

COMMON POSITION (EC) No 25/2003

adopted by the Council on 24 March 2003

with a view to adopting Directive 2003/.../EC of the Parliament and of the Council of ... on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC

(2003/C 125 E/02)

(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 Commission ⁽¹⁾,

Having regard to the Opinion of the European Economic and Social Committee ⁽²⁾,

Having regard to the Opinion of the European Central Bank ⁽³⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽⁴⁾,

Whereas:

(1) Council Directives 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing ⁽⁵⁾ and 89/298/EEC 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 ⁽⁶⁾ were adopted several years ago introducing a partial and complex mutual recognition mechanism which is unable to achieve the objective of the single passport provided for by this Directive. Those Directives should be upgraded, updated and grouped together into a single text.

(2) Meanwhile, Directive 80/390/EEC was integrated into Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of

securities to official stock exchange listing and on information to be published on those securities ⁽⁷⁾, which codifies several Directives in the field of listed securities.

(3) For reasons of consistency, however, it is appropriate to regroup the provisions of Directive 2001/34/EC which stem from Directive 80/390/EEC together with Directive 89/298/EEC and to amend Directive 2001/34/EC accordingly.

(4) This Directive constitutes an instrument essential to the achievement of the internal market as set out in timetable form in the Commission Communications 'Risk Capital Action Plan' and 'Implementing the framework for financial market: Action Plan' facilitating the widest possible access to investment capital on a Community-wide basis, including for small and medium sized enterprises (SMEs) and start-ups, by granting a single passport to the issuer.

(5) On 17 July 2000, the Council set up the Committee of Wise Men on the regulation of European securities markets. In its initial report of 9 November 2000 the Committee stresses the lack of an agreed definition of public offer of securities, with the result that the same operation is regarded as a private placement in some Member States and not in others; the current system discourages firms from raising capital on a Community-wide basis and therefore from having real access to a large, liquid and integrated financial market.

(6) In its final report of 15 February 2001 the Committee of Wise Men proposed the introduction of new legislative techniques based on a four-level approach, namely framework principles, implementing measures, cooperation and enforcement. Level 1, the Directive, should confine itself to broad general 'framework' principles while Level 2 should contain technical implementing measures to be adopted by the Commission with the assistance of a committee.

(7) The Stockholm European Council of 23-24 March 2001 endorsed the final report of the Committee of Wise Men and the proposed four-level approach to make the regulatory process for Community securities legislation more efficient and transparent.

⁽¹⁾ OJ C 240 E, 28.8.2001, p. 272 and OJ C 20 E, 28.1.2003, p. 122.

⁽²⁾ OJ C 80, 3.4.2002, p. 52.

⁽³⁾ OJ C 344, 6.12.2001, p. 4.

⁽⁴⁾ Opinion of the European Parliament of 14 March 2002 (not yet published in the Official Journal), Council Common Position of 24 March 2003 and Decision of the European Parliament of ...

⁽⁵⁾ OJ L 100, 17.4.1980, p. 1. Directive as last amended by Directive of the European Parliament and of the Council 94/18/EC (OJ L 135, 31.5.1994, p. 1).

⁽⁶⁾ OJ L 124, 5.5.1989, p. 8.

⁽⁷⁾ OJ L 184, 6.7.2001, p. 1.

- (8) The resolution of the European Parliament of 5 February 2002 on the implementation of financial services legislation also endorsed the Committee of Wise Men's final report, on the basis of the solemn declaration made before Parliament the same day by the Commission and the letter of 2 October 2001 addressed by the Internal Market Commissioner to the chairman of Parliament's Committee on Economic and Monetary Affairs with regard to the safeguards for the European Parliament's role in this process.
- (9) According to the Stockholm European Council, Level 2 implementing measures should be used more frequently to ensure that technical provisions can be kept up to date with market and supervisory developments and deadlines should be set for all stages of Level 2.
- (10) The aim of this Directive and its implementing measures is to ensure investor protection and market efficiency, in accordance with high regulatory standards adopted in the relevant international fora.
- (11) Non-equity securities issued by a Member State or by one of a Member State's regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States are not covered by this Directive and thus remain unaffected by this Directive; the abovementioned issuers of such securities may, however, if they so choose, draw up a prospectus in accordance with this Directive.
- (12) Full coverage of equity and non-equity securities offered to the public or admitted to trading on regulated markets as defined by Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field⁽¹⁾, and not only securities which have been admitted to the official lists of stock exchanges, is also needed to ensure investor protection. The wide definition of securities in this Directive, which includes warrants and covered warrants and certificates, is only valid for this Directive and consequently in no way affects the various definitions of financial instruments used in national legislation for other purposes, such as taxation. Some of the securities defined in this Directive entitle the holder to acquire transferable securities or to receive a cash amount through a cash settlement determined by reference to other instruments, notably transferable securities, currencies, interest rates or yields, commodities or other indices or measures. Depositary receipts and convertible notes, e.g. securities convertible at the option of the investor, fall within the definition of non-equity securities set out in this Directive.
- (13) The grant to the issuer of a single passport, valid throughout the Community, and the application of the country of origin principle require the identification of the home Member State as the one best placed to regulate the issuer for the purposes of this Directive.
- (14) One of the objectives of this Directive is to protect investors. It is therefore appropriate to take account of the different requirements for protection of the various categories of investors and their level of expertise. Disclosure provided by the prospectus is not required for offers limited to qualified investors. In contrast, any resale to the public or public trading through admission to trading on a regulated market requires the publication of a prospectus.
- (15) Issuers, offerors or persons asking for the admission to trading on a regulated market of securities which are exempted from the obligation to publish a prospectus will benefit from the single passport if they comply with this Directive.
- (16) The provision of full information concerning securities and issuers of those securities promotes, together with rules on the conduct of business, the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make this information available is to publish a prospectus.
- (17) Investment in securities, like any other form of investment, involves risk. Safeguards for the protection of the interests of actual and potential investors are required in all Member States in order to enable them to make an informed assessment of such risks and thus to take investment decisions in full knowledge of the facts.
- (18) Such information, which needs to be sufficient and as objective as possible as regards the financial circumstances of the issuer and the rights attaching to the securities, should be provided in an easily analysable and comprehensible form. Harmonisation of the information contained in the prospectus should provide equivalent investor protection at Community level.
- (19) Information is a key factor in investor protection; a summary conveying the essential characteristics of, and risks associated with, the issuer, any guarantor and the securities should be included in the prospectus. To ensure easy access to this information, the summary should be written in non-technical language and normally should not exceed 2 500 words in the language in which the prospectus was originally drawn up.

⁽¹⁾ OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27).

- (20) Best practices have been adopted at international level in order to allow cross-border offers of equities to be made using a single set of disclosure standards established by the International Organisation of Securities Commissions (IOSCO); the IOSCO disclosure standards⁽¹⁾ will upgrade information available for the markets and investors and at the same time will simplify the procedure for Community issuers wishing to raise capital in third countries. The Directive also calls for tailored disclosure standards to be adopted for other types of securities and issuers.
- (21) Fast-track procedures for issuers admitted to trading on a regulated market and frequently raising capital on these markets require the introduction at Community level of a new format of prospectuses for offering programmes or mortgage bonds and a new registration document system. Issuers may choose not to use those formats and therefore to draft the prospectus as a single document.
- (22) The content of a base prospectus should, in particular, take into account the need for flexibility in relation to the information to be provided about the securities.
- (23) Omission of sensitive information to be included in a prospectus should be allowed through a derogation granted by the competent authority in certain circumstances in order to avoid detrimental situations for an issuer.
- (24) A clear time limit should be set for the validity of a prospectus in order to avoid outdated information.
- (25) Investors should be protected by ensuring publication of reliable information. The issuers whose securities are admitted to trading on a regulated market are subject to an ongoing disclosure obligation but are not required to publish updated information regularly. Further to this obligation, issuers should, at least annually, list all relevant information published or made available to the public over the preceding twelve months, including information provided to the various reporting requirements laid down in other Community legislation. This should make it possible to ensure the publication of consistent and easily understandable information on a regular basis. To avoid excessive burdens for certain issuers, issuers of non-equity securities with high minimum denomination should not be required to meet this obligation.
- (26) It is necessary for the annual information to be provided by issuers whose securities are admitted to trading on a regulated market to be appropriately monitored by Member States in accordance with their obligations under the provisions of Community and national law concerning the regulation of securities, issuers of securities and securities markets.
- (27) The opportunity of allowing issuers to incorporate by reference documents containing the information to be disclosed in a prospectus — provided that the documents incorporated by reference have been previously filed with or accepted by the competent authority — should facilitate the procedure of drawing up a prospectus and lower the costs for the issuers without endangering investor protection.
- (28) Differences regarding the efficiency, methods and timing of the checking of the information given in a prospectus not only make it more difficult for undertakings to raise capital or to obtain admission to trading on a regulated market in more than one Member State but also hinder the acquisition by investors established in one Member State of securities offered by an issuer established in another Member State or admitted to trading in another Member State. These differences should be eliminated by harmonising the rules and regulations in order to achieve an adequate degree of equivalence of the safeguards required in each Member State to ensure the provision of information which is sufficient and as objective as possible for actual or potential securities holders.
- (29) To facilitate circulation of the various documents making up the prospectus, the use of electronic communication facilities such as Internet should be encouraged. The prospectus should always be delivered in paper form free of charge to investors on request.
- (30) The prospectus should be filed with the relevant competent authority and be made available to the public by the issuer, the offeror or the person asking for admission to trading on a regulated market, subject to European Union provisions relating to data protection.
- (31) It is also necessary, in order to avoid loopholes in Community legislation which would undermine public confidence and therefore prejudice the proper functioning of financial markets, to harmonise advertisements.
- (32) Any new matter liable to influence the assessment of the investment, arising after the publication of the prospectus but before the closing of the offer or the start of trading on a regulated market, should be properly evaluated by investors and therefore requires the approval and dissemination of a supplement to the prospectus.

⁽¹⁾ International Disclosure Standards for cross-border offering and initial listings by foreign issuers, Part I, International Organisation of Securities Commissions, September 1998.

- (33) The obligation for an issuer to translate the full prospectus into all the relevant official languages discourages cross-border offers or multiple trading. To facilitate cross-border offers, where the prospectus is drawn up in a language that is customary in the sphere of international finance, the host or home Member State should only be entitled to require a summary in its official language(s).
- (34) The competent authority of the host Member State should be entitled to receive a certificate from the competent authority of the home Member State which states that the prospectus has been drawn up in accordance with this Directive. In order to ensure that the purposes of this Directive will be fully achieved, it is also necessary to include within its scope securities issued by issuers governed by the laws of third countries.
- (35) A variety of competent authorities in Member States, having different responsibilities, may create unnecessary costs and overlapping of responsibilities without providing any additional benefit. In each Member State one single competent authority should be designated to approve prospectuses and to assume responsibility for supervising compliance with this Directive. Under strict conditions, a Member State should be allowed to designate more than one competent authority but only one will assume the duties for international cooperation. Such an authority or authorities should be established as an administrative authority and in such a form that their independence from economic actors is guaranteed and conflicts of interest are avoided. The designation of a competent authority for prospectus approval should not exclude cooperation between that authority and other entities, with a view to guaranteeing efficient scrutiny and approval of prospectuses in the interest of issuers, investors, markets participants and markets alike. Any delegation of tasks relating to the obligations provided for in this Directive and in its implementing measures should, except for publication on the Internet of approved prospectuses, end five years after the entry into force of this Directive.
- (36) A common minimum set of powers for the competent authorities will guarantee the effectiveness of their supervision. The flow of information to the markets required by Directive 2001/34/EC should be ensured and action against breaches should be taken by competent authorities.
- (37) For the purposes of carrying out their duties, cooperation between competent authorities of the Member States is required.
- (38) Technical guidance and implementing measures for the rules laid down in this Directive may from time to time be necessary to take into account developments on financial markets. The Commission should accordingly be empowered to adopt implementing measures, provided that these do not modify the essential elements of this Directive and provided that the Commission acts in accordance with the principles set out in this Directive, after consulting the European Securities Committee established by Commission Decision 2001/528/EC of 6 June 2001 establishing the European Securities Committee⁽¹⁾.
- (39) In exercising its implementing powers in accordance with this Directive, the Commission should respect the following principles:
- the need to ensure confidence in financial markets among small investors and small and medium-sized enterprises (SMEs) by promoting high standards of transparency in 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 financial markets if they are to be dynamic and efficient,
 - 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,

(¹) OJ L 191, 13.7.2001, p. 45.

— 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.

- (40) The European Parliament should be given a period of three months from the first transmission of draft implementing measures to allow it to examine them and to give its opinion. However, in urgent and duly justified cases, this period may be shortened. If, within that period, a resolution is passed by the European Parliament, the Commission should re-examine the draft measures.
- (41) Member States should lay down a system of sanctions for breaches of the national provisions adopted pursuant to this Directive and should take all the measures necessary to ensure that these sanctions are applied. The sanctions thus provided for should be effective, proportional and dissuasive.
- (42) Provision should be made for the right of judicial review of decisions taken by Member States' competent authorities in respect of the application of this Directive.
- (43) In accordance with the principle of proportionality, it is necessary and appropriate for the achievement of the basic objective of ensuring the completion of a single securities market to lay down rules on a single passport for issuers. This Directive does not go beyond what is necessary in order to achieve the objectives pursued in accordance with the third paragraph of Article 5 of the Treaty.
- (44) The assessment made by the Commission of the application of this Directive should focus in particular on the process of approval of prospectuses by the competent authorities of the Member States, and more generally on the application of the home-country principle, and whether or not problems of investor protection and market efficiency might result from this application; the Commission should also examine the functioning of Article 10.
- (45) For future developments of this Directive, consideration should be given to the matter of deciding which approval mechanism should be adopted to further enhance the uniform application of Community legislation on prospectuses, including the possible establishment of a European Securities Unit.
- (46) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.
- (47) 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 Commission ⁽¹⁾.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

GENERAL PROVISIONS

Article 1

Purpose and scope

1. The purpose of this Directive is to harmonise requirements for the drawing up, approval and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.
2. This Directive shall not apply to:
 - (a) units issued by collective investment undertakings other than the closed-end type,
 - (b) non-equity securities issued by a Member State or by one of a Member State's regional or local authorities, by public international bodies of which one or more Member States are members, by the European Central Bank or by the central banks of the Member States,
 - (c) shares in the capital of central banks of the Member States,
 - (d) securities unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities,
 - (e) securities issued by associations with legal status or non-profit-making bodies, recognised by a Member State, with a view to their obtaining the means necessary to achieve their non-profit-making objectives,
 - (f) non-equity securities issued in a continuous or repeated manner by credit institutions 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;
 - (iii) materialise reception of repayable deposits;
 - (iv) are covered by a deposit guarantee scheme under Directive 94/19/EC, of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes ⁽²⁾,

⁽¹⁾ OJ L 184, 17.7.1999, p. 23.

⁽²⁾ OJ L 135, 31.5.1994, p. 5.

- (g) non-fungible shares of capital whose main purpose is to provide the holder with a right to occupy an apartment, or other form of immovable property or a part thereof and where the shares cannot be sold on without this right being given up,
- (h) securities included in an offer where the total consideration of the offer is less than EUR 2 500 000, which limit shall be calculated over a period of twelve months,
- (i) 'bostadsobligationer' issued repeatedly by credit institutions in Sweden whose main purpose is to grant mortgage loans, provided that
- (i) the 'bostadsobligationer' issued are of the same series;
- (ii) the 'bostadsobligationer' are issued on tap during a specified issuing period;
- (iii) the terms and conditions of the 'bostadsobligationer' are not changed during the issuing period; and
- (iv) the sums deriving from the issue of the said 'bostadsobligationer', in accordance with the articles of association of the issuer, are placed in assets which provide sufficient coverage for the liability deriving from securities,
- (j) Non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer is less than EUR 50 000 000, which limit shall be calculated over a period of twelve 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.
3. Notwithstanding paragraph 2(b), (d), (h), (i) and (j), an issuer, an offeror or a person asking for admission to trading on a regulated market shall be entitled to draw up a prospectus in accordance with this Directive when securities are offered to the public or admitted to trading.

Article 2

Definitions

1. For the purposes of this Directive, the following definitions shall apply:

- (a) 'securities' means transferable securities as defined by Article 1(4) of Directive 93/22/EEC with the exception of money market instruments as defined by Article 1(5) of Directive 93/22/EEC having a maturity of less than 12 months. For these instruments national legislation may be applicable,
- (b) 'equity securities' means shares and other transferable securities equivalent to shares in companies, as well as any other type of transferable securities giving the right to acquire any of the aforementioned securities as a consequence of their being converted or the rights conferred by them being exercised, provided that securities of the latter type are issued by the issuer of the underlying shares or by an entity belonging to the group of the said issuer,
- (c) 'non-equity securities' means all securities that are not equity securities,
- (d) 'offer of securities to the public' means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. This definition shall also be applicable to the placing of securities through financial intermediaries,
- (e) 'qualified investors' mean:
- (i) legal entities which are authorised or regulated to operate in the financial markets, including: credit institutions, investment firms, other authorised or regulated financial institutions, insurance companies, collective investment schemes and their management companies, pension funds and their management companies, commodity dealers, as well as entities not so authorised or regulated whose corporate purpose is solely to invest in securities;
- (ii) national and regional governments, central banks, international and supranational institutions such as the International Monetary Fund, the European Central Bank, the European Investment Bank and other similar international organisations;
- (iii) other legal entities which do not meet two of the three criteria set out in paragraph (f);
- (iv) certain natural persons: subject to mutual recognition, a Member State may choose to authorise natural persons who are resident in the Member State and who expressly ask to be considered as qualified investors if these persons meet at least two of the criteria set out in paragraph 2;
- (v) certain SMEs: subject to mutual recognition, a Member State may choose to authorise SMEs which have their registered office in that Member State and who expressly ask to be considered as qualified investors,
- (f) 'small and medium-sized enterprises' means companies, which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000,

- (g) 'credit institution' means an undertaking as defined by Article 1(1)(a) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions ⁽¹⁾,
- (h) 'issuer' means a legal entity which issues or proposes to issue securities,
- (i) 'person making an offer' (or 'offeror') means a legal entity or individual which offers securities to the public,
- (j) 'regulated market' means a market as defined by Article 1(13) of Directive 93/22/EEC,
- (k) 'offering programme' means an issuer's plan for the issuance of non-equity securities, including warrants in any form, having a similar type and/or class, in a continuous or repeated manner during a specified issuing period,
- (l) 'securities issued in a continuous or repeated manner' means issues on tap with at least two separate issues of securities of a similar type and/or class over a period of twelve months,
- (m) 'home Member State' means:
- (i) for all Community issuers of securities which are not mentioned in (ii), the Member State where the issuer has its registered office;
 - (ii) for any issues of non-equity securities whose denomination per unit amounts to at least EUR 5 000, and for any issues of non-equity securities giving the right to acquire any transferable securities or to receive a cash amount, as a consequence of their being converted or the rights conferred by them being exercised, provided that the issuer of the non-equity securities is not the issuer of the underlying securities or an entity belonging to the group of the latter issuer, the Member State where the issuer has its registered office, or where the securities were or are to be admitted to trading on a regulated market or where the securities are offered to the public, at the choice of the issuer, the offeror or the person asking for admission, as the case may be;
 - (iii) for all issuers of securities incorporated in a third country, which are not mentioned in (ii), the Member State where the securities are intended to be offered to the public for the first time after the date of entry into force of this Directive or where the first application for admission to trading on a regulated market is made, at the choice of the issuer, the offeror or the person asking for admission,
- as the case may be, subject to a subsequent election by issuers incorporated in a third country if the home Member State was not determined by their choice;
- (n) 'host Member State' means the State where an offer to the public is made or admission to trading is sought, when different from the home Member State,
- (o) 'collective investment undertaking other than the closed-end type' means unit trusts and investment companies:
- (i) the object of which is the collective investment of capital provided by the public, and which operate on the principle of risk spreading; and
 - (ii) the units of which are, at the holder's request, repurchased or redeemed, directly or indirectly, out of the assets of these undertakings,
- (p) 'units of a collective investment undertaking' mean securities issued by a collective investment undertaking as representing the rights of the participants in such an undertaking over its assets,
- (q) 'approval' means the positive act at the outcome of the scrutiny of the completeness of the prospectus by the home Member State's competent authority including the consistency of the information given and its comprehensibility.

2. For the purposes of paragraph 1(e)(iv) the criteria are as follows:

- (a) the investor has carried out transactions of a significant size on securities markets at an average frequency of at least, ten per quarter over the previous four quarters,
- (b) the size of the investor's securities portfolio exceeds EUR 0,5 million,
- (c) the investor works or has worked for at least one year in the financial sector in a professional position which requires knowledge of securities investment.

3. For the purposes of paragraphs 1(e)(iv) and (v) the following shall apply:

Each competent authority shall ensure that appropriate mechanisms are in place for a register of natural persons and SMEs considered as qualified investors, taking into account the need to ensure an adequate level of data protection. The register shall be available to all issuers. Each natural person or SME wishing to be considered as a qualified investor shall register and each registered investor may decide to opt out at any moment.

⁽¹⁾ OJ L 126, 26.5.2000, p. 1. Directive as last amended by Directive 2000/28/EC (OJ L 275, 27.10.2000, p. 37).

4. 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, taking into account Community legislation and recommendations as well as economic developments and disclosure measures relating to the registration of individual qualified investors.

Article 3

Obligation to publish a prospectus

1. Member States shall not allow any offer of securities to be made to the public within their territories without prior publication of a prospectus.

2. The obligation to publish a prospectus shall not apply to the following types of offer:

- (a) an offer of securities addressed solely to qualified investors, and/or;
- (b) an offer of securities addressed to fewer than 100 natural or legal persons per Member State, other than qualified investors, and/or;
- (c) an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 50 000 per investor, for each separate offer, and/or;
- (d) an offer of securities whose denomination per unit amounts to at least EUR 50 000, and/or;
- (e) an offer of securities with a total consideration of less than EUR 100 000, which limit shall be calculated over a period of twelve months.

However, any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph shall be regarded as a separate offer and the definition set out in Article 2(1)(d) shall apply for the purpose of deciding whether that resale is an offer of securities to the public. The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final placement.

3. Member States shall ensure that any admission of securities to trading on a regulated market situated or operating within their territories is subject to the publication of a prospectus.

Article 4

Exemptions from the obligation to publish a prospectus

1. The obligation to publish a prospectus shall not apply to offers of securities to the public of the following types of securities:

- (a) shares issued in substitution for shares of the same class already issued, if the issuing of such new shares does not involve any increase in the issued capital;
- (b) securities offered in connection with a take-over by means of an exchange offer, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;
- (c) securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;
- (d) shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- (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.

2. The obligation to publish a prospectus shall not apply to the admission to trading on a regulated market of the following types of securities:

- (a) shares representing, over a period of twelve months, less than 10 per cent of the number of shares of the same class already admitted to trading on the same regulated market;
- (b) shares issued in substitution for shares of the same class already admitted to trading on the same regulated market, if the issuing of such shares does not involve any increase in the issued capital;
- (c) securities offered in connection with a take-over by means of an exchange offer, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;

- (d) securities offered, allotted or to be allotted in connection with a merger, provided that a document is available containing information which is regarded by the competent authority as being equivalent to that of the prospectus, taking into account the requirements of Community legislation;
- (e) shares offered, allotted or to be allotted free of charge to existing shareholders, and dividends paid out in the form of shares of the same class as the shares in respect of which such dividends are paid, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market and that a document is made available containing information on the number and nature of the shares and the reasons for and details of the offer;
- (f) securities offered, allotted or to be allotted to existing or former directors or employees by their employer or an affiliated undertaking, provided that the said securities are of the same class as the securities already admitted to trading on the same regulated market and that a document is made available containing information on the number and nature of the securities and the reasons for and detail of the offer;
- (g) shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, provided that the said shares are of the same class as the shares already admitted to trading on the same regulated market;
- (h) securities already admitted to trading on another regulated market, on the following conditions:
- (i) that these securities, or securities of the same class, have been admitted to trading on that other regulated market for more than 18 months;
 - (ii) that, for securities first admitted to trading on a regulated market after the date of entry into force of this Directive, the admission to trading on that other regulated market was associated with an approved prospectus made available to the public in conformity with Article 14;
 - (iii) that, except where (ii) applies, for securities first admitted to listing after 30 June 1983, listing particulars were approved in accordance with the requirements of Directive 80/390/EEC or Directive 2001/34/EC;
 - (iv) that the ongoing obligations for trading on that other regulated market have been fulfilled;
 - (v) that the person seeking the admission of a security to trading on a regulated market under this exemption makes a summary document available to the public in a language accepted by the competent authority of the Member State of the regulated market where admission is sought;
 - (vi) that the summary document referred to in (v) is made available to the public in the Member State of the regulated market where admission to trading is sought in the manner set out in Article 14(2); and
 - (vii) that the contents of the summary document shall comply with Article 5(2). Furthermore the document shall state where the most recent prospectus can be obtained and where the financial information published by the issuer pursuant to his ongoing disclosure obligations is available.
3. 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 paragraphs 1(b), 1(c), 2(c) and 2(d), notably in relation to the meaning of equivalence.

CHAPTER II

DRAWING UP OF THE PROSPECTUS

Article 5

The prospectus

1. Without prejudice to Article 8(2), the prospectus shall contain all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities. This information shall be presented in an easily analysable and comprehensible form.

2. 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, convey the essential characteristics and risks associated with the issuer, any guarantor and the securities, in the language in which the prospectus was originally drawn up. The summary shall also contain a warning that:

- (a) it should be read as an introduction to the prospectus, and

- (b) any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor, and
- (c) where a claim relating to the information contained in a prospectus is brought before a court, the plaintiff investor might, under the national legislation of the Member States, have to bear the costs of translating the prospectus before the legal proceedings are initiated, and
- (d) no civil liability attaches to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

Where the prospectus relates to the admission to trading on a regulated market of non-equity securities having a denomination of at least EUR 50 000, there shall be no requirement to provide a summary except when requested by a Member State as provided for in Article 19(4).

3. Subject to paragraph 4 the issuer, offeror or person asking for the admission to trading on a regulated market may draw up the prospectus as a single document or separate documents. A prospectus composed of separate documents shall divide the required information into a registration document, a securities note and a summary note. The registration document shall contain the information relating to the issuer. The securities note shall contain the information concerning the securities offered to the public or to be admitted to trading on a regulated market.

4. For the following types of securities, the prospectus shall consist of a base prospectus containing all relevant information concerning the issuer and the securities offered to the public or to be admitted to trading on a regulated market:

- (a) non-equity securities, including warrants in any form, issued under an offering programme;
- (b) non-equity securities issued in a continuous or repeated manner by credit institutions,
 - (i) where the sums deriving from the issue of the said securities, under national legislation, are placed in assets which provide sufficient coverage for the liability deriving from securities until their maturity date; and
 - (ii) where, in the event of the insolvency of the related credit institution, the said sums are intended, as a priority, to repay the capital and interest falling due, without prejudice to the provisions of Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions ⁽¹⁾.

The information given in the base prospectus shall be supplemented, if necessary, in accordance with Article 16 with updated information on the issuer and on the securities to be offered to the public or to be admitted to trading on a regulated market.

If the final terms of the offer are not included in either the base prospectus or a supplement, the final terms shall be provided to investors and filed with the competent authority when each public offer is made as soon as practicable and if possible in advance of the beginning of the offer. The provisions of Article 8(1)(a) shall be applicable in any such case.

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 and supplements.

Article 6

Responsibility attaching to the prospectus

1. Member States shall ensure that responsibility for the information given in a prospectus attaches at least to the issuer or its administrative, management or supervisory bodies, the offeror, the person asking for the admission to trading on a regulated market or the guarantor, as the case may be. The persons responsible shall be clearly identified in the prospectus by their names and functions or, in the case of legal persons, their names and registered offices, as well as declarations by them that, to the best of their knowledge, the information contained in the prospectus is in accordance with the facts and that the prospectus makes no omission likely to affect its import.

2. Member States shall ensure that their laws, regulation and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus.

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 is misleading, inaccurate or inconsistent when read together with the other parts of the prospectus.

⁽¹⁾ OJ L 125, 5.5.2001, p. 15.

Article 7

Minimum information

1. Detailed implementing measures regarding the specific information which must be included in a prospectus, avoiding duplication of information when a prospectus is composed of separate documents, shall be adopted by the Commission in accordance with the procedure referred to in Article 24(2). The first set of implementing measures shall be adopted by ... (*).

2. In particular, for the elaboration of the various models of prospectuses, account shall be taken of the following:

- (a) the various types of information needed by investors relating to equity securities as compared with non-equity-securities; a consistent approach shall be taken with regard to information required in a prospectus for securities which have a similar economic rationale, notably derivative securities;
- (b) the various types and characteristics of offers and admissions to trading on a regulated market of non-equity securities. The information required in a prospectus shall be appropriate from the point of view of the investors concerned for non-equity securities having a denomination per unit of at least EUR 50 000;
- (c) the format used and the information required in prospectuses relating to non-equity securities, including warrants in any form, issued under an offering programme;
- (d) the format used and the information required in prospectuses relating to non-equity securities, insofar as these securities are not subordinated, convertible, exchangeable, subject to subscription or acquisition rights or linked to derivative instruments, issued in a continuous or repeated manner by entities authorised or regulated to operate in the financial markets within the European Economic Area;
- (e) the various activities and size of the issuer, in particular SMEs. For such companies the information shall be adapted to their size and, where appropriate, to their shorter track record;
- (f) if applicable, the public nature of the issuer.

3. The implementing measures referred to in paragraph 1 shall be based on the standards in the field of financial and non financial information set out by international securities commission organisations, and in particular by IOSCO and on the indicative Annexes to this Directive.

Article 8

Omission of information

1. Member States shall ensure that where the final offer price and amount of securities which will be offered to the public cannot be included in the prospectus:

- (a) the criteria, and/or the conditions in accordance with which the above elements will be determined or, in the case of price, the maximum price, are disclosed in the prospectus, or
- (b) the acceptances of the purchase or subscription of securities may be withdrawn for not less than two working days after the final offer price and amount of securities which will be offered to the public have been filed.

The final offer price and amount of securities shall be filed with the competent authority of the home Member State and published in accordance with the arrangements provided for in Article 14(2).

2. The competent authority of the home Member State may authorise the omission from the prospectus of certain information provided for in this Directive or in the implementing measures referred to in Article 7(1), if it considers that:

- (a) disclosure of such information would be contrary to the public interest, or
- (b) disclosure of such information would be seriously detrimental to the issuer, provided that the omission would not be likely to mislead the public with regard to facts and circumstances essential for an informed assessment of the issuer, offeror or guarantor, if any, and of the rights attached to the securities to which the prospectus relates, or
- (c) such information is of minor importance only for a specific offer or admission to trading on a regulated market and is not such as will influence the assessment of the financial position and prospects of the issuer, offeror or guarantor, if any.

3. Without prejudice to the adequate information of investors, where, exceptionally, certain information required by implementing measures referred to in Article 7(1) to be included in a prospectus is inappropriate to the issuer's sphere of activity or to the legal form of the issuer or to the securities to which the prospectus relates, the prospectus shall contain information equivalent to the required information. If there is no such information, this requirement shall not apply.

4. 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 paragraph 2.

(*) 6 months after the date of entry into force of this Directive.

*Article 9***Validity of a prospectus, base prospectus and registration document**

1. A prospectus shall be valid for twelve months after its publication 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.
2. In the case of an offering programme, the base prospectus, previously filed, shall be valid for a period of up to twelve months.
3. In the case of non-equity securities referred to in Article 5(4)(b) the prospectus shall be valid until no more of the securities concerned are issued in a continuous or repeated manner.
4. A registration document, as referred to in Article 5(3), previously filed, shall be valid for a period of up to twelve months provided that it has been updated in accordance with Article 10(1). The registration document accompanied by the securities note, updated if applicable in accordance with Article 12, and the summary note shall be considered to constitute a valid prospectus.

*Article 10***Information**

1. Issuers whose securities are admitted to trading on a regulated market shall at least annually provide a document that contains or refers to all information that they have published or made available to the public over the preceding 12 months in one or more Member States and in third countries in compliance with their obligations under Community and national laws and rules dealing with the regulation of securities, issuers of securities, and securities markets. Issuers shall refer at least to the information required pursuant to Company Law Directives, Directive 2001/34/EC and Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of International Accounting Standards ⁽¹⁾.
2. The document shall be filed with the competent authority of the home Member State after the publication of the financial statement. Where the document refers to information, it shall be stated where the information can be obtained.
3. The obligation set out in paragraph 1 shall not apply to issuers of non-equity securities whose denomination per unit amounts to at least EUR 50 000.
4. In order to take account of technical developments on financial markets and to ensure uniform application of this

⁽¹⁾ OJ L 243, 11.9.2002, p. 1.

Directive, the Commission may, in accordance with the procedure referred to in Article 24(2), adopt implementing measures concerning paragraph 1. These measures will relate only to the method of publication of the disclosure requirements mentioned in paragraph 1 and will not entail new disclosure requirements. The first set of implementing measures shall be adopted by ... (*)

*Article 11***Incorporation by reference**

1. Member States shall allow information to be incorporated in the prospectus by reference to one or more previously published documents that have been approved by the competent authority of the home Member State or filed with it in accordance with this Directive, in particular pursuant to Article 10, or with Titles IV and V of Directive 2001/34/EC. This information shall be the latest available to the issuer. The summary shall not incorporate information by reference.
2. When information is incorporated by reference, a cross-reference list must be provided in order to enable investors to easily identify specific items of information.
3. 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 information to be incorporated by reference. The first set of implementing measures shall be adopted by ... (*)

*Article 12***Prospectuses consisting of separate documents**

1. An issuer which already has a registration document approved by the competent authority shall be required to draw up only the securities note and the summary note when securities are offered to the public or admitted to trading on a regulated market.
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 or any supplement as provided for in Article 16 was approved. The securities and summary notes shall be subject to a separate approval.
3. Where an issuer has only filed a registration document without approval, the entire documentation, including updated information, shall be subject to approval.

^(*) 6 months after the date of entry into force of this Directive.

CHAPTER III

ARRANGEMENTS FOR APPROVAL AND PUBLICATION OF THE PROSPECTUS*Article 13***Approval of the prospectus**

1. No prospectus shall be published until it has been approved by the competent authority of the home Member State.

2. This competent authority shall notify the issuer, the offeror or the person asking for admission to trading on a regulated market, as the case may be, of its decision regarding the approval of the prospectus within 15 working days of the submission of the draft prospectus.

If the competent authority fails to give a decision on the prospectus within the time limits laid down in this paragraph and paragraph 3, this shall not be deemed to constitute approval of the application.

3. The time limit referred to in paragraph 2 shall be extended to 30 working days if the public offer involves securities issued by an issuer which does not have any securities admitted to trading on a regulated market and who has not previously offered securities to the public.

4. If the competent authority finds, on reasonable grounds, that the documents submitted to it are incomplete or that supplementary information is needed, the time limits referred to in paragraphs 2 and 3 shall apply only from the date on which such information is provided by the issuer, the offeror or the person asking for admission to trading on a regulated market.

5. The competent authority of the home Member State may transfer the approval of a prospectus to the competent authority of another Member State, subject to the agreement of that authority. Furthermore, this transfer shall be notified to the issuer, the offeror or the person asking for admission to trading on a regulated market within 5 working days from the date of the decision taken by the competent authority of the home Member State. The time limit referred to in paragraph 2 shall apply from that date.

6. This Directive shall not affect the competent authority's liability, which shall continue to be governed solely by national law.

Member States shall ensure that their national provisions on the liability of competent authorities apply only to approvals of prospectuses by their competent authority or authorities.

7. In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission may, in accordance with the

procedure referred to in Article 24(2), adopt implementing measures concerning the conditions in accordance with which time limits may be adjusted.

*Article 14***Publication of the prospectus**

1. Once approved the prospectus shall be filed with the competent authority of the home Member State and shall be made available to the public by the issuer, offeror or person asking for admission to trading on a regulated market as soon as practicable and in any case, at a reasonable time in advance of, and at the latest at the beginning of, the offer to the public or the admission to trading of the securities involved. In addition, in the case of an initial public offer of a class of shares not already admitted to trading on a regulated market that is to be admitted to trading for the first time, the prospectus shall be available at least six working days before the end of the offer.

2. The prospectus shall be deemed available to the public when published either:

(a) by insertion in one or more newspapers circulated throughout, or widely circulated in, the Member States in which the offer to the public is made or the admission to trading is sought, or

(b) in a printed form to be made available, free of charge, to the public at the offices of the market on which the securities are being admitted to trading, or at the registered office of the issuer and at the offices of the financial intermediaries placing or selling the securities, including paying agents, or

(c) in an electronic form on the issuer's web-site and, if applicable, on the web-site of the financial intermediaries placing or selling the securities, including paying agents, or

(d) in electronic form on the web-site of the competent authority of the home Member State if the said authority has decided to offer this service.

A home Member State may require issuers which publish their prospectus in accordance with (a) or (b) also to publish their prospectus in an electronic form in accordance with (c).

3. In addition, a home Member State may require publication of a notice stating how the prospectus has been made available and where it can be obtained by the public.

4. The competent authority of the home Member State shall publish on its web-site over a period of twelve months, at its choice, all the prospectuses approved, or at least the list of prospectuses approved in accordance with Article 13, including, if applicable, a hyperlink to the prospectus published on the web-site of the issuer.

5. In the case of a prospectus comprising several documents and/or incorporating information by reference, the documents and information making up the prospectus may be published and circulated separately provided that the said documents are made available, free of charge, to the public, in accordance with the arrangements established in paragraph 2. Each document shall indicate where the other constituent documents of the full prospectus may be obtained.

6. The text and the format of the prospectus, and/or the supplements to the prospectus, published or made available to the public, shall at all times be identical to the original version approved by the competent authority of the home Member State.

7. Where the prospectus is made available by publication in electronic form, a paper copy must nevertheless be delivered to the investor, upon his request and free of charge, by the issuer, the offeror, the person asking for admission to trading or the financial intermediaries placing or selling the securities.

8. In order to take account of technical developments on financial markets and to ensure uniform application of the Directive, the Commission shall, in accordance with the procedure referred to in Article 24(2), adopt implementing measures concerning paragraphs 1, 2, 3 and 4. The first set of implementing measures shall be adopted by ... (*).

Article 15

Advertisements

1. Any type of advertisements relating either to an offer to the public of securities or to an admission to trading on a regulated market shall observe the principles contained in paragraphs 2 to 5. Paragraphs 2 to 4 shall apply only to cases where the issuer, the offeror or the person applying for admission to trading is covered by the obligation to draw up a prospectus.

2. Advertisements shall state that a prospectus has been or will be published and indicate where investors are or will be able to obtain it.

3. Advertisements shall be clearly recognisable as such. The information contained in an advertisement shall not be inaccurate, misleading or inconsistent with that contained in the prospectus or that expected to be contained therein.

4. In any case, all information concerning the offer to the public or the admission to trading on a regulated market

disclosed in an oral or written form, even if not for advertising purposes, shall be consistent with that contained in the prospectus.

5. When under this Directive no prospectus is required, material information provided by an issuer or an offeror and addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings relating to offers of securities, shall be disclosed to all qualified investors or special categories of investors to whom the offer is exclusively addressed. Where a prospectus is required to be published, such information shall be included in the prospectus or in a supplement to the prospectus in accordance with Article 16(1).

6. The competent authority of the home Member State shall have the power to exercise control over the compliance of advertising activity, relating to a public offer of securities or an admission to trading on a regulated market, with the principles referred to in paragraphs 2 to 5.

7. 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 dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading on a regulated market, in particular before the prospectus has been made available to the public or before the opening of the subscription, and concerning paragraph 4. The first set of implementing measures shall be adopted by the Commission by ... (*).

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, shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way 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. Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within a time-limit which shall not be shorter than two working days after the publication of the supplement, to withdraw their acceptances.

(*) 6 months after the date of entry into force of this Directive.

CHAPTER IV

CROSS-BORDER OFFERS AND ADMISSION TO TRADING*Article 17***Community scope of approvals of prospectuses**

1. Without prejudice to Article 23, where an offer to the public or admission to trading on a regulated market is provided for in one or more Member States, or in a Member State other than the home Member State, the prospectus approved by the home Member State, and any supplements thereto, shall be valid for the public offer or the admission to trading in any number of host Member States, provided that the competent authority of each host Member State is notified in accordance with Article 18. Competent authorities of host Member States shall not undertake any approval or administrative procedures relating to prospectuses.

2. If there are significant new factors, material mistakes or inaccuracies, as referred to in Article 16, arising since the approval of the prospectus, the competent authority of the home Member State shall require the publication of a supplement to be approved as provided for in Article 13(1). The competent authority of the host Member State may draw the attention of the competent authority of the home Member State to the need for any new information.

*Article 18***Notification**

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, provide the competent authority of the host Member States 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.

2. The application of the provisions of Article 8(2) and (3) shall be stated in the certificate, as well as its justification.

CHAPTER V

USE OF LANGUAGES AND ISSUERS INCORPORATED IN THIRD COUNTRIES*Article 19***Use of languages**

1. Where an offer to the public is made or admission to trading on a regulated market is sought only in the home Member State, the prospectus shall be drawn up in a

language accepted by the competent authority of the home Member State.

2. Where an offer to the public is made or admission to trading on a regulated market is sought in one or more Member States excluding the home Member State, the prospectus shall be drawn up either in a language accepted by the competent authorities of those Member States or in a language customary in the sphere of international finance, at the choice of the issuer, offeror or person asking for admission, as the case may be. The competent authority of each host Member State may only require that the summary be translated into its official language(s).

For the purpose of the scrutiny by the competent authority of the home Member State, the prospectus shall be drawn up either in a language accepted by this authority or in a language customary in the sphere of international finance, at the choice of the issuer, offeror or person asking for admission to trading, as the case may be.

3. Where an offer to the public is made or admission to trading on a regulated market is sought in more than one Member State including the home Member State, the prospectus shall be drawn up in a language accepted by the competent authority of the home Member State and shall also be made available either in a language accepted by the competent authorities of each host Member State or in a language customary in the sphere of international finance, at the choice of the issuer, offeror, or person asking for admission to trading, as the case may be. The competent authority of each host Member State may only require that the summary referred to in Article 5(2) be translated into its official language(s).

4. Where admission to trading on a regulated market of non-equity securities whose denomination per unit amounts to at least EUR 50 000 is sought in one or more Member States, the prospectus shall be drawn up either in a language accepted by the competent authorities of the home and host Member States or in a language customary in the sphere of international finance, at the choice of the issuer, offeror, or person asking for admission to trading, as the case may be. Member States may choose to require in their national legislation that a summary be drawn up in their official language(s).

*Article 20***Issuers incorporated in third countries**

1. The competent authority of the home Member State of issuers having their registered office in a third country may approve a prospectus for an offer to the public or for admission to trading on a regulated market, drawn up in accordance with the legislation of a third country, provided that:

(a) the prospectus has been drawn up in accordance with international standards set by international securities commission organisations, including the IOSCO Disclosure Standards, and

(b) the information requirements, including information of a financial nature, are equivalent to the requirements under this Directive.

2. In the case of an offer to the public or admission to trading on a regulated market of securities, issued by an issuer incorporated in a third country, in a Member State other than the home Member State, the requirements set out in Articles 17, 18 and 19 shall apply.

3. In order to ensure uniform application of this Directive, the Commission may adopt implementing measures in accordance with the procedure referred to in Article 24(2), stating that a third country ensures the equivalence of prospectuses drawn up in that country with this Directive, by reason of its national law or of practices or procedures based on international standards set by international organisations, including the IOSCO Disclosure Standards.

CHAPTER VI

COMPETENT AUTHORITIES

Article 21

Powers

1. Each Member State shall designate a central competent administrative authority responsible for carrying out the obligations provided for in this Directive and for ensuring that the provisions adopted pursuant to this Directive are applied.

However, a Member State may, if so required by national law, designate other administrative authorities to apply Chapter III.

These competent authorities shall be completely independent from all market participants.

If an offer of securities is made to the public or admission to trading on a regulated market is sought in a Member State other than the home Member State, only the central competent administrative authority designated by each Member State shall be entitled to approve the prospectus.

2. Member States may allow their competent authority or authorities to delegate tasks. Except for delegation of the publication on the Internet of approved prospectuses as mentioned in Article 14, any delegation of tasks relating to the obligations provided for in this Directive and in its implementing measures shall end on ... (*). Any delegation of tasks to entities other than the authorities referred to in paragraph 1 shall be made in a specific manner stating the tasks to be undertaken and the conditions under which they are to be carried out.

(*) Five years after the date of entry into force of this Directive.

These conditions shall include a clause obliging the entity in question to act and be organised in such a manner as to avoid conflict of interest and so that information obtained from carrying out the delegated tasks is not used unfairly or to prevent competition. In any case, the final responsibility for supervising compliance with this Directive and with its implementing measures and for approving the prospectus shall lie with the competent authority or authorities designated in accordance with paragraph 1.

Member States shall inform the Commission and the competent authorities of other Member States of any arrangements entered into with regard to delegation of tasks, including the precise conditions regulating such delegation.

3. Each competent authority shall have all the powers necessary for the performance of its functions. A competent authority that has received an application for approving a prospectus shall be empowered at least to:

- (a) require issuers, offerors or persons asking for admission to trading on a regulated market to include in the prospectus supplementary information, if necessary for investor protection;
- (b) require issuers, offerors or persons asking for admission to trading on a regulated market, and the persons that control them or are controlled by them to provide information and documents;
- (c) require auditors and managers of the issuer, offeror or person asking for admission to trading on a regulated market, as well as financial intermediaries commissioned to carry out the offer to the public or ask for admission to trading, to provide information;
- (d) suspend a public offer or admission to trading for a maximum of 10 consecutive working days on any single occasion if it has reasonable grounds for suspecting that the provisions of this Directive have been infringed;
- (e) prohibit or suspend advertisements for a maximum of 10 consecutive working days on any single occasion if it has reasonable grounds for believing that the provisions of this Directive have been infringed;
- (f) prohibit a public offer if it finds that the provisions of this Directive have been infringed or if it has reasonable grounds for suspecting that they would be infringed;
- (g) suspend, or ask the relevant regulated markets to suspend, trading on a regulated market for a maximum of 10 consecutive working days on any single occasion if it has reasonable grounds for believing that the provisions of this Directive have been infringed;

- (h) prohibit trading on a regulated market if it finds that the provisions of this Directive have been infringed;
- (i) make public the fact that an issuer is failing to comply with its obligations.

Where necessary under national law, the competent authority may ask the relevant judicial authority to decide on the use of the powers referred to in points (d) to (h) above.

4. Each competent authority shall also, once the securities have been admitted to trading on a regulated market, be empowered to:

- (a) require the issuer to disclose all material information which may have an effect on the assessment of the securities admitted to trading on regulated markets in order to ensure investor protection or the smooth operation of the market;
- (b) suspend or ask the relevant regulated market to suspend the securities from trading if, in its opinion, the issuer's situation is such that trading would be detrimental to investors' interests;
- (c) ensure that issuers whose securities are traded on regulated markets comply with the obligations provided for in Articles 102 and 103 of Directive 2001/34/EC and that equivalent information is provided to investors and equivalent treatment is granted by the issuer to all securities holders who are in the same position, in all Member States where the offer to the public is made or the securities are admitted to trading;
- (d) carry out on-site inspections in its territory in accordance with national law, in order to verify compliance with the provisions of this Directive and its implementing measures. Where necessary under national law, the competent authority or authorities may use this power by applying to the relevant judicial authority and/or in cooperation with other authorities.

5. Paragraphs 1 to 4 shall be without prejudice to the possibility for a Member State to make separate legal and administrative arrangements for overseas European territories for whose external relations that Member State is responsible.

Article 22

Professional secrecy and cooperation between authorities

1. The obligation of professional secrecy shall apply to all persons who work or have worked for the competent authority and for entities to which competent authorities may have delegated certain tasks. Information covered by professional secrecy may not be disclosed to any other person or authority except in accordance with provisions laid down by law.

2. Competent authorities of Member States shall cooperate with each other whenever necessary for the purpose of carrying out their duties and making use of their powers. Competent authorities shall render assistance to competent authorities of other Member States. In particular, they shall exchange information and cooperate when an issuer has more than one home competent authority because of its various classes of securities. Where appropriate, the competent authority of the host Member State may request the assistance of the competent authority of the home Member State from the stage at which the case is scrutinised, in particular as regards a new type or rare forms of securities. The competent authority of the home Member State may ask for information from the competent authority of the host Member State on any items specific to the relevant market.

3. Paragraph 1 shall not prevent the competent authorities from exchanging confidential information. Information thus exchanged shall be covered by the obligation of professional secrecy, to which the persons employed or formerly employed by the competent authorities receiving the information are subject.

Article 23

Precautionary measures

1. Where the competent authority of the host Member State finds that irregularities have been committed by the issuer or by the financial institutions in charge of the public offer or that breaches have been committed of the obligations attaching to the issuer by reason of the fact that the securities are admitted to trading on a regulated market, it shall refer these findings to the competent authority of the home Member State.

2. If, despite the measures taken by the competent authority of the home Member State or because such measures prove inadequate, the issuer or the financial institution in charge of the public offer persists in breaching the relevant legal or regulatory provisions, the competent authority of the host Member State, after informing the competent authority of the home Member State, shall take all the appropriate measures in order to protect investors. The Commission shall be informed of such measures at the earliest opportunity.

CHAPTER VII

IMPLEMENTING MEASURES*Article 24***Committee procedure**

1. The Commission shall be assisted by the European Securities Committee, instituted by Decision 2001/528/EC (hereinafter referred to as 'the Committee').

2. Where reference is made to this paragraph, Articles 5 and 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof and provided that the implementing measures adopted in accordance with this procedure do not modify the essential provisions of this Directive.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

3. The Committee shall adopt its rules of procedure.

4. Without prejudice to the implementing measures already adopted, on the expiry of a four-year period following its entry into force of this Directive the application of its provisions providing for the adoption of technical rules and decisions in accordance with the procedure referred to in paragraph 2 shall be suspended. On a proposal from the Commission, the European Parliament and the Council may renew the provisions concerned in accordance with the procedure laid down in Article 251 of the Treaty and, to that end, shall review them prior to the expiry of the four-year period.

*Article 25***Sanctions**

1. Without prejudice to the right of Member States to impose criminal sanctions and without prejudice to their civil liability regime, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible, where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive.

2. Member States shall provide that the competent authority may disclose to the public every measure or sanction that has been imposed for infringement of the provisions adopted pursuant to this Directive, unless the disclosure would seriously jeopardise the financial markets or cause disproportionate damage to the parties involved.

*Article 26***Right of appeal**

Member States shall ensure that decisions taken under laws, regulations and administrative provisions adopted in

accordance with this Directive are subject to the right to appeal to the courts.

CHAPTER VIII

TRANSITIONAL AND FINAL PROVISIONS*Article 27***Amendments**

With effect from the date set out in Article 29, Directive 2001/34/EC is hereby amended as follows:

1. Articles 3, 20 to 41, 98 to 101, 104 and 108(2) (c) (ii) shall be deleted;
2. in Article 107(3), the first subparagraph shall be deleted;
3. in Article 108(2)(a), the words 'the conditions of establishment, the control and circulation of listing particulars to be published for admission' shall be deleted;
4. Annex I shall be deleted.

*Article 28***Repeal**

With effect from the date indicated in Article 29, Directive 89/298/EEC shall be repealed. References to the repealed Directive shall be construed as references to this Directive.

*Article 29***Transposition**

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than [...] (*). They shall forthwith inform the Commission thereof. When Member States adopt those measures they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods for making such reference shall be laid down by Member States.

*Article 30***Transitional provision**

1. Issuers which are incorporated in a third country and whose securities have already been admitted to trading on a regulated market shall choose their competent authority in accordance with Article 2(1)(m)(iii) and notify their decision to the competent authority of their chosen home Member State by 31 December 2005.

(*) Eighteen months after the date of entry into force of this Directive.

2. By way of derogation from Article 3, Member States which have used the exemption in Article 5(a) of Directive 89/298/EEC may continue to allow credit institutions or other financial institutions equivalent to credit institutions which are not covered by Article 1(2)(j) of this Directive to offer debt securities or other transferable securities equivalent to debt securities issued in a continuous or repeated manner within their territory for five years following the date of entry into force of this Directive.

3. By way of derogation from Article 29, the Federal Republic of Germany shall comply with Article 21(1) by ... (*).

Article 31

Review

Five years after the date of entry into force of this Directive, the Commission shall make an assessment of the application of this Directive and present a report to the European Parliament and the Council, accompanied where appropriate by proposals for its review.

Article 32

Entry into force

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

Article 33

Addressees

This Directive is addressed to the Member States.

Done at ...

For the European Parliament
The President

For the Council
The President

(*). Five years after the date of entry into force of this Directive.

ANNEX I

PROSPECTUS

I. SUMMARY

The summary shall provide in a few pages the most important information included in the prospectus, covering at least the following items:

- A. identity of directors, senior management, advisers and auditors
- B. offer statistics and expected timetable
- C. key information concerning selected financial data; capitalisation and indebtedness; reasons for the offer and use of proceeds; risk factors
- D. information concerning the issuer
 - history and development of the issuer
 - business overview
- E. operating and financial review and prospects
 - research and development, patents and licences, etc.
 - trends
- F. directors, senior management and employees
- G. major shareholders and related-party transactions
- H. financial information
 - consolidated statement and other financial information
 - significant changes
- I. details of the offer and admission to trading
 - offer and admission to trading
 - plan for distribution
 - markets
 - selling shareholders
 - dilution (equity securities only)
 - expenses of the issue
- J. additional information
 - share capital
 - memorandum and articles of association
 - documents on display

II. IDENTITY OF DIRECTORS, SENIOR MANAGEMENT, ADVISERS AND AUDITORS

The purpose is to identify the company representatives and other individuals involved in the company's offer or admission to trading; these are the persons responsible for drawing up the prospectus as required by Article 5 of the Directive and those responsible for auditing the financial statements.

III. OFFER STATISTICS AND EXPECTED TIMETABLE

The purpose is to provide key information regarding the conduct of any offer and the identification of important dates relating to that offer.

- A. Offer statistics
- B. Method and expected timetable

IV. KEY INFORMATION

The purpose is to summarise key information about the company's financial condition, capitalisation and risk factors. If the financial statements included in the document are restated to reflect material changes in the company's group structure or accounting policies, the selected financial data must also be restated.

- A. Selected financial data
- B. Capitalisation and indebtedness
- C. Reasons for the offer and use of proceeds
- D. Risk factors

V. INFORMATION ON THE COMPANY

The purpose is to provide information about the company's business operations, the products it makes or the services it provides, and the factors which affect the business. It is also intended to provide information regarding the adequacy and suitability of the company's properties, plant and equipment, as well as its plans for future capacity increases or decreases.

- A. History and development of the company
- B. Business overview
- C. Organisational structure
- D. Property, plant and equipment

VI. OPERATING AND FINANCIAL REVIEW AND PROSPECTS

The purpose is to provide the management's explanation of factors that have affected the company's financial condition and results of operations for the historical periods covered by the financial statements, and management's assessment of factors and trends which are expected to have a material effect on the company's financial condition and results of operations in future periods.

- A. Operating results
- B. Liquidity and capital resources
- C. Research and development, patents and licences, etc.
- D. Trends

VII. DIRECTORS, SENIOR MANAGEMENT AND EMPLOYEES

The purpose is to provide information concerning the company's directors and managers that will allow investors to assess their experience, qualifications and levels of remuneration, as well as their relationship with the company.

- A. Directors and senior management
- B. Remuneration
- C. Board practices
- D. Employees
- E. Share ownership

VIII. MAJOR SHAREHOLDERS AND RELATED-PARTY TRANSACTIONS

The purpose is to provide information regarding the major shareholders and others that may control or have an influence on the company. It also provides information regarding transactions the company has entered into with persons affiliated with the company and whether the terms of such transactions are fair to the company.

- A. Major shareholders
- B. Related-party transactions
- C. Interests of experts and advisers

IX. FINANCIAL INFORMATION

The purpose is to specify which financial statements must be included in the document, as well as the periods to be covered, the age of the financial statements and other information of a financial nature. The accounting and auditing principles that will be accepted for use in preparation and audit of the financial statements will be determined in accordance with international accounting and auditing standards.

- A. Consolidated statements and other financial information
- B. Significant changes

X. DETAILS OF THE OFFER AND ADMISSION TO TRADING DETAILS

The purpose is to provide information regarding the offer and the admission to trading of securities, the plan for distribution of the securities and related matters.

- A. Offer and admission to trading
- B. Plan for distribution
- C. Markets
- D. Holders of securities who are selling
- E. Dilution (for equity securities only)
- F. Expenses of the issue

XI. ADDITIONAL INFORMATION

The purpose is to provide information, most of which is of a statutory nature, that is not covered elsewhere in the prospectus.

- A. Share capital
 - B. Memorandum and articles of association
 - C. Material contracts
 - D. Exchange controls
 - E. Taxation
 - F. Dividends and paying agents
 - G. Statement by experts
 - H. Documents on display
 - I. Subsidiary information
-

ANNEX II

REGISTRATION DOCUMENT

I. IDENTITY OF DIRECTORS, SENIOR MANAGEMENT, ADVISERS AND AUDITORS

The purpose is to identify the company representatives and other individuals involved in the company's offer or admission to trading; these are the persons responsible for drawing up the prospectus and those responsible for auditing the financial statements.

II. KEY INFORMATION ABOUT THE ISSUER

The purpose is to summarise key information about the company's financial condition, capitalisation and risk factors. If the financial statements included in the document are restated to reflect material changes in the company's group structure or accounting policies, the selected financial data must also be restated.

- A. Selected financial data
- B. Capitalisation and indebtedness
- C. Risk factors

III. INFORMATION ON THE COMPANY

The purpose is to provide information about the company's business operations, the products it makes or the services it provides, and the factors which affect the business. It is also intended to provide information regarding the adequacy and suitability of the company's properties, plants and equipment, as well as its plans for future capacity increases or decreases.

- A. History and development of the company
- B. Business overview
- C. Organisational structure
- D. Property, plants and equipment

IV. OPERATING AND FINANCIAL REVIEW AND PROSPECTS

The purpose is to provide the management's explanation of factors that have affected the company's financial condition and results of operations for the historical periods covered by the financial statements, and management's assessment of factors and trends which are expected to have a material effect on the company's financial condition and results of operations in future periods.

- A. Operating results
- B. Liquidity and capital resources
- C. Research and development, patents and licences, etc.
- D. Trends

V. DIRECTORS, SENIOR MANAGEMENT AND EMPLOYEES

The purpose is to provide information concerning the company's directors and managers that will allow investors to assess their experience, qualifications and levels of remuneration, as well as their relationship with the company.

- A. Directors and senior management
- B. Remuneration
- C. Board practices

D. Employees

E. Share ownership

VI. MAJOR SHAREHOLDERS AND RELATED-PARTY TRANSACTIONS

The purpose is to provide information regarding the major shareholders and others that may control or have an influence on the company. It also provides information regarding transactions the company has entered into with persons affiliated with the company and whether the terms of such transactions are fair to the company.

A. Major shareholders

B. Related-party transactions

C. Interests of experts and advisers

VII. FINANCIAL INFORMATION

The purpose is to specify which financial statements must be included in the document, as well as the periods to be covered, the age of the financial statements and other information of a financial nature. The accounting and auditing principles that will be accepted for use in preparation and audit of the financial statements will be determined in accordance with international accounting and auditing standards.

A. Consolidated statements and other financial information

B. Significant changes

VIII. ADDITIONAL INFORMATION

The purpose is to provide information, most of which is of a statutory nature, that is not covered elsewhere in the prospectus.

A. Share capital

B. Memorandum and articles of association

C. Material contracts

D. Statement by experts

E. Documents on display

F. Subsidiary information

ANNEX III

SECURITIES NOTE

I. IDENTITY OF DIRECTORS, SENIOR MANAGEMENT, ADVISERS AND AUDITORS

The purpose is to identify the company representatives and other individuals involved in the company's offer or admission to trading; these are the persons responsible for drawing up the prospectus and those responsible for auditing the financial statements.

II. OFFER STATISTICS AND EXPECTED TIMETABLE

The purpose is to provide key information regarding the conduct of any offer and the identification of important dates relating to that offer.

A. Offer statistics

B. Method and expected timetable

III. KEY INFORMATION ABOUT THE ISSUER

The purpose is to summarise key information about the company's financial condition, capitalisation and risk factors. If the financial statements included in the document are restated to reflect material changes in the company's group structure or accounting policies, the selected financial data must also be restated.

A. Capitalisation and indebtedness

B. Reasons for the offer and use of proceeds

C. Risk factors

IV. INTERESTS OF EXPERTS

The purpose is to provide information regarding transactions the company has entered into with experts or advisers employed on a contingent basis.

V. DETAILS OF THE OFFER AND ADMISSION TO TRADING

The purpose is to provide information regarding the offer and the admission to trading of securities, the plan for distribution of the securities and related matters.

A. Offer and admission to trading

B. Plan for distribution

C. Markets

D. Selling securities holders

E. Dilution (for equity securities only)

F. Expenses of the issue

VI. ADDITIONAL INFORMATION

The purpose is to provide information, most of which is of a statutory nature, that is not covered elsewhere in the prospectus.

A. Exchange controls

B. Taxation

C. Dividends and paying agents

D. Statement by experts

E. Documents on display

ANNEX IV

SUMMARY NOTE

The summary note shall provide in a few pages the most important information included in the prospectus, covering at least the following items:

- identity of directors, senior management, advisers and auditors
 - offer statistics and expected timetable
 - key information concerning selected financial data; capitalisation and indebtedness; reasons for the offer and use of proceeds; risk factors
 - information concerning the issuer
 - history and development of the issuer
 - business overview
 - operating and financial review and prospects
 - research and development, patents and licences, etc.
 - trends
 - directors, senior management and employees
 - major shareholders and related-party transactions
 - financial information
 - consolidated statement and other financial information
 - significant changes
 - details on the offer and admission to trading
 - offer and admission to trading
 - plan for distribution
 - markets
 - selling shareholders
 - dilution (for equity securities only)
 - expenses of the issue
 - additional information
 - share capital
 - memorandum and articles of incorporation
 - documents available for inspection
-

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 30 May 2001, the Commission presented a proposal for a Directive on the prospectus to be published when securities are offered to the public or admitted to trading ⁽¹⁾.
2. The European Central Bank delivered its Opinion on 16 November 2001 ⁽²⁾ and the Economic and Social Committee adopted its Opinion on 17 January 2002 ⁽³⁾. On 14 March 2002, the European Parliament adopted its Opinion at first reading ⁽⁴⁾.
3. In the light of the abovementioned Opinions on the original proposal, the Commission presented an amended proposal on 9 August 2002 ⁽⁵⁾.
4. On 24 March 2003, the Council adopted its common position pursuant to Article 251 of the Treaty.

II. OBJECTIVE

Offers to the public of securities or the admission of securities to trading on a regulated market generally trigger the obligation to draw up a prospectus to ensure that the public is properly informed. The main aim of the Directive is to create a true European passport for issuers by giving Community-wide validity to the prospectus approved by the issuer's home supervisor, in order to facilitate the raising of capital for all types of companies. To this end the Directive harmonises requirements for the drawing up, approval and distribution of the prospectus.

III. ANALYSIS OF THE COMMON POSITION

The common position follows closely the Commission's amended proposal.

In so doing it includes a large number of amendments proposed by the European Parliament to the original Commission proposal to the extent they were included in the amended Commission proposal. Some are included as proposed, namely amendments 1, 3, 4, 8, 9, 19, 29, 30, 31, 41, 43, 44, 46, 64, 50, 53, 58, 59, 60, 61 and 62, while others are included in spirit or with different wording, namely amendments 22, 26, 28 and 75, 40, 47, 48, 49 and 63. Some have been only partially included in the common position, namely 5 (in a different wording), 10, 76, 20, 23, 32, 33, 34, 45, 52 and 73.

Some amendments not included in the amended Commission proposal have not been included in the common position for the same reasons, namely amendments 2, 6, 11, 65 rev. (for the main part), 17, 21, 27, 35, 36 and 37.

The remaining amendments are to a large extent also included in the common position but not in the way set out in the amended Commission proposal and a limited number of amendments which were included in the amended Commission proposal are not taken over in the common position. The extent to which these amendments of the European Parliament have been included in the common position is set out and explained below.

⁽¹⁾ OJ C 240 E, 28.8.2001, p. 272.

⁽²⁾ OJ C 344, 6.12.2001, p. 4.

⁽³⁾ OJ C 80, 3.4.2002, p. 52.

⁽⁴⁾ OJ C 47 E, 27.2.2003, p. 524.

⁽⁵⁾ OJ C 20 E, 28.1.2003, p. 122.

The common position contains some further changes in comparison with the amended Commission proposal. The majority of the changes made are of a predominantly technical drafting nature and have been made in order to enhance legal certainty or to make the text clearer, while others modify the Commission proposal in a more substantial manner, e.g. the change in the definition of the home Member State.

THE RECITALS

The recitals have been amended to take account of the changes to the enacting terms of the Directive.

CHAPTER I — GENERAL PROVISIONS

Article 1 — Purpose and scope

In addition to the exemptions from the scope set out in the amended Commission proposal, the common position introduces some further exemptions set out below:

In line with the amended Commission proposal Article 1(2)(b) is limited to non-equity securities and part of amendment 65 rev. of the European Parliament is thus included. However, in order to take account of the situation in some Member States where the central bank is constituted in the form of a shareholding company, Article 1(2)(c) of the common position makes it clear, that the directive shall not apply to shares of capital in central banks of Member States.

In some Member States, in particular Finland, the right to occupy an apartment, real estate or part thereof is linked to ownership of a share in a housing association. Such shares are not fungible because of the difference of rights attached to each share, and therefore should not be considered shares for the purposes of this Directive. To make it clear that they are not covered, Article 1(2)(g) of the common position, in line with other Directives, explicitly exempts them from the scope of this Directive.

According to Article 2(2) of the amended Commission proposal, small offers of securities, those totalling less than 2 500 000 euro, were not considered offers of securities to the public, which would include such offers in the scope of the Directive but not in the obligation to publish a prospectus. The Council finds it more appropriate to exclude such securities from the scope of the Directive altogether, see Article 1(2)(h) and to leave to each Member State the right to define at national level the legislation applicable to such offers, but to give the issuers of such securities the possibility of 'opting in' into the scope of the Directive and draw up a prospectus in accordance with the Directive, if they so wish, see Article 1(3) of the common position. In any case issuers of very small offers totalling less than 100 000 euro, calculated over a period of 12 months, are still not obliged to draw up a prospectus, however, see Article 3(2)(e) of the common position.

A special type of mortgage bonds 'bostadsobligationer' issued only in Sweden, are also exempted from the scope of the Directive, Article 1(2)(i) of the common position, because of the special nature of this particular traditional type of bond. However, the Directive lays down specific conditions which these bonds must fulfil, in order to ensure the protection of the investor. As is the case for the issuers of small offers, the issuer of such bonds has an option to 'opt in' into the Directive by drawing up a prospectus, see Article 1(3) of the common position.

Finally, Article 1(2)(j) of the common position exempts small offers of bonds issued by credit institutions from the scope of the Directive, because of the domestic nature of such offers makes it appropriate to regulate them at national level. The bonds referred to in Article 1(2)(j) are therefore exempted from the scope of the Directive, but the issuers of such bonds may benefit from the 'opt in' option set out in Article 1(3) and draw up a prospectus according to the Directive if they so wish.

Article 1(3) of the common position sets out the 'opt in' option referred to above. The drafting of the option follows that of the option set out in the amended Commission proposal, but has been amended to include the issuers of small securities offers, 'bostadsobligationer' and the small offers of bonds referred to in Article 1(2)(j). The common position extends the 'opt in' option also to cover securities unconditionally and irrevocably guaranteed by a Member State or by one of its regional or local authorities.

In order to avoid any doubt, recital 11 makes it clear that securities which are not covered by the scope of the Directive remain unaffected by it. The Directive therefore does not impose any obligation upon issuers of exempted securities, e.g. non-equity securities issued by the European Central Bank, to draw up a prospectus.

Article 2 — Definitions

The common position amends a number of definitions in comparison with the amended Commission proposal.

In the definition of 'securities', Article 2(1)(a), it has been made clear that money market instruments with a maturity of less than 12 month are not considered securities for the purposes of the Directive. In largely following the amended Commission proposal the common position partially includes amendment 13 of the European Parliament.

The definitions of 'equity securities' and 'non-equity securities' are unchanged from the amended Commission proposal, but recital 12 of the common position adds an explanation of how these terms should be understood. This recital states i.a. that depositary receipts and convertible notes, e.g. securities convertible at the option of the investor, fall under the definition set out in this Directive of non-equity securities.

The definition of 'qualified investors' in Article 2(1)(e) has been amended to give a more precise definition of legal entities which are not small or medium sized enterprises. In order to strike a balance between the flexibility foreseen in the amended Commission proposal, which was based on amendment 15 of the European Parliament, and the need felt by some Member States to guarantee natural persons resident on their territory the full investor protection offered by the Directive, the common position makes it an option for Member States to choose to let natural persons be considered as qualified investors. This option has, however, been extended to place small and medium-sized enterprises on the same footing as natural persons, since the need for investor protection is considered the same in both cases. Amendment 15 of the European Parliament is thus partially included in the common position.

The definition of 'credit institution' in Article 2(1)(g), has been made more precise, by including a reference to Directive 2000/12/EC.

The definition of 'home Member State' has been amended in comparison with the amended Commission proposal. The common position follows the approach of the amended Commission proposal with separate treatment for equity and small denomination non-equity securities on the one hand and large denomination non-equity securities aimed at the professional market on the other, but strikes a different balance between the two categories, inspired by amendments 2 and 16 of the European Parliament. In the common position the balance is struck in a way that permits issuers of higher denomination bonds and certain derivative instruments to choose as the home Member State either the Member State where it has its registered office or the Member State where the securities in question are to be admitted to trading or are offered to the public for the first time. The limit for higher denomination bonds is set at 5 000 euro per unit. For EU issuers of all other securities the home Member State is defined as the Member State where the issuer has its registered office. This solution balances the need to preserve the principle of home Member State control against the need to take into account the fact that some competent authorities may have developed a particular expertise and experience in certain complex securities and therefore may be the best placed to approve certain prospectuses.

Although amendment 16 as proposed by the European Parliament has thus not been included in the common position, the balance struck in the common position is closer to the approach of the European Parliament than was the case in the amended Commission proposal.

For non-EU issuers the treatment is that foreseen in the amended Commission proposal, with the added provision that an issuer who has not chosen its home Member State, because another entity had offered its securities to the public or asked for admission to a regulated market, can, according to the Directive, subsequently elect a different home Member State.

The definition of 'approval' in Article 2(1)(q) has been made more precise.

Article 2(2) of the amended Commission proposal has been deleted in order to avoid both a positive and a negative definition of what constitutes an offer of securities to the public. The types of offer in that provision have now been set out in Article 3(2) of the common position, see below.

The criteria determining who can be considered a qualified investor have been set out in paragraph 2 and the provision relating to the register of qualified investors is set out in paragraph 3 where it has been redrafted to take account of the fact that small and medium-sized enterprises are also covered, see above.

Article 2(4) of the common position has been amended to make it clear that the definition of small and medium sized enterprises can be adjusted either upwards or downwards and the adjustment must take account of EU legislation and recommendations.

Article 3 — Obligation to publish a prospectus

Article 3(1) has been redrafted to set out the obligation incumbent upon Member States in a more precise manner.

Article 3(2) refers to the types of offer set out in the deleted Article 2(2) of the amended Commission proposal, see above. It is thus made clear that these offers are covered by the scope of the Directive, but not by the obligation to publish a prospectus. The limit set out in Article 3(2)(e) was amended, from 2 500 000 euro to 100 000 euro, compared to Article 2(2) of the amended Commission proposal, since small offers are now excluded from the scope of the Directive, see above, but with an option to 'opt in'. However, when they 'opt in' the very small offers will still not be subject to the obligation to publish a prospectus because of the Community wide exemption of the publication of a prospectus for such offers. The last subparagraph of Article 3(2) has been redrafted to make it clear that when placements of securities are made through financial intermediaries it is the final placement that matters.

Article 4 — Exemptions from the obligation to publish a prospectus

Except for paragraph 2(h) Article 4 essentially follows the amended Commission proposal with only minor amendments. Paragraphs 1(b) and (c) and 2(c) and (d) specify that when the competent authority assesses whether the information in the document to be made available is equivalent to that of a prospectus it must take into account what is required according to Community legislation. In the cases set out in paragraphs 1(d) and (e) and 2(e) the Council finds it sufficient to require that the document setting out the required information is made available, as is the case in paragraph 1(b) and (c) as opposed to published, as proposed in the amended Commission proposal.

The directors and employees referred to in paragraph 1(e) may not always be in a position to have a full enough knowledge of the company they work for to justify an exemption from the obligation to publish a prospectus in all cases. In order to protect their position the common position therefore stipulates that the application of paragraph 1(e) is restricted to cases where the employer has securities already admitted to trading on a regulated market and therefore is subject to ongoing disclosure requirements. The information requirement in paragraph 2(f) has been aligned on the requirement in paragraph 1(e) and a document containing some core information must now also be made available in the case referred to in paragraph 2(f).

Article 4(2)(h) of the common position introduces an exemption not foreseen in the amended Commission proposal, namely to exempt securities already traded on a regulated market from the obligation to publish a prospectus when admission to trading is sought on another regulated market in the Community. This possibility offers added flexibility to market participants and could facilitate the raising of capital on a new market. In order to ensure that investors receive sufficient information a number of conditions set out in (h) must, however, be fulfilled before this exemption can apply.

The scope of the implementing measures to be adopted pursuant to Article 4(3) has been restricted to those provisions where the Council finds implementing measures necessary, notably in relation to the meaning of equivalence.

CHAPTER II — DRAWING UP OF THE PROSPECTUS

Article 5 — The prospectus

Article 5(2) of the common position stipulates that the summary should convey the essential characteristics and risks associated with the issuer in a brief manner and in non-technical language. While the requirement set out in the amended Commission proposal and in amendment 24 of the European Parliament, that the summary should be limited to 2 500 words was deemed to have merit as an indication of the length of the summary, the Council found it too restrictive to be applied as a stringent requirement. It would for instance have had a different scope in the different languages of the Community according to the structure of each language. It is however, indicated in recital 19 that the summary should normally not exceed 2 500 words. Amendment 24 has thus been partially incorporated in the common position.

It has been stipulated that the summary must be drawn up in the language in which the prospectus was first drawn up. The possibility for a host Member State to require a translation of the summary is set out in Article 19. In order to avoid any doubt as to whether the issuer might in any event be under an obligation to provide a prospectus in the national language of the investor in some cases, Article 5(2)(c) of the common position states that the summary should contain a warning that where a claim related to the information contained in a prospectus is brought to a court, the plaintiff investor might, under the national legislation in the Member States, have to bear the translation costs of the prospectus before the start of legal proceedings. The warning in the summary should also cover the rule on civil liability set out in Article 6(2). Finally it has been made clear that the exception for high denomination non-equity securities in the last sentence of Article 5(2) is subordinate to the provisions of Article 19(4).

Article 5(4)(a) makes explicit reference to 'warrants in any form'. The intention is to cover all warrants, including equity warrants, and to make clear that a base prospectus should be published for such securities.

Paragraph 4 further aims to enhance the protection of the investor by stipulating that the final terms of the offer should if possible be provided to the investors and filed with the competent authority in advance of the beginning of the offer, and by recalling that the provisions of Article 8(1)(a) are applicable.

Article 6 — Responsibility attached to the prospectus

The wording of Article 6 has been clarified to take account of the fact that the issuer can be a legal person. The words 'at least' have been added to indicate that Member States are free at national level to extend responsibility to other persons such as auditors or advisors.

Article 7 — Minimum information

Article 7 is largely unchanged from the amended Commission proposal. Article 7(2)(c) has been aligned on Article 5(4)(a) and an addition has been made in Article 7(2)(f) stipulating that, where necessary, account should be taken of the public nature of the issuer, in developing the different models of prospectuses. As in the amended Commission proposal, amendment 29 of the European Parliament is included and extended to cover non-financial information too.

The indicative Annexes are unchanged from the amended Commission proposal.

Article 8 — Omission of information

Article 8 is largely unchanged from the amended Commission proposal. To avoid doubt, the second subparagraph of Article 8(1) now also uses the terms 'the final offer price and amount', as in the first subparagraph. Article 8(2)(c) of the common position further aims to give the competent authority a certain limited flexibility in authorising the omission of unimportant information from the prospectus. The common position thus includes amendment 25 of the European Parliament, albeit in a slightly different wording. The scope of the implementing measures to be adopted by the Commission has been limited in paragraph 2 to where the Council finds implementing measures necessary.

Article 9 — Validity of a prospectus, base prospectus and registration document

Article 9 is unchanged from the amended Commission proposal, except for more precise wording of Article 9(3) and stricter limitation on the validity of the prospectus for non-equity securities issued in a continuous or repeated manner by credit institutions.

Article 10 — Information

Article 10 of the common position has been redrafted in comparison with Article 10 of the amended Commission proposal. In order to reduce the administrative burden on issuers and to reduce costs, it makes clear that the obligation on the issuers is limited to the provision of a document or a list that contains or refers to all information that the issuer has already published or made available to the public over the previous 12 months in one or more Member States and in third countries in compliance with obligations under Community and national laws and rules dealing with the regulation of securities. No new disclosure obligations are imposed, since disclosures under existing law should be adequate. Since this obligation is not particularly burdensome it applies to all issuers, regardless of their size, with the sole exception set out in Article 10(3) for issuers of very large denomination non-equity securities which was also contained in the amended Commission proposal. Paragraph 4 explicitly states that the implementing measures to be adopted by the Commission will relate only to the method of publication and will not entail any new disclosure requirements.

The title of the article has been amended to reflect the emphasis on information.

Article 11 — Incorporation by reference

Article 11 is unchanged from the amended Commission proposal.

Article 12 — Prospectuses consisting of separate documents

Article 12 is unchanged from the amended Commission proposal, except for a clarification in the second subparagraph that 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 or any supplement according to Article 16 was approved.

CHAPTER III — ARRANGEMENTS FOR APPROVAL AND PUBLICATION OF THE PROSPECTUS

Article 13 — Approval of the prospectus

The common position maintains the deadline of 15 days working days, extendable to 30 days, for the approval of a prospectus, as set out in the amended Commission proposal. However, it does not mention what would happen if the competent authorities did not meet the deadline, which implies that the consequences must be regulated according to national law. The approval of the prospectus was deemed too important, however, to permit approval by default, and paragraph 2 therefore stipulates that the failure of the competent authorities to react shall not be deemed to be an approval of the application. Paragraph 5 of the amended Commission proposal has thus been deleted. Amendment 38 of the European Parliament is thus not included. The determination of the home Member State as set out in Article 2(1)(m), was also considered to represent a provision of such importance that it should not be derogated from and paragraph 2 of the amended Commission proposal, which allowed the issuer to choose another home Member State if the competent authority failed to give a decision within the set time limit, has therefore been amended accordingly.

The last sentence of paragraph 6 has been deleted as unnecessary in the light of the first sentence of the same paragraph. Paragraph 7 has been changed to make it clear that the deadlines set out in Article 13 can be adjusted and not only reduced. The main part of amendment 39 of the European Parliament is thus not incorporated in the common position

Article 14 — Publication of the prospectus

Article 14 has been amended to ensure the protection of the investor:

- a deadline has been introduced in the last sentence of paragraph 1 to make sure that investors have sufficient time to evaluate the prospectus before the end of the offer in the case of an initial public offering of a class of shares not already admitted to trading on a regulated market. Read together with the first sentence of paragraph 1 this means that amendment 42 of the European Parliament has been included in the common position, albeit with a slightly different wording;
- In paragraph 2 Member States have been given the option of requiring that publication always must be done in electronic form;
- In paragraph 3 Member States have the option of requiring the publication of a notice stating how the prospectus has been made available and where it can be obtained by the public;
- Paragraph 5 states that, in the case of a prospectus being made up of several documents, each document shall indicate where the other constituent documents of the full prospectus may be obtained.

In addition, to take account of practice in some Member States, Member States have been given the option of requiring the publication of prospectuses on the website of the competent authority, but only if the said competent authority has decided to offer this service.

Recital 30 further states that the prospectus should be filed with the relevant competent authority and be made available to the public by the issuer, the offeror or the person asking for admission to trading on a regulated market, subject to EU provisions related to data protection.

Article 15 — Advertisements

Article 15 has been made more precise than in the amended Commission proposal. Paragraph 5 of the amended Commission proposal would have obliged an issuer or offeror to disclose to the public material information regarding an offer addressed to qualified investors only, which would have created an unnecessary obligation on the issuer or offeror. To avoid this the common position makes it clear that paragraphs 2 to 4 apply only to cases where there is an obligation to draw up a prospectus. The reworded paragraph 5 aims to ensure that all material information reaches the qualified investors or special categories of investors to whom the offer is addressed. The common position does not specify how this information should be disclosed, and the part of amendment 45 of the European Parliament relating to this issue is thus not included. In cases where a prospectus has to be published, such material information shall be included therein or in a supplement, in accordance with the provisions relating to the publication of prospectuses.

Paragraph 3 has been reworded to take account of the fact that this provision can also apply before a prospectus has been published.

Paragraph 7 has been redrafted slightly in comparison with the amended Commission proposal to make it clear that the implementing measures are not restricted to the period before the prospectus is published.

Article 16 — Supplements to the prospectus

Article 16 has been amended in comparison with the amended Commission proposal in order to enhance the protection of the investor. It is now stated explicitly that where a supplement is necessary the summary shall also be supplemented to take account of the new information. More importantly, investors who have already agreed to purchase or subscribe to the securities before the supplement was published have been given the right to withdraw their acceptances at least two working days after the publication of the supplement.

CHAPTER IV — CROSSBORDER OFFERS AND ADMISSIONS TO TRADING

Article 17 — Community scope of approvals of a prospectuses

Article 17 is unchanged from the amended proposal of the Commission.

Article 18 — Notification

In comparison with the amended Commission proposal the wording of Article 18 has been changed only slightly to take account of the fact that it is not necessarily in all cases the issuer who is responsible for drafting the prospectus, and to make it clear that the host Member State has a right to receive a copy of the prospectus from the home Member State.

CHAPTER V — USE OF LANGUAGES AND ISSUERS INCORPORATED IN THIRD COUNTRIES

Article 19 — Use of languages

Concerning the language regime the common position largely follows the amended Commission proposal. However, in order to ensure that the competent authority of the home Member State is always in a position to understand the content of the prospectus it has to approve, the common position introduces a provision stipulating that even in cases where the offer is not made nor admission sought in the home Member State, the prospectus has to be drawn up either in a language accepted by the home Member State's authority or in a language customary in the sphere of international finance, the choice being made by the issuer.

So while paragraph 1 is identical to the amended Commission proposal and thus includes part of amendment 51 of the European Parliament, the rest of amendment 51 is only partially included.

In order to limit the scope of the exceptions to the language regime, paragraph 4 of the common position, in contrast with the amended Commission proposal, is limited to admission to trading on a regulated market of non-equity securities of the denomination set out in the amended Commission proposal, namely at least 50 000 euro. In line with paragraph 3, paragraph 4 of the common position adds an option for Member States, both home and host, to decide whether their national legislation should require that a summary be drawn up in their national language(s).

Article 20 — Issuers incorporated in third countries

Article 20 of the common position mainly follows the amended Commission proposal. The wording of paragraph 1(b) has been tightened to stipulate that the information requirements referred to in (b) must be equivalent, and not just 'broadly equivalent'. Amendment 54 of the European Parliament is thus not incorporated in the common position. The wording of paragraph 3 has been aligned with that of the other provisions in the Directive and confers on the Commission the power to adopt implementing measures. It still incorporates amendment 55 of the European Parliament, albeit with different wording.

CHAPTER VI — COMPETENT AUTHORITIES

Article 21 — Powers

In comparison with the amended Commission proposal, the common position emphasises the concentration of competences in the central competent administrative authority.

Paragraph 1 stipulates that the designation of other administrative authorities to apply Chapter III must be required by national law, and not merely by an administrative decision. The possibility for the competent authority to delegate tasks to other bodies has been largely removed so as to concentrate the responsibility for the supervision and approval of the prospectuses with the competent authority. In order to allow for a transitional period in those Member States which currently permit the delegation of functions, delegation will continue to be possible for a period of five years after the entry into force of the Directive, and during this period may take place only on the conditions set out in paragraph 2. An exception is made for the delegation of the publication of prospectuses on the internet as mentioned in Article 14, since this task is of a purely technical nature and for practical reasons would be impossible for smaller competent authorities to undertake. In any event, also during the transitional period, the final responsibility for supervision and approval of prospectuses shall lie with the designated competent authority.

It is also stipulated that the communication to the Commission and other Member States regarding any delegation of tasks should include the precise conditions regulating such delegation. The conditions set out in paragraph 2 for delegation during the transitional period correspond to those set out in the amended Commission proposal, which in turn incorporated the main part of amendments 7 and 56 of the European Parliament. However, to the extent these amendments aimed at allowing delegation on a permanent basis, they have not been incorporated in the common position.

Because of its federal structure, the Federal Republic of Germany has been granted a transitional period before it has to designate a single central competent authority, see Article 30(3).

Moreover, the wording of the fourth subparagraph of paragraph 1 has been amended to make the text more precise, and the requirement to inform the Commission of the list of administrative authorities has been deleted as unnecessary.

The wording of paragraph 3 has been amended to set out more precisely the deadlines in (d), (e) and (g) which now refers to 'consecutive working days', and the wording of the last subparagraph now takes into account the fact that the rights set out in this paragraph can be enforced in different ways according to national law.

Paragraph 4 makes it clear that the competent authority also shall have the right to carry out on-site inspections under the conditions set out in national law, which may require that such inspections may be undertaken only following a judicial decision and or in collaboration with other authorities. Amendment 57 of the European Parliament has thus not been included in the common position.

In a recital it is recalled that for future developments of the Directive, consideration should be given to the approval mechanism to be adopted to further enhance the uniform application of European legislation on prospectuses, including the possible establishment of a European Securities Unit.

Article 22 — Professional secrecy and cooperation between authorities, and Article 23 — Precautionary measures

These articles are unchanged from the amended Commission proposal.

CHAPTER VII — IMPLEMENTING MEASURES

Article 24 — Committee procedure, and Article 26 — Right of appeal

These articles are unchanged from the amended Commission proposal.

Article 25 — Sanctions

Article 25 is essentially unchanged from the amended Commission proposal, but the wording has been made more precise.

CHAPTER VIII — TRANSITIONAL AND FINAL PROVISIONS

Article 27 — Amendments, Article 28 — Repeal, Article 29 — Transposition, Article 32 — Entry into force, and Article 33 — Addressees

These articles are unchanged from the amended Commission proposal.

Article 30 — Transitional provisions

In comparison with the amended Commission proposal the common position adds two transitional provisions which the Council considers necessary.

The first of these is set out in paragraph 2, which allows Member States who have made use of the exemption in Article 5(a) of Directive 89/298/EEC in their national law to continue this exemption for five years. This will exempt certain debt securities from the obligation to publish a prospectus during the transitional period, provided they are issued in a continuous or repeated manner by credit institutions or other financial institutions equivalent to credit institutions which regularly publish their annual accounts and which, within the Community, are set up or governed by a special law or pursuant to such a law, or are subject to public supervision intended to protect savings.

The second of these is the exemption granted to the Federal Republic of Germany concerning Article 21(1), see above.

Article 31 — Review

In order to ensure the review of the Directive the common position introduces an obligation for the Commission to make an assessment of the application of this Directive and present a report to the European Parliament and the Council, accompanied where appropriate by proposals for its review. Recital 44 states that this assessment should focus in particular on the process of approval of prospectuses by Member States' competent authorities, and more generally on the application of the home country principle, and whether or not problems of investor protection and market efficiency might result from its application. The Commission should also examine the functioning of Article 10.

In addition to the changes set out above, a number of minor drafting changes of a purely technical nature have been made to improve the quality of the wording.

IV. CONCLUSIONS

The Council considers that all the amendments made to the amended Commission proposal are fully in line with the objectives of the Directive, which is to ensure investor protection and market efficiency, in accordance with high regulatory standards adopted in the relevant international fora. The common position incorporates a large majority of the amendments proposed by the European Parliament either completely or partially. The Council finds that the Directive will facilitate the widest possible access to investment capital on a Community-wide basis, including for small and medium sized enterprises (SMEs) while at the same time ensuring appropriate protection of the investors.
