

Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (Text with EEA relevance) (repealed)

COMMISSION REGULATION (EC) No 809/2004

of 29 April 2004

implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements

(Text with EEA relevance) (repealed)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Directive 2003/71/EC of the European Parliament and 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<sup>(1)</sup>, and in particular Article 5(5), Article 7, Article 10(4), Article 11(3), Article 14(8) and Article 15(7) thereof,

After consulting the Committee of European Securities Regulators (CESR)<sup>(2)</sup> for technical advice,

Whereas:

- (1) Directive 2003/71/EC lays down principles to be observed when drawing up prospectuses. These principles need to be supplemented as far as the information to be given therein, the format and aspects of publication, the information to be incorporated by reference in a prospectus and dissemination of advertisements are concerned.
- (2) Depending on the type of issuer and securities involved, a typology of minimum information requirements should be established corresponding to those schedules that are in practice most frequently applied. The schedules should be based on the information items required in the IOSCO Disclosure Standards for cross-border offering and initial listings (Part I) and on the existing schedules of Directive 2001/34/EC of the European Parliament and of the Council of 28 May on the admission of securities to official stock exchange listing and on information to be published on those securities.
- (3) Information given by the issuer, the offeror or the person asking for admission to trading on a regulated market, according to this Regulation, should be subject to European Union provisions relating to data protection.
- (4) Care should be taken that, in those cases where a prospectus is composed of separate documents, duplication of information is avoided; to this end separate detailed schedules for the registration document and for the securities note, adapted to the

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particular type of issuer and the securities concerned, should be laid down in order to cover each type of security.

- (5) The issuer, the offeror or the person asking for admission to trading on a regulated market are entitled to include in a prospectus or base prospectus additional information going beyond the information items provided for in the schedules and building blocks. Any additional information provided should be appropriate to the type of securities or the nature of the issuer involved.
- (6) In most cases, given the variety of issuers, the types of securities, the involvement or not of a third party as a guarantor, whether or not there is a listing etc, one single schedule will not give the appropriate information for an investor to make his investment decision. Therefore the combination of various schedules should be possible. A non exhaustive table of combinations, providing for different possible combinations of schedules and "building blocks" for most of the different type of securities, should be set up in order to assist issuers when drafting their prospectus.
- (7) The share registration document schedule should be applicable to shares and other transferable securities equivalent to shares but also to other securities giving access to the capital of the issuer by way of conversion or exchange. In the latter case this schedule should not be used where the underlying shares to be delivered have already been issued before the issuance of the securities giving access to the capital of the issuer; however this schedule should be used where the underlying shares to be delivered have already been issued but are not yet admitted to trading on a regulated market.
- (8) Voluntary disclosure of profit forecasts in a share registration document should be presented in a consistent and comparable manner and accompanied by a statement prepared by independent accountants or auditors. This information should not be confused with the disclosure of known trends or other factual data with material impact on the issuers' prospects. Moreover, they should provide an explanation of any changes in disclosure policy relating to profit forecasts when supplementing a prospectus or drafting a new prospectus.
- (9) Pro forma financial information is needed in case of significant gross change, i. e. a variation of more than 25% relative to one or more indicators of the size of the issuer's business, in the situation of an issuer due to a particular transaction, with the exception of those situations where merger accounting is required.
- (10) The schedule for the share securities note should be applicable to any class of share since it considers information regarding a description of the rights attached to the securities and the procedure for the exercise of any rights attached to the securities.
- (11) Some debt securities such as structured bonds incorporate certain elements of a derivative security, therefore additional disclosure requirements related to the derivative component in the interest payment should be included in the securities note schedule for debt securities.
- (12) The additional 'building block' related to guarantee should apply to any obligation in relation to any kind of security.

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- (13) The asset backed securities registration document should not apply to mortgage bonds as provided for in Article 5(4)(b) of Directive 2003/71/EC and other covered bonds. The same should apply for the asset backed securities additional 'building block' that has to be combined with the securities note for debt securities.
- (14) Wholesale investors should be able to make their investment decision on other elements than those taken into consideration by retail investors. Therefore a differentiated content of prospectus is necessary 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 or a denomination in another currency provided that the value of such minimum denomination when converted to EURO amounts to at least EUR 50.000.
- (15) In the context of depository receipts, emphasis should be put on the issuer of the underlying shares and not on the issuer of the depository receipt. Where there is legal recourse to the depository over and above a breach of its fiduciary or agency duties, the risk factors section in the prospectus should contain full information on this fact and on the circumstances of such recourse. Where a prospectus is drafted as a tripartite document (i.e. registration document, securities note and summary), the registration document should be limited to the information on the depository.
- (16) The banks registration document schedule should be applicable to banks from third countries which do not fall under the definition of credit institution provided for in Article 1(1)(a) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institutions<sup>(3)</sup> but have their registered office in a state which is a member of the OECD.
- (17) If a special purpose vehicle issues debt and derivative securities guaranteed by a bank, it should not use the banks registration document schedule.
- (18) The schedule 'securities note for derivative securities' should be applicable to securities which are not covered by the other schedules and building blocks. The scope of this schedule is determined by reference to the other two generic categories of shares and debt securities. In order to provide a clear and comprehensive explanation to help investors understand how the value of their investment is affected by the value of the underlying, issuers should be able to use appropriate examples on a voluntary basis. For instance, for some complex derivatives securities, examples might be the most effective way to explain the nature of those securities.
- (19) The additional information 'building block' on the underlying share for certain equity securities should be added to the securities note for debt securities or substitute the item referring to "information required in respect of the underlying" of the schedule securities note for derivative securities, depending on the characteristics of the securities being issued.
- (20) Member States and their regional or local authorities are outside the scope of Directive 2003/71/EC. However, they may choose to produce a prospectus in accordance with this Directive. Third country sovereign issuers and their regional or local authorities are not outside the scope of Directive 2003/71/EC and are obliged to produce a prospectus if they wish to make a public offer of securities in the Community or wish their securities

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to be admitted to trading on a regulated market. For those cases, particular schedules should be used for the securities issued by States, their regional and local authorities and by public international bodies.

- (21) A base prospectus and its final terms should contain the same information as a prospectus. All the general principles applicable to a prospectus are applicable also to the final terms. Nevertheless, where the final terms are not included in the base prospectus they do not have to be approved by the competent authority.
- (22) For some categories of issuers the competent authority should be entitled to require adapted information going beyond the information items included in the schedules and building blocks because of the particular nature of the activities carried out by those issuers. A precise and restrictive list of issuers for which adapted information may be required is necessary. The adapted information requirements for each category of issuers included in this list should be appropriate and proportionate to the type of business involved. The Committee of European Securities Regulators could actively try to reach convergence on these information requirements within the Community. Inclusion of new categories in the list should be restricted to those cases where this can be duly justified.
- (23) In the case of completely new types of securities which cannot be covered by the existing schedules or any of their combinations, the issuer should still have the possibility to apply for approval for a prospectus. In those cases he should be able to discuss the content of the information to be provided with the competent authority. The prospectus approved by the competent authority under those circumstances should benefit from the single passport established in Directive 2003/71/EC. The competent authority should always try to find similarities and make use as much as possible of existing schedules. Any additional information requirements should be proportionate and appropriate to the type of securities involved.
- (24) Certain information items required in the schedules and building blocks or equivalent information items are not relevant to a particular security and thus may be inapplicable in some specific cases; in those cases the issuer should have the possibility to omit this information.
- (25) The enhanced flexibility in the articulation of the base prospectus with its final terms compared to a single issue prospectus should not hamper the easy access to material information for investors.
- (26) With respect to base prospectuses, it should be set out in an easily identifiable manner which kind of information will have to be included as final terms. This requirement should be able to be satisfied in a number of different ways, for example, if the base prospectus contains blanks for any information to be inserted in the final terms or if the base prospectus contains a list of the missing information.
- (27) Where a single document includes more than one base prospectus and each base prospectus would require approval by a different home competent authority, the respective competent authorities should act in cooperation and, where appropriate, transfer the approval of the prospectus in accordance with Article 13(5) of Directive

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2003/71/EC, so that the approval by only one competent authority is sufficient for the entire document.

- (28) Historical financial information as required in the schedules should principally be presented in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards<sup>(4)</sup> or Member States' accounting standards. Specific requirements should, however, be laid down for third country issuers.
- (29) For the purposes of publication of the document referred to in Article 10 of Directive 2003/71/EC, issuers should be allowed to choose the method of publication they consider adequate among those referred to in Article 14 of that Directive. In selecting the method of publication they should consider the objective of the document and that it should permit investors a fast and cost-efficient access to that information.
- (30) The aim of incorporation by reference, as provided for in Article 11 of Directive 2003/71/EC, is to simplify and reduce the costs of drafting a prospectus; however this aim should not be achieved to the detriment of other interests the prospectus is meant to protect. For instance, the fact that the natural location of the information required is the prospectus, and that the information should be presented in an easily and comprehensible form, should also be considered. Particular attention should be granted to the language used for information incorporated by reference and its consistency with the prospectus itself. Information incorporated by reference may refer to historical data, however if this information is no more relevant due to material change, this should be clearly stated in the prospectus and the updated information should also be provided.
- (31) Where a prospectus is published in electronic form, additional safety measures compared to traditional means of publication, using best practices available, are necessary in order to maintain the integrity of the information, to avoid manipulation or modification from unauthorised persons, to avoid altering its comprehensibility and to escape from possible adverse consequences from different approaches on offer of securities to the public in third countries.
- (32) The newspaper chosen for the publication of a prospectus should have a wide area of distribution and a high circulation.
- (33) A home Member State should be able to require publication of a notice stating how the prospectus has been made available and where it can be obtained by the public. Where a home Member State requires publication of notices in its legislation, the content of such a notice should be kept to the necessary items information to avoid duplication with the summary. These home Member States may also require that an additional notice in relation to the final terms of a base prospectus is to be published.
- (34) In order to facilitate centralizing useful information for investors a mention should be included in the list of approved prospectuses posted in the web-site of the competent authority of the home Member State, indicating how a prospectus has been published and where it can be obtained.
- (35) Member States should ensure effective compliance of advertising rules concerning public offers and admission to trading on a regulated market. Proper co-ordination

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between competent authorities should be achieved in cross-border offerings or cross-border admission to trading.

- (36) In view of the interval between the entry into force of Regulation (EC) No 1606/2002 and the production of certain of its effects, a number of transitional arrangements for historical financial information to be included in a prospectus should be provided for, in order to prevent excessive burden on issuers and enable them to adapt the way they prepare and present historical financial information within a reasonable period of time after the entry into force of Directive 2003/71/EC.
- (37) The obligation to restate in a prospectus historical financial information according to Regulation (EC) N° 1606/2002 does not cover securities with a denomination per unit of at least EUR 50.000; consequently such transitional arrangements are not necessary for such securities.
- (38) For reasons of coherence it is appropriate that this Regulation applies from the date of transposition of Directive 2003/71/EC.
- (39) Whereas the measures provided for in this Regulation are in accordance with the opinion of the European Securities Committee,

HAS ADOPTED THIS REGULATION:

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- (1) OJ L, 6.7.2001, p. 1 Directive as last amended by Directive 2003/71/EC (OJ L 345, 31.12.2003, P. 64).
- (2) CESR was established by Commission Decision 2001/527/EC of 6 June 2001, OJ L 191, 13 July 2001, p. 43
- (3) OJ L 126, 26. 5. 2000, p. 1; Directive as last amended by the Act of Accession 2003.
- (4) OJ L 243, 11.9.2002, p. 1.