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## **4<sup>th</sup> Informal Meeting on Prospectus Transposition – 8 March 2005**

### **Summary record**

#### **1. Introduction**

The agenda was adopted. No comments were received on the working arrangements.

#### **2. State of play of transposition**

The Commission invited the Member States to send any comments they may have regarding the state of play of transposition of the Prospectus Directive ('PD') and, in particular, for the purpose of the table drawn up by the Commission following the last transposition meeting.

#### **3. Questions raised by delegations**

The Commission emphasised to MS that all legal interpretations given in the meeting are the informal opinion of the services of the Internal Market Directorate-General and do not bind the Commission as an institution. Only the ECJ is competent to interpret the EC law.

##### Article 1(2)(h)

The group discussed how the twelve-month period mentioned in the exclusion in Article 1(2)(h) is to be calculated. In general, the twelve-month period should be calculated from the opening of the offer and, in the case of an offering program, from the beginning to the end of the program. However, this does not prevent a competent authority ('CA') from assessing retrospectively whether a series of offers each having a total consideration of less than €2,500,000 should properly be regarded as a single offer (with a total consideration of more than that sum) requiring a prospectus.

The Article 1(2)(h) exclusion applies separately to offers of different kinds securities within a 12 month period. Accordingly, if in the same 12 month period an issuer offers shares with a total consideration of €2,000,000 and debt with a total consideration of €2,000,000, both offers would fall within the exclusion because they must be considered separately. An issuer or offeror is not required to aggregate the total consideration of different types of securities offered for the purposes of this provision.

The Commission emphasised that in a case where securities fall within a provision of Article 1(2), they are excluded from the scope of the Directive (“the Directive shall not apply”), and thus the disclosure requirements (if any) where those securities are offered to the public or admitted to trading on a regulated market will be subject to national regulation only.

#### Article 2(1)(d)

The group discussed whether it constitutes an offer of securities to the public, within the meaning of the Directive, where a custodian bank informs shareholders in one Member State about pre-emption rights in relation to a public offer of new shares taking place in another Member State (which would almost certainly trigger the obligation to publish a prospectus in this latter Member State). The Commission did not take a definite view on this question but indicated that it might issue further guidance after having consulted its Legal Service. However, the Commission recognised that the Directive should not operate as an instrument to limit cross-border share ownership, or effectively to restrict shareholders’ ability to exercise pre-emption rights; but noted that where a prospectus is published in connection with an offer of securities in one Member State, it may be used to offer those securities in any other Member State (subject only to a translation of the summary if that is required by the CA of the host State).

#### Article 2(3)

The register of natural persons and SMEs considered as qualified investors mentioned in Article 2(3) must be available at least to all issuers; but Member States may grant access more widely (including to investment firms) if they choose to do so, provided that this is consistent with the law on data protection.

The Directive also leaves it to the discretion of Member States as to how the register is made available to issuers. However, the Commission took the view the natural meaning of ‘to make available’ implies access to the information on the register, and does not include a verification process whereby, in response to inquiries about the status of particular individuals or SMEs, the CA informs an issuer whether or not that specified person is on the register.

#### Article 3(2)

It was discussed whether, and how, Member States will actively monitor whether issuers taking advantage of the exemptions in Article 3(2) are doing so correctly. Some Member States indicated that they will monitor the use of exemptions *ex post*, some focussing in particular on cases where the CA has previously denied approval for a prospectus in relation to the same securities.

In response to a request for clarification about the provision in Article 3(2) concerning the subsequent resale of securities previously offered in accordance with an exemption under that Article, the Commission recalled that each occasion on which such securities were offered for resale should be treated as a new offer of those securities, and analysed against the relevant provisions of the directive to determine whether it constitutes an offer of securities to the public which requires the publication of a prospectus. It is a matter of regulatory supervision to prevent the misuse of the exemption: for example, where an offer of securities is made to fewer than 100 persons in a Member State, some or all of whom subsequently resell the securities to fewer than 100 persons, and so on, CAs may look behind the series of sales to determine whether it should properly be

regarded as an artificial device aimed at circumventing the obligation to draw up a prospectus.

#### Article 4

The group discussed how the exemptions in Article 4(1) and (2) should be transposed. The Commission recalled that there is no passport for the documents which must be made available as a condition for the exemptions in paragraphs (1)(b), (c), (d), (e) and (2)(c), (d), (e) and (f); and that the availability of the exemptions in Article 4(1) and (2) should be considered on a territorial basis. It is up to Member States to decide how to implement the exemptions; for example, whether the determination of whether a document contains information which is regarded by the CA as equivalent to that of a prospectus is done on a case by case basis, or by means of regulations / guidelines issued by the CA defining in advance what information the CA regards as equivalent for a particular purpose.

The Commission noted that the PD does not specify how the exemptions should be applied and monitored, and that accordingly there is scope for flexible transposition. However, in cases where the PD refers to information “*which is regarded by the CA as being equivalent*”, the CA is required to take a view, whether on a case by case basis or by means of a more general abstract assessment. It would not be consistent with the PD for Member States to specify in their legislation what information is regarded as being equivalent. This has to be determined by the CA.

The exemptions in Article 4(1) and (2) are expressed as exemptions from the obligation to *publish* a prospectus. For the avoidance of doubt, issuers are not obliged to draft a prospectus and to file it with the CA if there is no obligation to publish it by virtue of an exemption under this Article.

#### Article 4(1)(c) and 4(2)(d)

Paragraphs (1)(c) and (2)(d) of Article 4 confer an exemption from the obligation to publish a prospectus where securities are offered in connection with a merger (provided the specified conditions are met). The group discussed whether the meaning of merger shall also cover de-mergers and other similar business transactions. The Commission considers that there is scope for flexibility in this particular issue. It invited Member States to consult national experts on company law on this issue. Where company law requires the provision of the same information in the case of a de-merger that is required in the case of a merger, then that would suggest that the two kinds of transaction should be treated in the same way for this purpose.

#### Articles 4(1)(d) and 4(2)(e)

Cases where the issuer gives its shareholders an option to reinvest dividends in the form of shares instead of receiving cash would fall under the exemptions in Article 4(1)(d) and 4(2)(e).

#### Articles 4(1)(e) and 4(2)(f)

The meaning of paragraph (1)(e) as compared with the meaning of paragraph 2(f) was discussed again (see summary note 3<sup>rd</sup> meeting). The Commission reiterated that the current wording of Article 4(1)(e) appears to be a drafting mistake. There is no obvious reason why the two parallel exemptions should be subject to different conditions. It

would be logical if both exemptions were construed as subject to similar conditions, and the drafting of Article 4(2)(f) – which requires that the securities in question are of the same class as securities which are already admitted to trading – makes better sense in terms of investor protection. The Commission therefore invited Member States to take a purposive and practical approach to the transposition of Article 4(1)(e). However, Member States are entitled to transpose Article 4(1)(e) literally if they choose to do so.

For the purposes of these exemptions, where the securities are offered or allotted to employees through the device of a trustee who holds the securities on trust for the employees, it would be consistent with the objectives of the exemption to treat the securities as issued to the employees if that is the effect of the trust.

#### Article 5(4)

The final sub-paragraph of Article 5(4) stipulates that final terms, if not included in the base prospectus or a supplement, must be “filed with the competent authority”. In this context, “filed” has the same meaning as it has elsewhere in the PD (e.g. in relation to the ‘filing’ of a prospectus). The final terms are part of the prospectus, and should be treated in the same way. This means that the CA should not only register but should also check the information received. However, the Directive does not require a formal approval of the final terms by the CA.

#### Article 6(1)

At least one of the persons mentioned in Article 6(1) must be responsible for the whole prospectus, notwithstanding that there might be different persons might be responsible separately for particular parts of the prospectus.

#### Article 8(1)

Article 8(1) stipulates conditions, set out in sub-paragraphs (a) and (b), which must be met where the final offer price and the amount to securities to be offered cannot be included in a prospectus. Those conditions also apply if one of these items of information (either the final price or amount) is included, but the other is not.

Sub-paragraphs (a) and (b) of Article 8(1) are alternative provisions (“or”). If, in a case which falls within Article 8(1), the information described in sub-paragraph (a) is included in the prospectus, then sub-paragraph (b) does not apply (and vice versa).

If neither the final offer price and amount of securities nor the information described in paragraph 8(1)(a) are included in the prospectus, then paragraph 8(1)(b) applies. In such a case, this should be indicated in the prospectus (by, for example, stating that a person who accepts the offer has the right specified in that sub-paragraph).

#### Article 10

If an issuer has more than one home Member State (for the purpose of different kinds of securities, in accordance with Article 2(1)(m)), the document referred to in Article 10(1) must be filed with the CA of each of State which is the home Member State of the issuer for the purposes of a security which is admitted to trading.

#### Article 14(3) and Articles 31 and 33 of Regulation 809/2004

Article 33 of the Regulation 809/2004, concerning the method of publication of the final terms of a base prospectus, cross-refers regarding to the methods indicated in Article 14 of the PD. This should be read as a reference to Article 14(2) only, as no more than this paragraph deals with publication methods.

Article 14(3) PD does not prevent Member States from requiring the publication of a notice stating how the final terms, where published separately and in a different manner from the base prospectus (in accordance with Article 33 of the Regulation) have been made available.

In exercising the discretion conferred by Article 14(3) PD, Member States are entitled to distinguish between different types of securities (for example by requiring the publication of a notice under that paragraph in respect of some but not all).

#### Transitional regime – prospectuses approved before 1 July 2005

The Commission reiterated that every public offer and admission to trading which takes place after the 1 July 2005 must have a prospectus which has been drawn up and approved in accordance with the regime of the PD.

The Commission recalled that the PD does not oblige issuers to draw up a new prospectus for a public offer which has been made before 1 July 2005 on the basis of an old prospectus where the offer period extends beyond that date. The group discussed how this principle applies to offering programmes: the Commission did not state a definite view on that and saw scope for Member States to implement a transitional regime for ongoing offering programmes. The application will depend on whether the offering programme should properly be regarded as a series of distinct offers or a single continuous offer, and the CA is best placed to make this assessment on a case by case basis. If an offering programme constitutes a series of separate offers, the issuer would need to draw up a new prospectus for the offers under the programme taking place after the 1 July 2005.

If a CA approves a prospectus that complies fully with the directive and the disclosure requirements set out in the Prospectus Regulation before the transposition deadline for the PD, such a prospectus could in principle be valid under the new prospectus regime and have full passport rights from 1 July 2005. The approval of prospectuses before the 1 July 2005 is a matter of domestic law; therefore it has to be decided under national law whether it is legally possible to approve a prospectus prospectively before the 1 July 2005 in anticipation of the new PD regime and, in particular, of the application of the Regulation from 1<sup>st</sup> July.

There is no requirement to transpose the PD earlier than 1 July 2005. However, the Commission recalled that Member States are free to transpose the PD earlier than that date, and EC law does not prohibit Member States from approving prospectuses before that date which comply with the disclosure requirements of the Regulation. However, prospectuses approved before that date would not have passport rights during the transposition period, and the 809/2004 Regulation does not apply before 1 July 2005.

The Commission noted that a prospectus approved prior to the transposition of the Directive can be incorporated by reference into a new prospectus approved after 1 July 2005 if the requirements of Article 11(1) are met.

### Articles 30(1) and interaction with Article 2(1)(m)(iii)

[A summary of the Commission's views on Article 30(1) will be made available in due course.]

### Transposition of Annexes of the PD

The Annexes to this Directive are not binding: there is nothing in the substantive provisions of the PD which provides that they are binding. (This is in contrast with other EC instruments where it is stated that Annexes have binding effect.)

Rather, Article 7(3) of the PD states that the Annexes are "indicative". This means that they are not exhaustive and do not set out comprehensive rules. Rather, they contain lists of the minimum categories of information which must be included in a prospectus or a component document of a prospectus. In the case of the registration document and the securities note, the Prospectus Regulation makes definitive provision as to what information must be included in those documents for various kinds of securities.

However, the Regulation does not make provision relating to the summary note. The principal provision dealing with the contents of a summary note is article 5(2) of the PD, which provides that the summary must 'convey the essential characteristics and risks associated with the issuer, any guarantor and the securities'. Annex IV indicates that the summary must set out the most important items which are included in the prospectus, and 'at least' the items of information which are listed in the Annex. This is not a comprehensive or exhaustive list: the summary note might contain items which are not mentioned in that list in Annex IV if those items should be included in the summary in accordance with article 5(2).

Member States may transpose the Annexes in national law provided that their indicative status is maintained. Any such transposition should not affect in any way the application of the Prospectus Regulation.

In particular, if Member States choose to transpose Annex IV into national rules, the national rules should reflect its 'indicative' status, and the fact that it is not a comprehensive list. Member States should not reduce or extend the indicative list. The important consideration to bear in mind is that the summary note is a summary of the most important items of information in the prospectus. So the actual contents of the summary note will vary from case to case. Annex IV indicates the categories of information which, as a minimum, will convey those essential characteristics etc. Any expansion of the list might be inconsistent with the objective of Article 5(2), which is to ensure that the summary 'summarises' the 'essential' information relating to the issuer and securities in question.

### Non transposition after 1 July 2005 and passport rights

The Commission recalled the settled jurisprudence of the ECJ that any Directive can have direct effect as of the end of the transposition deadline if certain requirements are met. Passport right will be not limited because of a lack of fulfilment of that deadline. If a member State is late in transposition, it would nonetheless have to accept a prospectus approved by another Member State for public offers or admissions to trading after 1 July 2005. The Commission reminded Member States that, under that ECJ jurisprudence, they run the risk of being held liable in damages for loss to persons caused by non transposition of the PD.

**Next meeting/further working arrangements**

The Group did not see a need to organise a further transposition workshop on the PD. The Commission invited Member States to send any additional questions or comments they may have by e-mail; they will be answered bilaterally.