



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 4 November 2009

15096/09

**EF 155
ECOFIN 674
DRS 65
CODEC 1244**

NOTE

from:	Presidency
to:	Delegations
Subject:	Proposal for a Directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market - Presidency compromise

Delegations will find attached a Presidency compromise on the above Commission proposal, following the meeting of 26 October.

With respect to the Commission's proposal, additions are underlined and deletions indicated as "(...)".

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 44 and 95 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Economic and Social Committee²,

Having regard to the opinion of the European Central Bank³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty⁴,

Whereas:

¹ OJ C , , p. .

² OJ C , , p. .

³ OJ C , , p. .

⁴ OJ C , , p. .

- (1) The European Council agreed, at its meeting on 8 and 9 March 2007, that administrative burdens on companies should be reduced by 25% by the year 2012 in order to enhance the competitiveness of companies in the Community.
- (2) Directive 2003/71/EC 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 and amending Directive 2001/34/EC¹ has been identified by the Commission as one piece of legislation that contains a number obligations for companies, some of which seem burdensome.
- (3) Those obligations need to be reviewed in order to reduce the burdens weighing on companies within the Community to the necessary minimum without compromising the protection of investors and the proper functioning of the securities markets in the Community.
- (4) Directive 2003/71/EC requires the Commission to make an assessment of the application of that Directive five years after the date of entry into force and to present, where appropriate, proposals for its review. That assessment has revealed that certain elements of Directive 2003/71/EC should be modified in order to simplify and improve its application, increase its efficiency and enhance the international competitiveness of the Community, contributing to the reduction of administrative burdens.
- (5) The way limits of maximum offering amounts are calculated in the Directive 2003/71/EC should be clarified for reasons of certainty and efficiency. The total consideration for certain offers referred to in that Directive should be computed on a Community wide basis.

¹ OJ L 345, 31.12.2003, p. 64.

- (6) For the purposes of private placements of securities, investment firms and credit institutions should be entitled to treat as qualified investors those natural or legal persons that are considered to be or that they treat as professional clients, or that are recognized eligible counterparties in accordance with Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC¹. An alignment of the relevant provisions of Directives 2003/71/EC and 2004/39/EC in this sense would reduce complexity and costs for investment firms in the event of private placements because the firms would be able to define the persons to whom the placement is to be addressed relying on their own list of professional clients and eligible counterparties. Therefore, the definition of qualified investors in Directive 2003/71/EC should be widened to include those persons **and a separate regime for registers should no longer be maintained.**
- (7) **(...) The threshold of EUR 50 000 in Article 3(2)(c) and (d) does no longer reflect the distinction between retail investors and professional investors in terms of investor capacity, since it appears that even retail investors have made investments of more than EUR 50 000 in one single transaction. For this reason, it is appropriate to increase the said threshold.**

¹ OJ L 145, 30.4.2004, p. 1.

- (8) A valid prospectus, drawn up by the issuer or the offeror and available to the public at the time of the final placement of securities through financial intermediaries or in any subsequent resale of securities, provides sufficient information for investors to make informed investment decisions. Therefore, financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer or the offer or as long as this is valid and duly supplemented in accordance with Article 9 and Article 16 of Directive 2003/71/EC and the issuer or the (...) **person** responsible for drawing up such prospectus consents to its use. **The consent should be explicitly stated in the initial prospectus, enabling investors to assess whether the resale or final placement of securities complies with the prospectus.** In this case no other prospectus should be required **and the issuer or the person responsible for drawing up the initial prospectus should be liable for the information stated therein.** However, in case the issuer or the (...) **person** responsible for drawing up such initial prospectus does not consent to its use, the financial intermediary should be required to publish a new prospectus. **In that case, the financial intermediary should be liable for the information in the prospectus, including all information incorporated by reference.**
- (9) The requirement to produce a prospectus for offers made in the context of an employee share scheme is not an effective means of informing employees about the risks and benefits of that very particular kind of offer, and imposes excessive costs on employers that are not justified in terms of investor protection. **This exemption should therefore be extended to (...) companies listed in markets (...) in third countries, provided that the Commission has taken a decision to the end that the regulatory and supervisory requirements regulating the markets in the third country concerned are equivalent to those of the Community.**

- (10) The summary of the prospectus is a key source of information for retail investors. It should be short, simple and easy for targeted investors to understand. It should focus on the key information that investors need in order to be able to make informed investment decisions. **Such key information should inter alia convey the essential characteristics of, and risks associated with, the issuer, any guarantor, and the securities offered or admitted to trading on a regulated market.** Its content should not be restricted to any predetermined number of words. The format and content of the summary should be determined in a way that **(...) allows** comparability with **(...) similar** investment products **(...)**. Therefore, Member States should attach civil liability on the basis of the summary **(...) if it does not provide key information,** is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus **(...)**.
- (10a) **It is appropriate to clarify that final terms to a base prospectus should only contain securities note information which is specific to the issue. Such information might for instance include ISIN, issue price, maturity, coupon, exercise date, exercise price and redemption price. Other new information which is capable of affecting the assessment of the issuer and the securities, such as market terminology, market definitions or new risk factors should in general be included in a supplement to the prospectus. Furthermore, in order to provide key information under a base prospectus, issuers may combine the summary with relevant parts of final terms. Final terms should not be subject to a separate approval.**
- (11) In order to improve the efficiency of **(...) pre-emptive issues of equity securities** and to adequately take into account the size of issuers, **(...)** a proportionate disclosure regime should be introduced for **(...) offers of shares limited to existing shareholders** and offers **(...) by** issuers with reduced market capitalization, i.e. small companies **whose shares are admitted to trading on a regulated market,** and offers of non-equity securities referred to in Article 1(2)(j) of Directive 2003/71/EC, **issued by credit institutions (...).** **If such credit institutions issue securities below the limit laid down in that Article, but choose to opt in under the regime of the Directive and, consequently, draw up a prospectus, they should be entitled to benefit from the proportionate disclosure regime.**

- (12) Member States publish abundant information on their financial situation which is in general available in the public domain. Therefore, in case a Member State in the Community **unconditionally and irrevocably** guarantees an offer of securities, the issuer should not be obliged to provide in the prospectus information about that Member State acting as guarantor.
- (13) **(...) In order to improve legal certainty, the validity of a prospectus should commence at its approval, a point in time which is easily verified by the competent authority. Furthermore, in order to enhance flexibility for issuers, they should have the option to update the registration document also in accordance with the normal procedure to supplement prospectuses.**
- (14) As a consequence of the entry into force of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC¹, the obligation in Directive 2003/71/EC for the issuer to provide annually a document containing or referring to all information published in the twelve months preceding the issuance of the prospectus has become a dual obligation and should therefore be abolished. As a consequence, a registration document, instead of being updated in accordance with Article 10, should be **(...) updated by means of a supplement or the securities note.**

(14a) Internet ensures easy access to information. Therefore, in order to ensure better accessibility for investors, the prospectus should always be published on the issuer's website.

¹ OJ L 390, 31.12.2004, p. 38.

- (15) In order to (...) **improve legal certainty it should be clarified when** the requirement to publish a supplement to the prospectus **and the right of withdrawal** ends(...). **It is prudent to look at these provisions separately.** The obligation to supplement a prospectus should be terminated at the final closing of the offering period or the time when trading of such securities on a regulated market begins, whichever occurs (...) **later. On the other hand, the right to withdraw an acceptance should only be applicable if the prospectus relates to an offer of securities to the public and the new factor, mistake or inaccuracy did arise before the final closing of the offer and the delivery of the securities.**
- (16) When the prospectus is supplemented, harmonization at Community level of the time frame for the exercise by investors of the right of withdrawal of their previous acceptances would provide certainty to issuers making cross border offers of securities. To provide flexibility to issuers from Member States with traditionally longer time frame in this regard, the issuer **or** the offeror (...) should be able to extend voluntarily the term for the exercise of that right.
- (17) The authority responsible for the approval of the prospectus should also notify the issuer or the person responsible for drawing up the prospectus of the certificate of approval of the prospectus that is addressed to the authorities of host Member States in accordance with Directive 2003/71/EC in order to provide the issuer or the person responsible for drawing up the prospectus with certainty as to whether and when a notification has actually been effected.
- (18) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission¹.

¹ OJ L 184, 17.7.1999, p. 23.

- (19) In particular, in order to take account of the technical developments in the financial markets and to ensure uniform application of Directive 2003/71/EC, the Commission should be empowered to adopt implementing measures to update the limits established in that Directive, **as well as the definitions. In this context, it may be particularly important to adjust the figures used for the definition of SMEs, the elements to be included in the key information and the thresholds for reduced market capitalization. The Commission should also be empowered to adopt implementing measures concerning the detailed content and format of the prospectus and base prospectus, the final terms, the summary and supplements.** As far as the summary is concerned, it is necessary to take into account the on-going development following the Commission's White Paper on Packaged Retail Investment Products of 30 April 2009. Since **all** those **implementing** measures are of general scope and are designed to amend non-essential elements of Directive 2003/71/EC by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (20) Since the objectives of this Directive, namely reducing administrative burdens relating to the publication of a prospectus in the case of offers of securities to the public and admission to trading in regulated markets within the Community, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (21) Directive 2003/71/EC and Directive 2004/109 should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1
Amendments to Directive 2003/71/EC

Directive 2003/71/EC is amended as follows:

1. Article 1 is amended as follows:

(a) Paragraph 2 is amended as follows:

(i) Point (h) is replaced by the following:

"(h) securities included in an offer where the total consideration of the offer in the Community is less than EUR 2 500 000, which limit shall be calculated over a period of 12 months;"

(ii) Point (j) is replaced by the following:

"(j) non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer in the Community is less than EUR 50 000 000, which limit shall be calculated over a period of 12 months, provided that these securities:

(i) are not subordinated, convertible or exchangeable;

(ii) do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument."

(b) The following paragraph 4 is added:

"4. In order to take account of technical developments on financial markets, including inflation, and to ensure uniform application of this Directive, the Commission shall adopt implementing measures concerning the adjustment of the limits referred to in points (h) and (j) of Article 1(2). Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC."

2. Article 2(1) is amended as follows:

(a) Point (e) is (...) **replaced by the following**:

(...)

"(e) 'Qualified investors' means persons or entities that are considered to be or treated on request as professional clients in accordance with Annex II to Directive 2004/39/EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC. **Investment firms authorised to continue considering existing professional clients as such in accordance with Article 71(6) of Directive 2004/39/EC shall be authorised to treat those clients as qualified investors under this Directive.**"

(...)

(b) Point (s) is inserted:

"(s) 'key information' means essential and appropriately structured information which is to be provided to investors with a view to enable them to understand the nature and the risks of the securities that are being offered to them or admitted to trading on a regulated market and, consequently, to take investment decisions on an informed basis and to compare such securities with other investment products. Where applicable in light of the offer and securities concerned, the key information shall include the following elements:

- (i) essential characteristics and risks associated with the issuer, any guarantor and the securities offered or admitted to trading on a regulated market;
- (ii) reasons for the offer and use of proceeds;
- (iii) general terms of the offer and associated costs;
- (iv) appropriate guidance on and warnings of the risks associated with an investment in the relevant security."

(c) Point (t) is inserted:

"(t) 'company with reduced market capitalization' means a company listed on a regulated market and having had an average market capitalization of less than EUR 200 000 000 on the basis of end-year quotes during the last three calendar years."

2a. Article 2(2) is replaced by the following:

"2. In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall, in accordance with the procedure set out in Article 24(2), adopt implementing measures concerning the definitions referred to in paragraph 1, including adjustment of the figures used for the definition of SMEs, the elements to be included in the key information and the thresholds for reduced market capitalization, taking into account Community legislation and recommendations as well as economic developments."

2b. Articles 2(3) and 2(4) are deleted.

3. Article 3 is amended as follows:

(a) In the first subparagraph of paragraph 2, points (c)–(e) are replaced by the following:

"(c) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 100 000 per investor, for each separate offer; and/or

(d) an offer of securities whose denomination per unit amounts to at least EUR 100 000; and/or

(e) an offer of securities with a total consideration in the Community of less than EUR 100 000, which limit shall be calculated over a period of 12 months."

(b) In paragraph 2, the following subparagraph is added:

"Member States shall not require another prospectus in any such subsequent resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available in accordance with Article 9 and the issuer or the person responsible for drawing up such prospectus consents to its use as explicitly stated in the prospectus."

4. In Article 4(1), point (e) is replaced by the following:

"(e) securities offered, allotted or to be allotted to existing or former directors or employees by their employer which has securities already admitted to trading on a regulated market or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer. This point shall apply also to a third country market provided that the **Commission** has adopted an equivalence decision in accordance with the procedure referred to in Article 24(2), stating that the legal and supervisory framework of **a third country ensures that a market authorised in that third country complies with legally binding requirements which are equivalent to the requirements resulting from Title III of Directive 2004/39/EC, from Directive 2003/6/EC and Directive 2004/109/EC,** and which are subject to effective supervision and enforcement in that third country.

A third-country legal and supervisory framework may be considered equivalent if that framework fulfils at least the following conditions:

(i) markets in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis;

(ii) markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable;

(iii) security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and

(iv) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation."

5. In Article 5(2), the first subparagraph is replaced by the following:

"The prospectus shall contain information concerning the issuer and the securities to be offered to the public or to be admitted to trading on a regulated market. It shall also include a summary. The summary shall, in a brief manner and in non-technical language, (...) **provide key information** in the language in which the prospectus was originally drawn up. (...) **The summary shall be drawn up in a common format, allowing for comparison with other relevant investment products.** The summary shall also contain a warning that:"

5a. In Article 5(4), the last subparagraph is replaced by the following:

"Where the final terms of the offer are neither included in the base prospectus, nor in a supplement, the final terms shall be made available to investors prior to the start of a public offer. The final terms shall only contain information that relates to the securities note and shall not be used to supplement the base prospectus. The provisions of Article 8(1)(a) shall apply in these cases. The final terms shall be filed with the competent authority of the home Member State and communicated by the issuer to the competent authority of the Member State(s) where the public offer is made.

The provisions in Articles 5(2) and 6(2) shall apply to the summary and relevant parts of the final terms taken together."

5b. Article 5(5) is replaced by the following:

"5. In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall, in accordance with the procedure referred to in Article 24(2), adopt implementing measures concerning the format of the prospectus or base prospectus, the summary, **final terms** and supplements."

6. In Article 6(2), the second subparagraph is replaced by the following:

"However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it **does not provide key information, or** is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus (...)."

7. Article 7(2) is amended as follows:

(a) Point (e) is replaced by the following:

"(e) the various activities and size of the issuer, in particular credit institutions issuing non-equity-securities referred to in Article 1(2)(j) (...), companies with reduced market capitalization and SMEs. For such companies the information shall be adapted to their size and, where appropriate, to their shorter track record;"

(b) Point (g) is inserted:

"(g) a proportionate disclosure regime shall apply to (...)**offers of equity securities by (...)** companies whose shares **of the same class** are admitted to trading on a regulated market, **provided that the offer is restricted to existing shareholders.**"

8. In Article 8, the following paragraph 3a is inserted after paragraph 3:

"3a. If securities are **unconditionally and irrevocably** guaranteed by a Member State, an issuer, an offeror or a person asking for the admission to trading on a regulated market, when drawing up a prospectus in accordance with Article 1.3, shall be entitled to omit information about such guarantors."

9. Article 9 **(...) is amended as follows:**

(a) Paragraph 1 (...) is replaced by the following:

"1. A prospectus shall be valid for **(...) 12** months after its **(...) approval** for offers to the public or admissions to trading on a regulated market, provided that the prospectus is completed by any supplements required pursuant to Article 16.**(...)**"

(b) Paragraph 4 is replaced by the following:

"4. A registration document, as referred to in Article 5(3), previously filed and approved, shall be valid for a period of up to **(...) 12** months **(...)**. The registration document, **updated** if necessary in accordance with Article **12(2)** or 16, accompanied by the securities note and the summary note shall be considered to constitute a valid prospectus."

10. Article 10 is deleted.

11. Article 11(1) is replaced by the following:

"1. Member States shall allow information to be incorporated in the prospectus by reference to one or more previously or simultaneously published documents that have been approved by the competent authority of the home Member State or filed with it in accordance with this Directive or Directive 2004/109/EC. This information shall be the latest available to the issuer. The summary shall not incorporate information by reference."

12. Article 12(2) is replaced by the following:

"2. In this case, the (...) securities note shall provide information that would normally be provided in the registration document, if there has been a material change or recent development which could affect investors' assessments since the latest updated registration document, unless such information is provided in a supplement in accordance with Article 16. The securities and summary notes shall be subject to a separate approval."

13. Article 14(2) last subparagraph is replaced by the following:

"Member States shall require issuers which publish their prospectus in accordance with (a) or (b) to also publish their prospectus electronically in accordance with (c)."

(...)

14. Article 16 is replaced by the following:

*"Article 16
Supplements to the prospectus*

1. 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 and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs (...) later, shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way in a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary to take into account the new information included in the supplement.

2. If the prospectus relates to an offer of securities to the public, investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within two working days after the publication of the supplement, to withdraw their acceptances, provided that the new factor, mistake or inaccuracy referred to in paragraph 1 did arise before the final closing of the offer to the public and the delivery of the securities. This period may be extended by the issuer or the offeror (...). The final date of the right of withdrawal shall be stated in the supplement.

15. Article 18(1) is replaced by the following:

"1. The competent authority of the home Member State shall, at the request of the issuer or the person responsible for drawing up the prospectus and within three working days following that request or, if the request is submitted together with the draft prospectus, within one working day after the approval of the prospectus notify the competent authority of the host Member State with a certificate of approval attesting that the prospectus has been drawn up in accordance with this Directive and with a copy of the said prospectus. If applicable, this notification shall be accompanied by a translation of the summary produced under the responsibility of the issuer or person responsible for drawing up the prospectus. The same procedure shall be followed for any supplement to the prospectus. The issuer or the person responsible for drawing up the prospectus shall also be notified of the certificate of approval at the same time as the competent authority of the host Member State."

Article 2

Amendment of Directive 2004/109/EC

In Article 2(1)(i) of Directive 2004/109/EC, point (i) is replaced by the following:

"(i) in the case of an issuer of debt securities the denomination per unit of which is less than EUR 1 000 or an issuer of shares:

— where the issuer is incorporated in the Community, the Member State in which it has its registered office;

— where the issuer is incorporated in a third country, the Member State referred to in point (iii) of Article 2(1)(m) of Directive 2003/71/EC.

The definition of 'home' Member State shall be applicable to debt securities in a currency other than Euro, provided that the value of such denomination per unit is, at the date of the issue, less than EUR 1 000, unless it is nearly equivalent to EUR 1 000;"

Article 3
Transposition

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*twelve months after the entry into force of this Directive*] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

- 2 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3a
Review

Three years after the entry into force of this Directive, the Commission shall make an assessment of the application of this Directive, in particular with regard to the application and the effects of the rules regarding the summary and the proportionate disclosure regime referred to in Article 7(2)(e) and (g), and submit a report to the European Parliament and the Council of the European Union.

Article 4
Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 5
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President