POSITION PAPER

10 April 2009

BUSINESSEUROPE RESPONSE TO THE COMMISSION CONSULTATION ON THE REVIEW OF THE PROSPECTUS DIRECTIVE

EXECUTIVE SUMMARY

- Introducing a single passport for issuers is a key step towards an integrated European capital market leading to the reduction of companies costs by making it easier to raise capital on a single market with access to more customers;
- We support the Commission's removing or amending disproportionate requirements of the Prospectus Directive. Simplifying this piece of legislation to take account of better regulation principles is crucial to reduce costs companies currently face;
- There should be uniformity in the regulatory conditions for the raising of capital by European companies in order to increase transparency in the European capital market;
- Member States should not be allowed to apply additional and more burdensome requirements than the ones set out in the Prospectus Directive;
- Alignment and removal of provisions included in other legislative documents will reduce administrative burdens and increase legal certainty;
- For smaller companies the administrative burden has greatly increased with little practical benefit since these companies do not passport their prospectuses. The new Directive should take account of that.

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GENERAL COMMENTS

In its comments on the Commission proposal for a Prospectus Directive, BUSINESSEUROPE very much welcomed the Commission initiative to introduce a single passport for issuers by ensuring that adequate and equivalent disclosure standards are in place in all Member States when securities are made available for European investors.

We acknowledged the need for uniformity in the regulatory conditions for the raising of capital by European companies in order to increase transparency in the European capital market. This harmonisation, combined with the introduction of a genuine European passport for securities issuers in terms of notification processes, was intended to constitute a fundamental step towards an integrated European capital market.

It would reduce companies' costs for raising by making it easier to raise capital on a single market with access to more customers, which would allow economies of scale. Further, it would encourage greater economic growth with more investment, higher productivity and higher inflows of foreign capital.

In the background document for the ongoing consultation, the Commission points out that although most market participants are satisfied with the current regime, it still imposes unnecessary burdens and unjustified costs on EU companies.

BUSINESSEUROPE has always been a very strong supporter of the Commission's better regulation agenda. Simplification and concrete measures to achieve the target of reducing administrative burdens of 25% by 2012 are key for European companies. Now, more than ever, fewer burdens are crucial for companies having to compete in difficult times.

This is why we welcome the ongoing consultation and support the Commission's objective of removing or amending disproportionate requirements of the Prospectus Directive, improving and simplifying this piece of legislation. We believe that this exercise should however go further than what is proposed by the Commission.

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BUSINESSEUROPE RESPONSE TO THE COMMISSION CONSULTATION ON THE REVIEW OF THE PROSPECTUS DIRECTIVE

Do you agree with the Commission services' preliminary assessment of the functioning of the Prospectus Directive?

We welcome the Commission's intention to assess whether the rules on the Prospectus Directive are really working on the ground, and in particular whether it is contributing to the development of the single market for securities. Since drawing up a prospectus generates considerable additional costs we appreciate the efforts at deregulation where regulation is not necessary.

There are indeed many issues that in our view have to be addressed regarding the Prospectus regime and its application.

In particular, differing interpretations among competent authorities of the provisions of the Prospectus regime do not help to create an efficient European market. Some regulators demand requirements in addition to the provisions of the Prospectus regime. For instance, the Prospectus Directive adversely affects the ability of both EU and non-EU companies with pan-European share plans to operate them effectively due to inconsistent application of the Directive by the 27 Member States, e.g. various policies with regard to the "passport".

As we regard the Prospectus Directive as a Directive of maximum harmonisation, additional requirements are in our view an infringement of the Prospectus Directive. We suggest that it is made clear that it is not allowed for Member States to stipulate additional requirements.

Furthermore, we would like to note that for smaller companies the administrative burden has been much increased with little practical benefit since these companies do not passport their prospectuses.

Changes Proposed

3.1. Article 2(1)(e) – Definition of qualified investors

Do you agree with this analysis?
Do you agree with the changes proposed in Article 2.1(e) of the Prospectus Directive?

We agree with the Commission's proposal to align the Prospectus Directive with MiFID, as suggested in the Report of the ESME group. However, in case of a placement of securities by an intermediary some questions have to be asked.

The new Article 2 (1)(e)(ii) of the Prospectus Directive allows investment firms or credit institutions to categorise professional clients or eligible counterparts in accordance with Directive 2004/39/EC that can differ from the qualified investors set out in paragraph (i).

It is not clear whether Article 2(1)(e)(ii) covers both placements of intermediaries in accordance with the issuer and placements without the consent of the issuer.

In the first case the definition of qualified investors can diverge for the issuer and the intermediary since it is not clear if the issuer can refer to the category of qualified investors the intermediary as defined. If placing securities with the help of intermediaries the issuer will have to rely on the stricter concept of qualified investors set out in paragraph (i) because of this legal uncertainty.

If the new provision of paragraph (ii) is applicable in any case that an intermediary is involved in a placement, the contracts between the issuer and the intermediary would have to be adjusted. It would have to be clarified that the issuer can rely on the qualification of qualified investors made by the intermediary. The liability in cases of wrong classifications would have to be contractually defined.

As further steps have to follow the new provision, the described legal uncertainty about the application of Article 2(1)(e)(ii) should be removed, with reference made in the recital of the Prospectus Directive.

Following the new definition of "credit institution" referring to Directive 2006/48/EC in paragraph (ii), there should be either an adjustment in Article 2(1)(g) still referring to 2000/12/EC, or a clarification that the relation to Directive 2006/48/EC is only valid for Article 2 (1)(e)(ii) of the Prospectus Directive.

3.2. <u>Article 3 – Exempt Offers</u>

Do you agree with this analysis? Do you agree with the change proposed in Article 3.2 of the Prospectus Directive?

The proposed amendment to Article 3(2), leaves the position of intermediaries acting in association with the issuer unclear because the wording in the draft amendment "subsequent resale... shall be regarded as a separate offer" means that this will be the case even where intermediaries are acting in association with the issuer. If the intention is that current CESR guidance continues to apply, which we think should be the case, the amendment should make that clear.

The Commission proposal solves the problem of the retail cascade only for intermediaries but not for issuers.

The so-called "retail cascade" can raise problems, not so much for equity issues, but for debt issues. As to an issue of securities according to Article(2), especially (c), it should be clarified that the further resale of the securities to retail investors through intermediaries following the initial issue does not qualify as a public offer of the initial issuer as it is beyond its control ("retail cascade").

This is the only possible interpretation of the exemptions of Article 3(2) that lives up to the expectations of the Prospectus. If a secondary offer by a third party triggered the requirement of a prospectus of the initial issuer, none of the exemptions of Article 3(2) of the Prospectus Directive apart from (d) could be made use of in a legally secure way. This cannot be the intention of the Prospectus Directive.

We doubt, though, that by the deletion of the last sentence of Article 3(2), the pursued objective of clarifying the responsibilities of drafting a prospectus can be achieved.

It should be made clear that the prospectus of the initial issue/first offer does not have to be supplemented when a secondary offer is made to the public without any cooperation of the initial issuer.

Still, there would remain legal uncertainty about which regime would be applicable in case of subsequent resale, as it could still be regarded as an offer of securities to the public.

In Germany, if a prospectus has once been drawn up and published in accordance with the Prospectus Directive, for any secondary offer of the same securities no prospectus is required. This would be a good solution for the European Prospectus regime because investors can learn about the securities from the original prospectus.

It should be made clear, though, that the original issuer is only responsible for its offer. So, if the prospectus expires the responsibility for the initial offer ends and no supplements have to be made in regard of some secondary offer through intermediaries.

3.3. Article 4 – Exemptions for Employee Share Schemes

Do you agree with this analysis?
Do you agree with the change proposed in Article 4(1)(e) of the Prospectus Directive?

BUSINESSEUROPE fully supports the proposal to extend the exemption in Article 4(1)(e) to all employee share schemes. BUSINESSEUROPE sees the need to remove obstacles to developing the financial participation of employees in Europe.

Financial participation of employees in Europe is an important factor in motivation and cohesion. It helps to increase a feeling of affiliation towards the company regardless of the country where employees carry out their activity.

The current exemption for employee share schemes set out in Article 4(1)(e) of the Prospectus Directive only applies to companies that are fully listed within the EU, and puts companies which are not fully listed within the EU at a major disadvantage, as they must bear the administrative and financial costs of issuing a prospectus, if they wish to offer share-based incentives to its employees, and if other exemptions are not available.

Furthermore, and as mentioned by the Commission, producing a full prospectus for this type of offer 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.

3.4. Article 10 – Information

Do you agree with this analysis?
Do you agree with the removal of Article 10 of the Prospectus Directive?

We fully agree with the removal of Article 10 of the Prospectus Directive, as this is now addressed in the Transparency Directive (2004/109/EC).

The value of the annual document has been minimised by the Transparency Directive (2001/34/EC). The Transparency Directive which was to be implemented in national law by 20 January 2007 puts in place a Europe-wide disclosure and storage regime of regulated information. In each Member State at least one officially appointed mechanism (OAM) for the central storage of regulated information has to be set up giving investors or whoever interested easy access to the documents. The Transparency Directive also aims at the creation of a single electronic network, or a platform of electronic networks across Member States so that the investor has one single access to the information.

Thus, the same (overlapping) information is stored in the different OAMs and the website of the issuers. Also, the annual document contains information of a certain period of time. Investors visiting the website of an issuer will generally be interested in current information on the issuer, not historical information referring to a certain period of time in the past. And such information is already provided by the issuer on a voluntary basis. For offering historical information, the OAM has been invented by the Transparency Directive.

Additionally, if an issuer has more than one home Member State (Article 2 (1)(m)(ii)) it has to file the annual document in all home Member States with differing interpretations among competent authorities about e.g. the period of reference ("annually"). This even controverts the scope of the annual document confusing investors. This problem is also solved by deletion of Article 10.

3.5. Article 16 – Supplement to the prospectus:

Do you agree with the analysis?
Do you agree with the change proposed in Article 16.2 of the Prospectus Directive?

We agree that the technical issues referred to in the first question should be left to Level 3.

We support the Commission's proposal to establish a common period of two working days after the publication of the supplement for investors to withdraw their acceptances in Article 16.2 Prospectus Directive. In any case the words "at least" should be deleted, so that a full harmonisation of the period for the right to withdraw can be achieved.

3.6. Modification of thresholds

Do you agree with this analysis?
Do you agree with the change proposed in Article 2(1)(m)(ii) of the Prospectus Directive?

We agree with the Commission analysis.

In Article 2(1)(m)(ii) the reference on the threshold ("whose denomination per unit amounts to at least EUR 1000") is deleted in the Commission's draft while in the second half of the paragraph reference is taken to it: "The same regime shall be applicable to non-equity securities in a currency other than euro, provided that the value of such minimum denomination is nearly equivalent to EUR 1000". We suggest that the last sentence of paragraph (ii) is deleted to achieve the free determination of the home Member State for the issuers.

4. Other Issues Identified

4.1. Disclosure obligations: the prospectus and its summary

Do you agree with this analysis?
Do you have any suggestion in this regard?

We agree that a standard prospectus has become very long and detailed.

We therefore support the approach of including a Summary with understandable and useful representation of the main features of issuer and product in the perspective of investors.

In order to avoid misrepresentations in the summary note or unnecessary/lengthy duplications between the summary note of the prospectus and the prospectus, cross-references to the prospectus should be allowed in the summary note for certain items, in particular risk factors, corporate governance and transactions with shareholders.

4.2. Disclosure obligations for retail investment products

BUSINESSEUROPE has no comments.

4.3. Disclosure obligations for small quoted companies

Do you agree with this analysis?
Do you support any of the two alternative solutions mentioned? Do you have any other suggestion?

The cost and administrative burden caused by the Prospectus Directive are inappropriate for smaller quoted companies.

The relation between the cost of raising capital on one side and the amount of money raised on the other has to be reasonable and appropriate. Therefore the threshold of EUR 2.5 million per annum is too low and should be increased to EUR 10 million .

This would make it possible for smaller companies to raise capital whilst ensuring and appropriate relation between costs and capital raised and at the same time do not harm investors due to the fairly small investment sum.

4.4. Disclosure requirements and Government Guarantee Schemes

Do you agree with this analysis?

BUSINESSEUROPE has no comments.

4.5. Rights Issues

Do you agree with this analysis?
Do you have any other suggestion?

BUSINESSEUROPE fully supports exemption of offers to existing holders from the Prospectus.

The exemption should apply to offers to existing shareholders of the issuer; such shareholders have made a decision to invest in the issuer based on such information as was available publicly at the time and the information now required is that which would justify a further investment, taking into account information supplied to them as a shareholder.

Also, the exemption should apply to the admission to trading of issuers already listed; the continuous disclosure regime mandated by the Market Abuse Directive means that sufficient information would be publicly available for secondary trading, and the decision to participate in the rights issue or open offer is not materially different from the decision to purchase shares in the market.

4.6. Article 2(1)(d) – Definition of offer of securities to the public

Do you agree with this analysis?

We agree that no legislative amendment is needed for the definition of offer of securities to the public.

However, it appears that there are differences in the national implementation of the definition, and therefore it may be appropriate for some guidance on this from the Commission and CESR Level 3 on what a public offer is and when it ends.

4.7. Liability

Do you agree with this analysis?

We do agree with the commission analysis.

Differing Member State standards for prospectus liability are almost an obstacle for cross-border offers of securities. Issuers and other transaction parties are exposed to inconsistent liability regimes in various countries, e.g. the liability for the summary.

However, we cannot follow the Commission's suggestion that the use of the passporting possibilities show that issuers can cope with a non-harmonised liability regime. The reality is that companies do not have a choice if they do not want to stop raising capital other than in their home Member State.

4.8. Equal treatment of shareholders

Do you agree with this analysis?

BUSINESSEUROPE agrees with the Commission since this subject is already dealt by other Directives, such as the Second Company Law Directive.

Other comments

BUSINESSEUROPE would like to express its considerations about other topics, as asked by the Commission in the background document (p. 1).

Article 3
Debt securities issuers who want to address above all institutional investors have the option to offer their securities to investors who acquire securities for a total consideration (Article 3(2)(c)) or at a denomination of at least EUR 50,000 (Article 3 (2)(d)), as mentioned before. The latter is less attractive for issuers because the market demands also other, flexible, units (EUR 51,000, 52,000 etc.).

In the Prospectus Regulation a differentiated content of prospectuses is devised for debt and derivative securities aimed at those investors who purchase debt or derivative securities with a denomination per unit of at least EUR 50,000. According to Recital 14 of the Regulation the reason is that wholesale investors should be able to make their investment decision on other elements than those taken into consideration by retail investors.

The exemption from the obligation to draw up a prospectus in Article 3(2)(c) was inserted in the Prospectus Directive on the same grounds. This exemption should be applied everywhere in the Prospectus Regulation where the exemption of Article 3 (2)(d) is allowed for, e.g. Article 7 of the Regulation.

Article 5

In order to reflect the need for market efficiency and flexibility which is addressed in Recitals 10 and 24 of the Prospectus Directive a base prospectus can be drawn up. It is not clear what information can be included in final terms and when a supplement is required.

It should be at least clarified that "final terms of the offer" do not refer only to the items set forth in no. 5 of Annex XII under the heading "terms and conditions of the offer" which would be only the amount, time period of offer, method of payment for the securities, pricing, names and addresses. A broader understanding of final terms providing for market efficiency and flexibility is supported by Article 22 (2) and (4) of the Prospectus Regulation where it is referred to as "information items from the securities note schedules which are not known at the time of approval of the base prospectus and can only be determined at the time the public offer takes place" and where the additional words "of the offer" do not appear.

Article 11

It should be clarified that financial statements may be incorporated by reference as Article 28 of the Prospectus Regulation expresses explicitly. There should not be any restricting implementation or interpretation in Member States.

Article 18

A tacit confirmation in the notification procedure should be introduced.

If an issuer wants to make use of the European Passport it has to request the home Member State authority to provide the host Member State authority with a certificate of approval attesting that the prospectus has been drawn up in accordance with the Prospectus Directive. The notification period is three working days. Some home Member State and host Member State authorities do not come up with any confirmation of the notification. Therefore, it would be very helpful to clarify that after the expiry of this period the issue can start to offer the securities in the host Member State.

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