direct effect, the Prospectus Regulation applies without further action on the part of the Member States.

The Prospectus Directive and the Prospectus Regulation are also applicable in the member states of the European Economic Area (EEA), i.e. Norway, Iceland and Liechtenstein.²⁵ Therefore, any references in

²⁴ Summary record of the 4th Informal Meeting of 8 March 2005, p. 5.

²⁵ Further to the Decision of 8 June 2004 of the EEA Joint Committee, amending Annex IX to the EEA Agreement (*Official Journal*, 25 November 2004).

this report to the European Union or its Member States should be construed to include these three countries as well, unless specified otherwise.

III Scope

1 General remarks

6. The Prospectus Directive applies to prospectuses for the public offering of securities or for the admission of securities to trading on a regulated market in the European Economic Area. Takeover bids with a price paid partly or entirely in securities (as defined below) must also comply with the provisions of the Prospectus Directive unless they are governed by the rules implementing the Directive of 21 April 2004 on takeover bids²⁶ and such rules are considered equivalent by the competent authority to those set forth in the Prospectus Directive (see no. 13 of this report). In any event, the Prospectus Directive does not apply to a takeover bid if the price is paid in cash regardless of whether the bid complies with the Directive of 21 April 2004, since no securities are offered to the public.

The prospectus obligation and the other obligations contained in the Prospectus Directive apply only to transferable securities. Non-transferable securities are not covered by the Prospectus Directive.²⁷ Transferable securities are defined as those which are negotiable on the capital markets, with the exception of payment instruments.²⁸ The following securities are considered negotiable on the capital markets: shares in companies and other securities equivalent to company shares; interests in partnerships or other entities; depositary receipts in respect of shares, bonds or other forms of securitised debt (including depositary receipts in respect of such securities); and any other securities giving the right to acquire or sell any transferable security or giving rise to a cash settlement determined with reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures,²⁹ including

²⁶ *Official Journal* L 142 of 30 April 2004.

²⁷ Such as non-transferable options granted to employees (see the answer to Question 3 of 'Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members', 18 July 2006, available at www.cesr.eu).

²⁸ Art. 4(1)(18) of Directive 2004/39 of 21 April 2004 on markets in financial instruments (*Official Journal* L 145 of 30 April 2004). Article 1(a) of the Prospectus Directive refers to Article 1(4) of the Council Directive of 10 May 1993 on investment services in the securities field (*Official Journal* L 141 of 11 June 1993) as last amended by Directive 2000/64 of 7 November 2000 (*Official Journal* L 290 of 17 November 2000). However, this directive has since been repealed by Article 69 of Directive 2004/39 of 21 April 2004, effective 1 May 2006. Any references to the repealed directive should thus be construed to refer to the equivalent terms as defined in the Directive of 21 April 2004. The deadline for transposition of the Directive into national law was 1 May 2006 (Art. 70 of the Directive of 21 April 2004). ²⁹ *Ibid.*