

***Important note:***

***This document is a working document of the Commission services for consultation. It does not purport to represent or pre-judge the formal proposals of the Commission.***

You are invited to comment on the proposals in this paper. The proposals are only an indication of the approach the European Commission may take and are not its final policy position.

Since this is a simplification and administrative burden reduction initiative we would welcome in particular the views of SMEs, investors and consumers.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

Your comments will help us develop our proposals to review the Prospectus Directive. We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on compliance costs, impacts on competition and other impacts, costs and benefits. These elements will be taken into account when we prepare our final policy position.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

You can send your contributions until 10th March 2009 to [markt-g3@ec.europa.eu](mailto:markt-g3@ec.europa.eu)

**Consultation on a draft 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**

- (1) The European Council agreed, at its meeting on 8 and 9 March 2007, that administrative burdens on companies should be reduced by 25% by the year 2012 in order to enhance the competitiveness of companies in the Community.
- (2) Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC has been identified as one area that contains a number obligations for companies, some of which seem disproportionate.
- (3) These obligations need to be reviewed in order to reduce the burdens weighing on companies within the Community to the minimum that is necessary to ensure the protection of the investors and the proper functioning of the securities markets in the EU.
- (4) Article 31 of the Prospectus Directive requires the European Commission to review the application of the Directive five years after its entry into force and to present, where appropriate, proposals for its review. As a result of an extensive and continuous dialogue and consultation with stakeholders, including the Committee of European Securities Regulators and the European Securities Markets Expert Group, the European Commission concluded that some particular elements of the prospectus regime merit a review, in line with the reduction of administrative burdens exercise.
- (5) For the purposes of a private placement of securities, investment firms and credit institutions should be entitled to treat as qualified investors those natural or legal persons that the firms consider to be professional clients or eligible counterparties in accordance with Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC<sup>1</sup>. Such an alignment would reduce complexity and costs for investment firms in the event of a private placement because the firms will be able to define the persons to whom the placement is to be addressed relying in their own list of professional clients. Therefore, the definition of qualified investors in the Prospectus Directive should be widened in order to also cover those persons.
- (6) The limitation on the free determination of the home Member State for issues of non-equity securities with a denomination below 1.000 euros is a burdensome restriction that is causing practical problems for issuers, either because it obliges them to

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<sup>1</sup> Official Journal L 145, 30.4.2004, p. 1–44

maintain additional debt issuance programmes or because the threshold does not accommodate certain structured products which are not denominated. The 1.000 euros threshold should be removed in order to alleviate this burden from issuers and increase the flexibility for the issuance of debt. Such a change would not create concrete risks in terms of investor protection because the characteristics of and the risks associated with debt securities do not depend on the denomination of the securities offered or traded in a regulated market.

- (7) A prospectus drawn up by the issuer or the offeror, duly supplemented if needed, available to the public at the time of the final placement of the securities, provides for sufficient information for investors to make informed investment decisions. Therefore, the publication of different subsequent prospectus in each of the stages of a placement of securities through financial intermediaries is a burdensome requirement which should be abolished.
- (8) The exemption of the obligation to produce a prospectus for offers made in the context of an employee share scheme should be applied also to non-listed companies and companies listed in markets other than EU regulated markets. The requirement to produce a full prospectus for this type of offers is not an effective means of informing employees about the risks and benefits of this very particular kind of offer, and imposes excessive costs on employers that are not justified in terms of investor protection. Therefore, the exemption related to Employee Shares Schemes should be widened in order to cover the employee shares schemes of companies that are not listed in a regulated market.
- (9) As a consequence of the entry into force of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC<sup>2</sup>, the obligation for the issuer to provide annually a document containing or referring to all information published in the twelve months preceding the issuance of the prospectus has become outdated. Therefore, in order to reduce the administrative burden on issuers, such obligation should be abolished.
- (10) In order to reduce the legal uncertainty for multinational offers or admission to trading, the time frame for the exercise of the right of withdrawal should be harmonised at European level.
- (11) Since the objectives of this Directive, namely reducing administrative burdens relating to the publication of a prospectus in case of offers of securities to the public and admission to trading in regulated markets within the Community, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (12) Directive 2003/71/EC should therefore be amended accordingly,

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<sup>2</sup> Official Journal L 390, 31.12.2004, p. 38-57

## *Article 1*

### *Amendments to Directive 2003/71/EC*

Directive 2003/71/EC is amended as follows:

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

(a) Paragraphs (i) and (ii) in Article 2(1)(e) are replaced by the following:

"(i) persons that meet the criteria set out in paragraphs (1) to (4) of Section I Annex II of Directive 2004/39/EC;

(ii) in relation to a placement of securities by an intermediary that is an investment firm as defined in Article 4.1.1 of Directive 2004/39/EC or a credit institution as defined in Article 4(1) of Directive 2006/48/EC, other persons that the intermediary categorises as professional clients as defined in Annex II of Directive 2004/39/EC or eligible counterparties as defined in Article 24 of Directive 2004/39/EC, in relation to the services it provides to those persons with respect to that placement;"

(b) Point (m) (ii) is amended as follows:

"(ii) for any issues of non-equity securities, 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;"

2. Last paragraph in Article 3(2) is replaced by the following:

"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."

3. Article 4 (1) (e) is replaced by the following:

"(e) securities offered, allotted or to be allotted to existing or former directors or employees by their employer 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."

4. Article 10 is deleted

5. Paragraph 2 of Article 16 is amended as follows:

"2. Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within at least two working days after the publication of the supplement, to withdraw their acceptances."

## *Article 2*

### *Amendment of Directive 2004/109/EC*

Article 2.1.i (i), second indent, of Directive 2004/109/EC is amended as follows:

"– where the issuer is incorporated in a third country, the Member State referred to in Article 2.1.m (iii) of Directive 2003/71/EC".

## *Article 3*

### *Transposition*

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*twelve months after the entry into force of this Directive*] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

## *Article 4*

### *Entry into force*

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

## *Article 5*

### *Addressees*

This Directive is addressed to the Member States.