

Securities: offer to the public and harmonisation of transparency requirements

2009/0132(COD) - 17/06/2010 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 464 votes to 41, with 57 abstentions a resolution setting out its position at first reading under the ordinary legislative procedure (formerly known as the codecision procedure) with a view to the adoption of the proposal for a directive of the European Parliament and of the Council amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. The amendments were the result of a compromise negotiated with the Council. They modify the Commission's proposal as follows:

Scope: the directive will not apply to:

- securities included in an offer where the total consideration of the offer in the European Union is less than EUR 5 000 000, which limit shall be calculated over a period of 12 months;
- non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer in the European Union is less than EUR 75 000 000, which limit shall be calculated over a period of 12 months, provided that these securities: i) are not subordinated, convertible or exchangeable; ii) do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument.

Definitions: the definition of "**key information**" is added: this relates to essential and appropriately structured information which is to be provided to investors with a view to enable them to understand the nature and the risks of the securities that are being offered to them or admitted to trading on a regulated market and, without prejudice to Article 5(2)(b), to decide which offers of securities to consider further. In light of the offer and securities concerned, the key information shall include the following elements:

- a short description of the risks associated with and essential characteristics of the issuer and any guarantor, including the assets, liabilities and financial position;
- a short description of the risk associated with and essential characteristics of the investment in the relevant security, including any rights attaching to the securities;
- general terms of the offer, including estimated expenses charged to the investor by the issuer or the offeror;
- details of the admission to trading;
- reasons for the offer and use of proceeds.

The definition of a "company with reduced market capitalisation" is also introduced. It means a company listed on a regulated market and having had an average market capitalisation of less than EUR 100 000 000 on the basis of year-end quotes during the previous three calendar years.

Requirement to publish a prospectus: the requirement to issue a prospectus does not apply to the following categories of offer:

- an offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors; and/or
- an offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 100 000 per investor, for each separate offer; and/or

- an offer of securities whose denomination per unit amounts to at least EUR 100 000; and/or
- an offer of securities with a total consideration in the European Union of less than EUR 100 000, which limit shall be calculated over a period of 12 months.

Liability: the issuer or the person responsible for drawing up the prospectus should be able to **attach conditions to his or her consent**. The consent, including any conditions attached thereto, shall be given in a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement. In the event that consent to use the prospectus has been given, the issuer or person responsible for drawing up the initial prospectus should be **liable for the information** stated therein and in case of a base prospectus, for providing and filing final terms and no other prospectus should be required. However, in case the issuer or the person responsible for drawing up such initial prospectus does not consent to its use, the financial intermediary should be required to publish a new prospectus. In that case, the financial intermediary should be liable for the information in the prospectus, including all information incorporated by reference and, in case of a base prospectus, final terms.

Exceptions to the requirement to publish a prospectus: the requirement to publish a prospectus would not apply to

- securities offered, allotted or to be allotted in connection with a merger or division, 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 Union legislation;
- dividends paid out to existing shareholders 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;
- securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking provided that the company has its head office or registered office in the European Union and provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer.

This last derogation would also apply to a company **established outside the European Union** whose securities are admitted to trading either on a regulated market or on a third country market. In the latter case, the exemption shall apply provided that adequate information, including the document referred to above, is available at least in a language customary in the sphere of international finance and that the Commission has adopted an equivalence decision regarding the third country market concerned.

The legal and supervisory framework of a third country may be considered equivalent if they fulfil the following conditions: i) markets in that third country are subject to authorisation and to effective supervision and enforcement on an ongoing basis; ii) markets have clear and transparent rules regarding admission of securities to trading so that such securities are capable of being traded in a fair, orderly and efficient manner, and are freely negotiable; iii) security issuers are subject to periodic and ongoing information requirements ensuring a high level of investor protection; and iv) it ensures market transparency and integrity by preventing market abuse in the form of insider dealing and market manipulation.

Prospectus: according to the amended text, the prospectus must also include a summary that, in a concise manner and in non-technical language, provides key information in the language in which the prospectus was originally drawn up. The format and content of the summary of the prospectus shall provide, **in conjunction with the prospectus**, appropriate information about essential elements of the securities concerned in order to aid investors when considering whether to invest in such securities.

The summary shall be drawn up in a **common format** in order to facilitate comparability of the summaries of similar securities.

Where the prospectus relates to the admission to trading on a regulated market of non equity securities having a denomination of at least EUR 100 000, there shall be no requirement to provide a summary except when requested by a Member State .

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, or it does not provide, when read together with the other parts of the prospectus, key information in order to aid investors when considering whether to invest in such securities. The summary shall contain a clear warning in this respect.

Validity of prospectus, base prospectus and registration document: a prospectus shall be valid for **12 months after its approval**. A registration document, previously filed and approved, shall be valid for a period of up to 12 months.

Publication of prospectus: the prospectus will be considered to be available to the public once it has been published in electronic form on the issuer's website or, if applicable, on the website of the financial intermediaries placing or selling the securities, including paying agents.

Supplement to the prospectus: according to the amended text, every significant new factor, material mistake or inaccuracy relating to the information included in the prospectus which is capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, **whichever occurs later**, shall be mentioned in a supplement to the prospectus.

Linguistic regime: where admission to trading on a regulated market of non-equity securities whose denomination per unit amounts to at least EUR 100 000 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).

Delegated acts: in order to take account of the technical developments in the financial markets and to specify the requirements laid down in Directive 2003/71/EC, the Commission should be empowered to adopt delegated acts in accordance with Article 290 of the Treaty on the Functioning of the European Union. In particular, delegated acts may be necessary concerning the updating of the limits and definitions and thresholds for reduced market capitalisation and SMEs established in this Directive and Directive 2003 /71/EC, and specifying the detailed content and specific form of the summary. The text contains a number of provisions concerning the adoption of delegated acts.

Review: five years after the entry into force of this Directive, the Commission shall assess the application of this Directive, in particular with regard to the application and the effects of the rules, including liability, regarding the summary with key information, the impact of exemption stipulated in Article 4(1)(e) on the protection of employees and the proportionate disclosure regime referred to in Article 7(2)(e) and (g), as well as the electronic publication of prospectuses according to Article 14 and it shall review Article 2(1) (m)(ii) in relation to the limitation on the determination of the home Member State for issues of non-equity securities with a denomination below EUR 1 000 in order to consider whether this provision should be maintained or removed.

The Commission shall, furthermore, assess the need to revise the definition of the term 'public offer' and the need to define the terms 'primary market' and 'secondary market' and, in this respect, shall fully clarify

the links between this Directive and Directives 2004/109/EC and 2003/6/EC. Following its assessment, the Commission shall present a report to the European Parliament and the Council, accompanied, where appropriate, by proposals to amend this Directive.