

Securities: offer to the public and harmonisation of transparency requirements

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The Committee on Economic and Monetary Affairs adopted the report by Wolfgang KLINZ (ALDE, DE) on 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 committee made some amendments to the proposal which may be summarised as follows:

Alignment of qualified investor: the committee agrees with the Commission proposal to align the prospectus directive with the definition in Directive 2004/39/EC (the Markets in Financial Instruments Directive or MiFID), but it wants to go further and to delete the separate register as the latter has shown very little value in practice.

Liability of issuer and financial intermediary: Members clarified the terms under which the financial intermediary is liable for the prospectus on resale. They state that financial intermediaries subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer as long as this is valid and duly supplemented in accordance with Directive 2003/71/EC and the issuer or the offeror responsible for drawing up such consents to its use. The issuer or the offeror should be able to attach conditions to his or her consent. In the event that consent to use the prospectus has been given, the issuer or the offeror responsible for drawing up the initial prospectus should be liable for the information stated therein and no other prospectus should be required. Where, notwithstanding such consent, the final terms of the prospectus have to be updated with specific information relating to a resale, the financial intermediary making use of the prospectus should be liable for such additional information. However, where the issuer or the offeror does not consent to its use, the financial intermediary should be required to publish a new prospectus. Where the financial intermediary chooses to use the initial prospectus without consent, the intermediary should be liable for the information stated in the initial prospectus.

The report reflects the fact that in any resale, some additional conditions will apply, such as a new price or a new acceptance period. Therefore, the text clarifies that the financial intermediary is liable for providing such additional information.

Scope of the Directive: the Commission proposal had provided that securities included in an offer where the total consideration of the offer in the Community is less than EUR 2 500 000, which limit shall be calculated over a period of 12 months, are outside the scope of the Directive. The committee notes that this figure was settled in 2003. Due to market developments and the need to bridge a funding gap for small and medium sized enterprises, it raised the amount to EUR 5 000 000.

Similarly, there was an exemption for non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer in the Community is less than EUR 50 000 000. The committee raised this figure to EUR 100 000 000.

Definitions: the report aligns provisions with MIFID and adds a definition for company with reduced market capitalisation'. It adds that in order to allow for the efficient application of Directive 2003/71/EC, Directive 2004/109/EC (the Transparency Directive) and Directive 2003/6/ (the Market Abuse Directive) and to clarify underlying problems of differentiation and overlaps, the Commission should put forward a definition of 'primary market', 'secondary market' and 'public offer'.

Obligation to publish a prospectus: Members state that, in order to avoid uncertainties regarding liabilities and **to prevent restrictions to the distribution via retail cascade**, an exemption should be introduced from the obligation to produce a prospectus for a public offer of securities, as long as a prospectus relating to the securities in question is already published. The existing prospectus would not be 'used' by anyone else, but provide an exemption by its existence. Investors are sufficiently protected by the Market Abuse and Transparency Directive. According to the amended text, exemptions from the obligation include: (i) an offer of securities addressed to fewer than 250 natural or legal persons per Member State (rather than 100), other than qualified investors; (ii) an offer of securities of an issuer or an intermediary acting on behalf of the issuer after publication of a prospectus relating to securities of that issuer, which are already admitted to trading on a regulated market.

In order to take account of technical developments on financial markets, including inflation, the Commission must adopt measures concerning the thresholds by means of delegated acts.

Exemptions from the obligation to publish a prospectus: the committee felt that there is a need for clarification of the exemptions under this article in order to prevent discrimination among issuers by given preference to certain corporate structures instead of others. It made certain amendments and also stated that the definition of shares used in this directive should be aligned with the definition of shares in the MiFID Directive (2004/39/EC).

Key information document: Members provide that, rather than a summary, the prospectus shall include a key information document, which will be in a common format and provide, in conjunction with the prospectus, appropriate information about the essential elements of the securities concerned in order to aid investors when considering whether to invest in such securities. The key information document shall include information on the following essential elements in respect of the securities concerned: (i) essential information on the issuer including the assets, liabilities and financial position and, if applicable, the guarantor, and the securities to be offered to the public or to be admitted to trading on a regulated market; (ii) a short description of the risks associated with and essential characteristics of the investment in the relevant security if and to the extent it may be useful for the investor; (iii) details of the offer and admission to trading; (iv) the reasons for the offer and prospective use of proceeds, where appropriate; (v) any rights attaching to the securities; and (vi) the general terms and associated costs.

By means of delegated acts, the Commission must lay down within 18 months the detailed content and specific form of the key information document; and also the detailed content and specific form in regard to structured securities and base prospectuses, shares and bonds.

Omission of information: the report makes explicit the **exemption of central banks**, adding that there shall be no requirement for the prospectus or any supplements thereto to contain information about central bank lending or other liquidity facilities provided to a particular credit institution by an ESCB central bank.

Validity of a prospectus, base prospectus and registration document: the Commission proposal had provided that the validity of the prospectus shall be 24 months but the committee felt that the validity period of 12 months should be maintained. Extending the validity period to 24 months increases the risk that the prospectus becomes outdated, as not all information can be adjusted through a supplement. In addition, extension of the validity period significantly increases the number of supplements, which negatively affects investors' understanding and the readability of the prospectus. The registration document too, should be valid for a period of 12 months rather than 24.

Publication of the prospectus: the prospectus may be deemed available, inter alia, when 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.

Supplements to the prospectus: the obligation to keep the prospectus up to date ends either with the closing of the public offer or the admission to trading on a regulated market, whichever occurs earlier. The report provides that in the event that the admission to trading on a regulated market takes place before the final closing of the public offering, the date of the admission shall terminate the obligation to supplement the prospectus, and the information obligations laid down by Directives 2004/109/EC and 2003/6/EC shall apply from thereon. For offers to the public, the duration of the right of withdrawal shall be specified in the supplement.

Comitology: the report provides that in accordance with Article 291 of the Treaty on the Functioning of the European Union, rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of its implementing powers shall be laid down in advance by a Regulation adopted in accordance with the ordinary legislative procedure. Pending the adoption of that new Regulation, the provisions of Council Decision 1999/468/EC continue to apply, with the exception of the regulatory procedure with scrutiny. The report makes several provisions on the adoption of delegated acts for certain measures, the revocation of the delegation, and objection to acts.

Review: five years after the entry into force of the Directive, the Commission shall assess its application, in particular with regard to the application and effects of the rules regarding the key information document. The Commission shall, furthermore, develop definitions of the terms 'public offer', '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 for amendment.

Limitation on determination of home Member State in Directive 2004/109/EC (Transparency Directive): the Commission proposal had provided that the limitation on the determination of the home Member State for issues of non-equity securities with a denomination below EUR 1 000 should be removed. The committee deleted this, stating that the removal of the EUR 1 000 threshold from which issuers of non-equity securities can choose their competent authority is likely to weaken investor protection, particularly the protection of retail investors, by enhancing the possibility for the issuer to engage in regulatory arbitration to the detriment of the closest authority.

Civil liability regimes: lastly, a new recital states that liability regimes in the Member States are significantly different due to national competence in civil law. In order to identify and monitor the arrangements in the Member States, the ESMA shall establish a comparative table of Member States' regimes.