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Subject : Proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading

1. On 7 and 8 March 2002, the Working Party on Financial Services (prospectus) discussed Articles 1 to 14 of the draft Directive on the basis of the Presidency proposals set out in document 6502/02 + COR 1 (en). The results from the discussion are set out in footnotes to the text at Annex.
2. It is recalled that DK has a parliamentary scrutiny reservation and that D, F, IRL, A, S and UK have maintained general scrutiny reservations on the entire proposal.

Chapter I

General provisions

Article 1

Subject matter and scope

1. The purpose of this Directive is to harmonise requirements for the drawing up, scrutiny and distribution of the prospectus to be published when securities are offered to the public or admitted to trading.
2. This Directive shall apply to securities which:
 - (a) are offered to the public in one or more Member State, or
 - (b) are admitted to, or are the subject of a procedure for admission to, trading on a regulated market situated or operating within a Member State.¹

¹ D, supported by UK, proposed “at the request or on behalf of the issuer, are the subject of...” (EP amendment 11). B, F, I, LUX, NL, P, FIN: opposed. A needed more time to study the German proposal.

3. This Directive shall not apply to:

- (a) units issued by collective investment undertakings other than the close-end type,
- (b) 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 or by the European Central Bank,²
- (c) securities fully guaranteed by a Member State or by one of a Member State's regional authorities,³
- (d) securities issued, with a view to raising the funds necessary to achieve their objectives, by associations with legal status and non-profit making bodies recognised by the State.⁴

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² It was agreed to add “central banks of Member States” in (b).
LUX suggested “securities issued by a State or by...” and proposed to add an exemption for the EIB.
A, supported by B, EL and LUX, suggested transferring (b) and (c) to Article 4 in order for such issuers to benefit from the European passport.

³ Whilst DK wanted to extend (c), by analogy with (b), to local authorities with revenue-raising powers, A was opposed to the references to local and regional authorities in (b) and (c).

⁴ It was agreed to align (d) on the wording of Article 2(2)(j) of Directive 89/298/EEC.

⁵ FIN suggested excluding Finnish housing companies, joint-stock property companies and consumer co-operatives and companies from the scope of the Directive through a new paragraph 4: “Member States may exclude from the scope of the Directive shares in companies whose exclusive purpose is to own means of production that are essential for the shareholders' business or to own real estate. Member States may also exclude from the scope of the Directive shares in companies whose main purpose is to provide consumer goods and services to their shareholders and the value of whose shares is connected to the shareholders' ability to receive such goods and services.” (an alternative proposal is in footnote 7)

Article 2

Definitions

1. For the purposes of this Directive, the following definitions shall apply:
 - a) ‘securities’ covers the following types of securities:⁶
 - i. ‘equity securities’ means shares and other transferable securities giving access to a company's capital 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 the latter type of transferable securities are issued by the same issuer of the underlying shares or by an entity belonging to the group of said issuer;⁷

⁶ I: reservation on the definition of securities, which it felt was not exhaustive. B felt that covered warrants were not covered by (i) nor (ii). Fearing that future securities may fall between (i) and (ii), UK, supported by EL, preferred the definition of securities as proposed by the Commission. Alternatively, UK, supported IRL, LUX, NL and S, would prefer a general definition of securities followed by a positive definition of equity securities and a negative definition of non-equity securities, as set out in document SN 1491/02. Agreeing that greater flexibility was necessary, F suggested adapting the definitions of equity and non-equity securities through comitology.

⁷ FIN: reservation on the definition of equity securities; suggested excluding Finnish housing companies and joint-stock property companies by adding “negotiable on regulated markets” before “giving access to”. (an alternative proposal is in footnote 5) LUX, supported by D and FIN, proposed “negotiable” or “transferable and likely to be listed on a stock exchange” in (i) instead of “transferable”. IRL and UK: opposed. FIN proposed “...of the underlying shares or other types of transferable security or by...”

- ii. ‘non equity securities’ means bonds which have a maturity of at least one year and other forms of securitized debt which are transferable as well as any other transferable securities either giving rise to cash settlement or the right as a consequence of their being converted or the rights conferred by them being exercised, to acquire any type of securities, provided that the latter type of transferable securities are neither issued by the same issuer of the underlying shares nor by an entity belonging to the group of said issuer;⁸
- b) ‘offer of securities to the public’ or ‘public offer’ means an offer of securities addressed to the public in any form, including promotional messages,⁹ and by any means of communication whose objective is to give rise to a contract for the sale or subscription of the related securities including the placing of securities through financial intermediaries;¹⁰

⁸ A: reservation on paragraph 1(a)(ii).
Whilst LUX, supported by B and E, wanted to delete “which have a maturity of at least one year”, DK and E suggested applying it only to credit institutions and FIN felt that it would be more appropriate after “transferable” in the following line.
FIN proposed “...of the underlying shares or other types of transferable security nor by...”

⁹ DK, supported by UK, proposed to delete “including promotional messages” and the definition of promotional messages in paragraph 1(n) (cf. footnote 17).
B preferred the Commission proposal for a definition of an offer of securities to the public and shared the view that the definition of promotional messages should be deleted.

¹⁰ NL, supported by A, suggested “to the public for the first time in any form”.
P proposed “addressed to unidentified addressees” instead of “addressed to the public”.
I suggested deleting “to give rise to a contract”.
D suggested adding “the mere inclusion of securities in a securities trading system without any advertising measures does not constitute a public offer” from amendment 14 of the EP committee on economic and monetary affairs.

- c) ‘qualified investors’ means:
- i. credit institutions, investment firms, insurance companies, collective investment schemes and their management companies, pension funds and retirement funds, and any other authorised or regulated financial institutions;
 - ii. supranational institutions, government and central administrative authorities, including the European Central Bank and the Central Banks of Member States;¹¹
 - iii. financial and non-financial entities provided that, according to their last audited annual accounts, two of the following size requirements are met:¹²
 - total balance sheet of at least: [27.000.000] Euro
 - net turnover of at least: [40.000.000] Euro
 - average number of employees during the financial year, at least: 250
- d) ‘issuer’ means a person who issues or proposes to issue securities, or who seeks admission of such securities on a regulated market;
- e) ‘person making an offer’ (or ‘offeror’) means a person who intends to offer securities to the public, or who seeks admission of securities on a regulated market;
- f) ‘regulated market’ means a market as defined by Article 1(13) of Directive 93/22/EEC;

¹¹ D proposed to delete “of Member States”.

¹² F, supported by IRL, I and FIN, proposed to delete “financial and” which they considered redundant in the light of paragraph 1(c)(i).
D, supported by EL, proposed “last audited consolidated annual accounts”.
B, supported EL and I, proposed a net equity criterion instead of the three criteria.

g) ‘home Member State’ of an issuer means:¹³

i. for equity securities:

- the Member State where the issuer has its registered office;
- in the case of an issuer incorporated in a third country, the Member State where its equity securities are admitted to trading. If said equity securities are admitted to trading in more than one Member State, the Member State in which the issuer’s equity securities were first admitted to trading;
- if the third country issuer does not have its equity securities admitted to trading in a Member State, the issuer may choose amongst those where the offer of securities to the public will take place or admission to trading will be sought;

ii. for non equity securities:

- the Member State where the issuer has its registered office, when admission to trading will be sought or the offer of securities to the public will take place in that country;¹⁴
- if admission to trading will not be sought or the offer of securities to the public will not take place in the Member State where the issuer has its registered office, the Member State chosen by the issuer amongst those where each of the offers of securities to the public will take place or admission to trading will be sought;

¹³ B, D, EL, F, LUX, NL, P, UK: reservations on Article 2(1)(g).
B, EL, F, I, NL, P and S preferred the Commission proposal, which they felt would never result in multiple home Member States (S: with possible exceptions for complex securities).
LUX, A, UK and IRL: in favour of freedom of choice of home Member State (IRL: within the scope of Article 2(1)(g) as currently drafted).

¹⁴ A proposed to delete the first indent of (ii) and the first half of the second indent (“if admission to trading will not be sought ... its registered office”).

- in the case of an issuer incorporated in a third country, the Member State chosen by the issuer amongst those where each of the offers of securities to the public will take place or admission to trading will be sought.
- h) ‘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;
- i) ‘collective investment undertaking other than the close-end type’ means unit trusts and investment companies:
- the object of which is the collective investment of capital provided by the public, and which operate on the principle of the risk spreading, and
 - the units of which are, at the holder’s request, repurchased or redeemed, directly or indirectly, out of the assets of these undertakings;
- j) ‘units of a collective investment undertaking’ means securities issued by a collective investment undertaking representing rights of the participants in such an undertaking over its assets;
- k) ‘working day’ means a working day in the financial sector of the Member State concerned;
- l) ‘small and medium-sized enterprises’ means companies incorporated in a Member State whose average number of employees during the last financial year is fewer than 250 and which, according to their last annual audited consolidated accounts, have either an annual net turnover not exceeding 40.000.000 Euro or a total balance sheet not exceeding 27.000.000 Euro;¹⁵

¹⁵ B, supported by FIN and S, questioned the need for a definition of SMEs since they could find no reference to SMEs in the remainder of the Directive. P felt that it would be more appropriate to refer to the Commission recommendation 96/280/EC of 3 April 1996 as amended in future.

- m) ‘offering program’ means an issuer’s plan for the issuance of non equity securities of a similar type and/or class in a continuous or repeated manner;¹⁶
- n) ‘promotional message’ means any advertising activity through any means of communication addressed to the public aimed at promoting a ‘public offer’ as far as the advertisements indicate the terms of the offer and the securities, so as to allow the public to adhere to said offer;¹⁷
- o) ‘guarantor’ includes any person who agrees to make any payment required to be made by the issuer, provides any asset or security which could be used for such purpose or is described in the prospectus as having agreed to, or having a policy (howsoever described) of ensuring that the issuer is able to meet its financial obligations generally or those in respect of the securities regardless of any such obligations being contingent;¹⁸
- p) ‘credit institution’ means an undertaking whose business is to receive deposits or other repayable funds from the public and to grant loans for its own account, as defined in Directive 2000/12/EC.

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¹⁶ LUX proposed to replace (m) with “offering programme means an issuer's structured plan for the issuance of securities during a determined or indeterminate issue period”.
D proposed “one or more” instead of “an”.

¹⁷ B, DK, I, FIN and UK proposed to delete (n) (cf. footnote 9).

¹⁸ B, F, NL and FIN felt than (o) was unnecessary and could be deleted.

¹⁹ UK proposed to add a definition of "designated securities" as set out in doc. SN 1491/02. B, IRL, LUX, NL, A, FIN and S supported the UK proposal (however, NL felt that more objective criteria than in the UK proposal were needed, B and IRL felt that Article 27 of Directive 2001/34/EC should be the starting point, and IRL objected to the proposed threshold of € 40.000, which it considered should be at least € 100.000). EL, E, F, I and P were opposed to the UK proposal and DK entered a scrutiny reservation on it.

2. Implementing rules intended to ensure uniform application by Member States of the definitions in paragraph 1 and take account of technical developments on financial markets shall be adopted by the Commission in accordance with the procedure referred to in Article 22(2).²⁰

²⁰ F proposed to delete “and take account of technical developments on financial markets”. I, supported by P, suggested aligning paragraph 2 on the corresponding paragraph of the market abuse text set out in document 14385/2/01 REV 2.

Article 3

Obligation to draw up a prospectus

1. Member States shall ensure that any offer of securities to the public within their territories is subject to the publication of a prospectus by the person making the offer.²¹
2. The following types of offer do not constitute offers of securities to the public, on the understanding that any subsequent resale to the public of the securities previously offered following the conditions set out in subparagraphs a), b) and c) will give rise to an obligation to draw up a prospectus:²²
 - a) offers of securities directed to qualified investors;
 - b) offers addressed to fewer than 150 persons per Member State, other than qualified investors, and not exceeding 1.500 if the offer takes place in several Member States;²³
 - c) offers of any type of securities which, irrespective of their denomination per unit, can be acquired, in the course of that offer, only for a consideration of at least 100.000 Euro per investor;

²¹ A suggested “any offer of securities to the public for the first time”.

²² B: opposed to the second part of the first sentence applying also to subparagraphs b) and c); proposed a return to the previous drafting (cf. document 5814/02).
D proposed to make it clearer that the obligation to draw up a prospectus would pass to the reseller in case of resale.
UK, supported by FIN, proposed “is regarded as a separate offer to the public” instead of “previously offered following the conditions set out in subparagraphs a), b) and c) will give rise to an obligation to draw up a prospectus” in order to avoid a possible conflict with Article 4.

²³ LUX, NL, FIN, S and UK proposed to delete “and not exceeding 1.500 if the offer takes place in several Member States”, and LUX, NL and UK proposed a limit of 100 persons instead of 150. F: opposed; preferred “restricted circle” in combination with an overall limit of 1.500.

- d) offers of any type of securities whose denomination per unit amounts to at least 100.000 Euro.

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3. Member States shall ensure that any admission of securities to trading on a regulated market situated or operated within their territories is subject to the availability of a prospectus. That obligation is deemed to be satisfied when the issuer has filed with the home competent authority the prospectus referred to in paragraph 1 and that the information included in it is up to date.²⁵

²⁴ D proposed to add a subparagraph exempting offers of Eurosecurities from the obligation to draw up a prospectus.

²⁵ B, supported by F, LUX and NL, proposed “approved by” instead of “filed with”.
B questioned the meaning of “deemed to be satisfied”.
UK questioned “up to date” in relation to Article 14, B, F and NL felt that paragraph 3 needed a reference to Article 14 and belonged to Article 4 rather than Article 3, whereas FIN suggested that the paragraph belonged to Article 14.

Article 4

Exemptions from the obligation to draw up a prospectus

1. The obligation provided for in Article 3(1) shall not apply to the offer of securities of the following types:
 - 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;²⁶
 - 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;
 - c) securities offered 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;²⁷
 - d) shares offered or to be allotted free of charge to existing shareholders;²⁸
 - e) securities offered, allotted or to be allotted to directors or to existing or former employees;²⁹

²⁶ UK proposed “in the same company” instead of “of the same class already issued”.

²⁷ P felt that “provided that ... of the prospectus” went too far and proposed to delete it. UK: opposed to deletion.

²⁸ UK suggested “offered, allotted or to be allotted” in (c) and (d). NL, supported by D, proposed to add “including dividends in the form of shares”.

²⁹ DK, supported by B and I, wanted to restrict (e) to free securities. UK: opposed.

2. The obligation provided for in Article 3(3) shall not apply to the admission to trading on regulated markets of securities of the following types:
- a) shares representing, over a period of 12 months, less than 10% 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 already admitted on the same regulated market if the issuance of such new shares does not involve any increase in the issued capital;³¹
 - 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;

³⁰ D, supported by A, proposed to add a subparagraph exempting offers of Eurosecurities and continuous offers of bonds issued by credit institutions. LUX and UK: opposed to an exemption for such offers if they are aimed at the public (LUX could however accept an exemption for *Pfandbrief* bonds).

B proposed to add in a new subparagraph: “securities issued in a continuous or repeated manner by credit institutions to materialise reception of repayable deposits, provided that these credit institutions are authorised within the EEA, and that these securities are not subordinated, convertible, or exchangeable, that they do not give a right to subscribe or to acquire, and that they are not linked to a derivative”.

LUX could accept the Belgian proposal without “or repeated”.

D could accept the idea behind the Belgian proposal but preferred the wording of Article 5(b) of Directive 89/298/EEC.

UK, supported by DK and P, felt that the proposal went too far and proposed instead to exclude *bons de caisse* from the scope of the Directive by referring in Article 1 to Directive 94/19/EC.

³¹ LUX, supported by A, suggested “in substitution for shares of the same issuer already admitted ...” and moving (b) and (e) together.

B proposed “in substitution for shares of the same class already admitted ...”

- d) securities offered 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;³²
 - e) securities offered or allotted free of charge to existing shareholders, provided that a document containing the same information as would be contained in a securities note regarding the securities is filed with the home Member State competent authority prior to admission;³³
 - f) securities which have been offered or allotted to directors or to existing or former employees, provided that said securities are of the same class as the securities already admitted to trading on the same regulated market;
 - g) securities resulting from the conversion or exchange of other securities or from the exercise of rights conferred by other securities, provided that said securities are of the same class as those securities already admitted to trading on the same regulated market;
3. Technical rules intended to ensure uniform application by Member States of the exemptions in paragraphs 1 and 2 shall be adopted by the Commission in accordance with the procedure referred to in Article 22(2).

³² UK suggested “offered, allotted or to be allotted” in (d) and (e).

³³ LUX, supported by A, proposed “already listed securities offered ...”
LUX, supported by B and A, proposed “has been approved by” instead of “is filed with”.
NL proposed to add “provided that the securities are of the same class as the securities already admitted to trading on the same regulated market”.
LUX, supported by A, proposed to add “and that this securities note has been published in accordance with this Directive”.
B proposed to add the publication requirement in the last indent of Article 23(3) of Directive 2001/34/EC.

Chapter II

Drawing up of the prospectus

Article 5

The prospectus

1. The prospectus shall incorporate³⁴ all the information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading, is necessary to enable investors and their investment advisers to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and any guarantor and of the rights attaching to said securities.
2. The information provided for in paragraph 1 shall be presented in a form which is easy to analyse and comprehend and shall be made available by means of publication of a prospectus which may be either a single or separate documents.
3. The prospectus published as a single document shall include at least the items referred to in Annex I.³⁵

³⁴ B remarked that “incorporate” was used in a different context elsewhere in the Directive.

³⁵ UK proposed to replace paragraph 3 and the first three sentences of paragraph 4 with: “The minimum disclosure requirements for the prospectus in either form and for every type of security, shall be specified in accordance with the procedure referred to in Article 22(2) with reference to the categories set out in the Annexes. Such requirements shall take account of paragraphs 5, 7, 7a and 7b.”

4. The prospectus composed by separate documents shall include a registration document, a securities note and a summary note. The registration document shall include at least the items referred to in Annex II. The securities note shall include at least the items referred to in Annex III. The summary note shall include at least the items referred to in Annex IV and shall be written in non-technical language, convey the essential characteristics and risks associated with the securities being offered, the issuer, and any guarantor and contain a warning that:³⁶
- it should be read as an introduction to the registration document and the securities note; and
 - any decision to invest in the securities should be based on consideration of the prospectus as a whole by the investor or their advisor.
5. Notwithstanding what is stated in paragraphs 3 and 4, the prospectuses relating to the following types of securities shall be composed of the documents listed below:³⁷
- a) for non equity securities issued under an offering program, issuers shall only draw up, for offering and admission purposes, an initial prospectus,³⁸ valid for the whole duration of the offering program, subject to annual updating. The initial prospectus shall be supplemented as referred to in Article 8(2);³⁹

³⁶ UK suggested also laying down a maximum number of words for the summary note.

³⁷ UK proposed to replace paragraph 5 as set out in document SN 1491/02.

³⁸ LUX proposed “an initial programme prospectus” and B proposed “a base prospectus”.

³⁹ D: reservation on paragraph 5(a).
B considered “valid for the whole duration of the offering programme” and “subject to annual updating” to be contradictory.
LUX, supported by B, questioned the meaning of “annual updating” in this context, calling for a completely new prospectus at least once a year.

- b) in the case of a public offer or admission to trading of debt securities on a regulated market,⁴⁰
- issued by credit institutions authorised within the European Economic Area,
 - where the sums deriving from the issue of said debt securities, according to national legal provisions, are placed in assets which provide sufficient coverage for the liability deriving from said debt securities until their maturity date, and
 - in the event of the bankruptcy of the issuer, the said sums are intended as a priority to repay the capital and interest becoming due,

the issuer shall only draw up an initial prospectus valid until maturity and not subject to annual updating.⁴¹ The initial prospectus shall be supplemented as referred to in Article 8(2).

6. The competent authorities may, in the following two cases, grant exemptions from certain information requirements laid down in this Directive or by the implementing measures referred to in Article 6(1):⁴²

⁴⁰ D and A: reservations; in favour of applying paragraph 5(b) to standing emissions.
NL suggested referring to Eurobonds.
LUX proposed that the first sentence should include the first indent, which it felt was not a precondition in the same way as the remaining two indents.
F proposed to make it clearer that the indents were cumulative preconditions.

⁴¹ DK proposed to delete “and not”.
B proposed “base prospectus” instead of “initial prospectus”.
LUX: opposed to requiring prospectus for *Pfandbrief* bonds; preferred securities notes.

⁴² UK proposed “Home Member State competent authorities may ...” (cf. doc. SN 1491/02).

- a) if the disclosure of such information would be contrary to the public interest;
- b) if the disclosure of such information would be seriously detrimental to the issuer, provided that in this latter case the non-disclosure is not of such nature as to give the public an incorrect view of the essential facts and circumstances of the valuation of the securities.⁴³

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- 7. Member States shall ensure that the obligation provided for in paragraph 1 is incumbent upon the administrative, management or supervisory bodies of the issuers, the offeror, and the guarantor as the case may be.⁴⁵
- 8. The Commission shall adopt technical rules intended to ensure uniform application by Member States of the exemptions provided for in paragraph 5 in accordance with the procedure referred to in Article 22(2).⁴⁶

⁴³ UK proposed to replace (b) with “...detrimental to the issuer and its omission would not be likely to mislead investors with regard to facts and circumstances necessary for an informed assessment of the issuer or the guarantor (if any) with respect to investment in the relevant securities;” and to add two subparagraphs (c) and (d) as set out in document SN 1491/02.

⁴⁴ UK proposed two additional paragraphs 7a and 7b as set out in document SN 1491/02.

⁴⁵ UK proposed to replace paragraph 7 with paragraph 8 as set out in document SN 1491/02. I, supported by D, P and S, objected to the discharge of liability for the summary note proposed by UK, and D proposed a recital stating that civil liability is a matter for national law.
DK: opposed to supervisory bodies being held responsible (paragraph 8(i) of the UK proposal), and also considered the question of civil liability a matter for Member States. FIN, whilst still examining the UK proposal, suggested “the issuer, the offeror, the underwriter and the guarantor as the case may be”.

⁴⁶ UK proposed to apply paragraph 8 to the whole of Article 5 (cf. document SN 1491/02).

Article 6

Minimum information

1. Detailed rules regarding the specific information which must be included in each of the items of the Annexes I, II, III and IV according to Article 5(3) and (4) in the form of models for the different types of securities and of issuers shall be adopted by the Commission in accordance with the procedure referred to in Article 22(2). These rules shall be adopted within 180 days after the entry into force of this Directive. In particular, while developing the different models of prospectuses referred to above, the following provisions shall be taken into account:
 - a) the different types of information needed by investors relating to equity securities compared to non equity securities;⁴⁷
 - b) the different types and nature of offers and admission to trading of non equity securities. In particular, the case of admission to trading on a regulated market of such securities having a denomination per unit of at least 100.000 Euro;
 - c) the different contents of information required in prospectuses relating to non equity securities issued under an offering program;
 - d) the different activity and size of the issuers.
2. The rules referred to in paragraph 1 shall be based on the standards in the field of financial information set out by international securities commission organisations, and in particular by the International Organisation of Securities Commissions.

⁴⁷ IRL proposed “needed by the different types of investors”.

3. Member States shall ensure that where the final offering price and amount of securities which will be offered to the public cannot be included in the prospectus, the prospectus shall contain the criteria, and/or the conditions, according to which the above elements will be determined or, in the case of price, state a maximum price or state that acceptances of the public offer may be withdrawn for not less than [24] hours since such final offering price and amount of securities which are offered to the public have been filed as referred to in the next sentence. The final terms shall be filed with the competent authority of the home Member State and made available according to the modalities provided for in Article 12(2).⁴⁸
4. Without prejudice to the adequate information of investors, where, exceptionally, certain headings in models referred to in paragraph 1 appear inappropriate to the issuers' sphere of activity, legal form or to the securities to which the prospectus relates, the competent authority may allow the inclusion in the prospectus of information equivalent to the information required by said headings.⁴⁹
5. Detailed rules on modalities of the offer in order to ensure uniform application of this Directive shall be adopted by the Commission in accordance with the procedure referred to in Article 22(2). These rules shall be adopted within 180 days after the entry into force of this Directive.⁵⁰

⁴⁸ NL, supported by DK and EL considered the added phrase (“or, in the case of price ... next sentence”) superfluous and that it could be deleted. UK: opposed to deletion. D, LUX and A: scrutiny reservations on the implications of the added phrase for programs. E supported the addition of the phrase but proposed 48 rather than 24 hours.

⁴⁹ EL, IRL and UK: opposed to paragraph 4. EL proposed to delete it, UK to replace it with Article 5(7b) in its proposal as set out in document SN 1491/02, and IRL proposed to replace it with Article 5(7b) or delete it.

⁵⁰ NL proposed to delete paragraph 5, which it considered redundant in the light of paragraph 1.

Article 7

Language and format of the prospectus

1. The prospectus shall be drawn up in a language accepted by the competent authority in the home Member State.
2. The format of the prospectus to be published and approved by the relevant competent authority shall be adjusted to the following provisions:⁵¹
 - a) for issuers whose shares or whose transferable securities giving access to their capital are admitted to or are the subject of a procedure for admission to trading on regulated markets, the prospectus shall be comprised of the separate documents provided for in Article 5(4);
 - b) for issuers whose shares or whose transferable securities giving access to their capital are not admitted to trading and are not the subject of a procedure for admission to trading on a regulated market, the prospectus shall, at the choice of the issuer, either be comprised of the separate documents provided for in Article 5(4) or take the form of a single document including at least the information referred to in Annex I. In any of these two cases the obligations laid down in Article 9 shall not apply.

⁵¹ D, LUX, NL, FIN, S, UK: reservations on paragraph 2; in favour of freedom for issuers to choose format (LUX: in particular third-country issuers). D also referred to EP amendment 31.
P: flexible.

Article 8

Use of a registration document, securities note and summary note

Use of an initial prospectus

1. For an issuer whose registration document has been already filed with the relevant competent authority, either on a mandatory or on a voluntary basis, only the securities note and the summary note need to be drawn up when securities are publicly offered or admitted to trading.
 - 1a. Where in accordance with the provisions stated in Article 2(1)(g) an issuer has the right to choose amongst different competent authorities [and where the issuer has voluntarily decided to compose its prospectus by separate documents under the options provided under Article 7(2)] the registration document referred to in paragraph 1 shall be the one first filed with a Member State by said issuer after the approval of its last audited annual accounts.
2. For an issuer whose initial prospectus, as referred to in Article 5(5),⁵² has been approved by the competent authority, only the final terms of the securities need to be provided to investors and filed with that authority, when each public offering is made or admission to a regulated market is sought. In these cases, Article 12, paragraphs 2 and 2a, shall not apply.⁵³

⁵² (Reference to subparagraphs deleted.)

⁵³ I: scrutiny reservation on paragraph 2; suggested it would be more appropriate in Article 9. LUX, supported by P, proposed to delete the last sentence in paragraph 2. B sought clarity on its meaning. B proposed “For an issuer whose base prospectus ...” and remarked, supported by P, that “only the final terms” was too restrictive. LUX, supported by B and P, proposed “approved by” instead of “filed with”. DK: opposed.

3. In any case, in addition to the information items required under Article 5(4), 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 since the registration document was published.
4. In order to ensure uniform application of this Directive, detailed rules on the procedures for publishing and filing the terms of information referred to in paragraph 2 of this Article, shall be adopted by the Commission, in accordance with the procedure referred to in Article 22(2). These rules shall be adopted within 180 days after this Directive comes into force.⁵⁴

⁵⁴ P remarked that the last sentence of paragraph, which P would like to see deleted, should in any case not be covered by paragraph 4.

Article 9

*Control and annual updating of the registration document*⁵⁵

1. Issuers whose shares or whose transferable securities giving access to their capital are already admitted to trading on a regulated market, shall update their registration document, subsequent to its first filing, on a regular basis each year after the approval of the financial statements according to the requirements applicable to the issuer in the home Member State.⁵⁶
2. The registration document and its annually updated versions shall be filed with the competent authority of the home Member State, which shall verify its completeness.⁵⁷
3. Member States may allow the issuer to use the documents referred to in Article 46 of Directive 78/660/EEC and Article 36 of Directive 83/349/EEC for the purpose of compulsory or voluntary updating its registration document annually, provided that said documents comply with the requirements for information set out in this Directive.⁵⁸

⁵⁵ LUX, NL and UK objected to mandatory shelf registration and updating (LUX did however support mandatory updating for those issuer who choose to publish a registration document).

⁵⁶ EL and I would prefer to extend the requirements in paragraph 1 to all securities.

⁵⁷ LUX, supported by IRL, I and P, proposed to delete “which shall verify its completeness”.

⁵⁸ P: reservation on paragraph 3, which it felt was the opposite of the Commission proposal. B proposed “Issuers may use the documents referred to ...”

Article 10

Incorporation by a reference

1. Member States shall allow information to be incorporated in the prospectus by referring to one or more documents, which have either been accepted, approved or filed with the relevant competent authority in accordance with this Directive or with [Title IV] of Directive 2001/34/EC.⁵⁹
 - 1a. The summary note referred to in Article 5(4) shall contain no information incorporated by a reference.
2. When information is incorporated by reference, a list of the documents incorporated by reference shall be provided as part of the prospectus which shall allow identification of each document and identify where that document may be obtained.⁶⁰
3. Detailed rules concerning the information to be incorporated by a reference in order to ensure uniform application in the Community of this Directive shall be adopted by the Commission in accordance with the procedure referred to in Article 22(2). These rules shall be adopted within 180 days after the entry into force of this Directive.

⁵⁹ S remarked that some documents referred to under Title IV of Directive 2001/34/EC are to be submitted not to the competent authority but to other authorities.

⁶⁰ S preferred the previous version of paragraph 2 (cf. document 5814/02).

Chapter III

Arrangements for the scrutiny and distribution of the prospectus

Article 11

Approval and publication of the prospectus ⁶¹

1. No prospectus shall be published until it has been approved by the competent authority of the home Member State. Moreover, where the home Member State of an issuer's registration document differs from the home Member States of its securities and summary notes, as may be the case referred to in Article 8(1a), said registration document, once approved by the former home Member State, may be used for the purpose described in Article 8(1). In such cases, the competent authority approving the registration document shall provide the competent authorities approving the securities and summary notes with said registration document and a certificate of approval attesting that the document has been drawn up in accordance with this Directive.
2. The competent authority of the home Member State shall notify the issuer or the offeror of its decision regarding the approval of the prospectus within 15 working days of the submission of the draft prospectus.
3. The time limit referred to in paragraph 2 shall be reduced to 7 working days if the approval is required for the securities note and the summary note only. It shall be extended to [30] working days if the public offer involves securities issued by an issuer without any securities admitted to trading on a regulated market and who has not yet offered securities to the public.

⁶¹ NL, supported by S and UK, called for a definition of “filed with” in Article 9 in relation to “approved by” in Article 11, which they felt could not in the present Article go beyond the verification of completeness referred to in the former Article.
A raised the question of advertising during the process outlined in Article 11.

- 3a. If the competent authority finds that the documents submitted to it are incomplete or that complementary information is needed, the time limits referred to above shall only apply from the date such complementary information is provided by the issuer or the offeror.
4. If the competent authority of the home Member State fails to give a decision within the time limit laid down in paragraphs 2 and 3, this shall be deemed to be a rejection of the application, such rejection shall give right to apply to the courts.
5. This Directive shall not affect the competent authority's liability, which shall continue to be governed solely by the national law.
6. Detailed technical rules concerning the scrutiny of the prospectus, the registration document and its updated versions in order to take account of developments on financial markets and to ensure uniform application of this Directive shall be adopted by the Commission in accordance with the procedure referred to in Article 22(2). These rules shall be adopted within 180 days after the entry into force of this Directive.

Article 12

Availability of the prospectus

1. The prospectus once approved must be made available to the public by the issuer or the offeror.
2. The prospectus shall be deemed available to the public by the issuer or the offeror when published either:
 - a) by insertion in one or more newspapers circulated throughout the Member States in which the offer is made or the admission to trading is sought, or widely circulated therein, or
 - b) in the form of a brochure 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, as well as at the registered offices of the issuer and at the offices of the financial intermediaries placing or selling the securities, or
 - c) in electronic form on the issuer's web-site and, if applicable, on the web-site of the financial intermediaries placing the securities.
- 2a. The prospectus must be made available to the public at a reasonable time in advance of the beginning of the offer or of the admission to trading of the security.⁶²

⁶² NL, supported by I, suggested laying down a minimum “reasonable time”, for instance six days, for initial offerings of listed securities. LUX and UK remarked that it would not always be possible to respect such a minimum time period (UK added that it could be considered for “non designated securities” and drew attention to EP amendment 42.

3. The competent authority shall publish on its web-site a list of approved prospectuses in accordance with Article 11, including a hyperlink to the web-site where the prospectus has been published, if applicable, according to paragraph 2(c) of this Article.⁶³
4. In the case of a prospectus drawn up according to Article 5(4), the documents composing the prospectus may be published and circulated separately as long as the said documents are made available, free of charge, to the public, according to the arrangements established in paragraph 2.
5. The text and the format of the prospectus, and/or the supplements to the prospectus, published or made available to the public, should at all times be identical to the original version approved by and filed with the competent authority.
6. Where the prospectus is made available by publication in electronic form, a paper copy must nevertheless be delivered free of charge by the issuer or his representatives to the investor on request.⁶⁴
7. Detailed technical rules on publication and means of availability of the prospectus, in particular on time limits, shall be adopted by the Commission in accordance with the procedure referred to in Article 22(2). These rules shall be adopted within 180 days after the entry into force of this Directive.

⁶³ LUX, supported by B, I and UK, proposed to delete “including a hyperlink ... of this Article”.

⁶⁴ P, supported by I, proposed “by the issuer, the offeror or his representative”.

Article 13

Advertising

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1. Any type of advertisements relating to a public offer of securities as defined in Article 2(1)(b) or to an admission to trading on a regulated market shall respect the principles contained in this Article. Those advertisements shall state that a prospectus will be or has been published and indicate where investors will be able to obtain it.⁶⁶
2. Advertisements shall be clearly recognisable as such. The information contained in an advertisement shall not be misleading for prospective investors or inconsistent with that contained in the prospectus.⁶⁷
3. In any case, the information concerning the offer or the admission to trading divulged in an oral form, even if not for advertising purposes, shall be consistent with that contained in the prospectus.
4. Material information addressed to qualified investors or special categories of investors, including information disclosed in the context of meetings, which is not in substance reflected in the prospectus, shall also be disclosed to the public in a supplement to the prospectus if this has already been approved.

⁶⁵ UK suggested a new paragraph preceding paragraph 1: “This Article only applies to advertisements made within 45 days prior to the making of the offer or the application for admission to trading and shall not apply with respect to designated securities.”

⁶⁶ NL remarked that the definition in Article 2(1)(b) included even those offers of securities which by virtue of Articles 3 or 4 would be exempt from the obligation to draw up a prospectus, and called for paragraph 1 to apply only to offers covered by the obligation to draw up a prospectus.

⁶⁷ S proposed to delete “for prospective investors”.
UK preferred “shall not be unfair, inaccurate or inconsistent” as in the previous version (cf. document 5814/02).

5. The dissemination of advertisements announcing the intention to offer securities to the public or the admission to trading shall also comply with technical rules laid down in accordance with the procedure referred to in Article 22(2). These technical rules shall be adopted by the Commission within 180 days after the entry into force of this Directive.
6. The competent authority of the home Member State shall have the power to exercise control over the compliance of the advertising activity relating to a public offer of securities or its admission to trading with the principles referred to in this Article.
7. Where an advertising activity is to take place in relation to a public offer or admission to trading envisaged in several Member States, the competent authorities of the host Member States shall co-operate with that of the home Member State for the purposes of the appropriate application of this Directive.⁶⁸
8. The provisions contained in this Article do not prejudice the national provisions on advertising aimed at consumer protection.⁶⁹

⁶⁸ DK, supported by B, sought clarity on the scope of cooperation between authorities and what information should be exchanged.
B proposed “the competent authority of the home Member State shall co-operate with those of the host Member States ...”

⁶⁹ S: scrutiny reservation on Article 13(8).
UK felt that Article 13(8) went too far and that it could stop European passport holders from informing about ongoing offers.
FIN proposed to delete “advertising aimed at”.

Article 14

Supplement to the prospectus

Every significant new factor capable of affecting assessment of the securities which arises or is noted between the time when the prospectus is approved and the definitive closure of the offer or, if applicable, the time when trading begins shall be mentioned in a supplement to the prospectus, scrutinised in the same way and published and made available to the public in accordance with at least the same arrangements as were applied when the original prospectus was disseminated.⁷⁰

⁷⁰ S proposed “Any significant new factor or significant inaccuracy ... shall be mentioned or rectified” as in Article 18 of Directive 89/298/EEC.

UK remarked that to the extent that material mistakes were not already covered by “new factor” a distinction would have to be made between material and immaterial mistakes.