

ECO/073
**Prospectus to be published
when transferable securities
are offered**

Brussels, 17 January 2002

OPINION
of the
Economic and Social Committee
on the
**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**
COM(2001) 280 final - 2001/0117 (COD)

On 2 July 2001 the Council decided to consult the Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on the

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
(COM(2001) 280 final).

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 5 December 2001. The rapporteur was **Mr Levitt**.

At its 387th plenary session (meeting of 17 January 2002), the Economic and Social Committee adopted the following opinion by 92 votes to one with three abstentions.

1. Introduction

1.1 The Commission has presented a proposal for a Directive intended to introduce a new “single passport for issuers” so that once a prospectus has been approved by the home country authority of the issuer, it would have to be accepted throughout the EU for public offer and/or admission to trading on regulated markets. A prospectus is a disclosure document by issuers given to investors by issuers when they want to raise capital and/or when they want their securities admitted to trading. The proposed Directive is intended to make the system of prospectuses much simpler in order to make it easier and cheaper to raise capital throughout the EU. The initiative is an important element of the Financial Services Action Plan and the drive to create an integrated financial services market. The Commission has stressed that it is one of the first two proposals for Directives under the new “Lamfalussy” format endorsed at the Stockholm European Council, distinguishing framework principles from implementing technical details. The Commission intends to adopt technical measures to complement the framework principles established by the Directive after consulting the Member States' representatives in the (new) Securities Committee by a comitology process.

1.2 The proposed Directive seeks to ensure that adequate and equivalent disclosure standards are in place in all Member States when securities are made available for European investors whether through a public offer procedure or because they are admitted to trading. The proposed Directive includes in its scope all types of securities normally traded in the market and it introduces a standard definition of a “public offer”.

1.3 The key features of the proposed Directive as outlined in the Commission's Press Release and Explanatory Memorandum are:

- definition of conditions for offering securities to the public and admission to trading;
- harmonisation of essential definitions in order to avoid loopholes and different national approaches, to ensure a level playing field throughout the EU;

- introduction of enhanced disclosure standards in line with international (IOSCO) standards for public offers of securities and admission to trading (to facilitate the offering of securities by EU issuers in non-EU countries such as the USA);
- the introduction of a registration document system for issuers whose securities are admitted to trading on regulated markets in order to ensure a yearly update of the key information concerning the issuer;
- concentration of the responsibilities in the home country's administrative competent authority;
- a single passport – in other words, the ability to offer or admit securities to trading on the basis of a simple notification of the prospectus approved by the home competent authority.

1.4 The Commission states that the proposed Directive follows the approach suggested by the Committee of Wise Men chaired by **Alexandre Lamfalussy** and endorsed in a Resolution of the Stockholm European Council in March 2001. This approach involves consultation with market practitioners prior to adopting legislation/regulation and distinguishing between framework principles and implementing measures. For the proposed Prospectuses Directive, the Commission says this means that all the key rules, basic concepts and principles are laid down in the Directive while the Commission intends to adopt technical guidance and implementing measures in specific areas after consulting Member States' representatives in a Securities Committee. These technical/implementing measures involve:

- adaptation and updating of definitions and exemptions;
- definition of specific disclosure standards of prospectuses in accordance with international disclosure standards established by IOSCO for cross-border offerings and initial listings;
- detailed technical rules and guidance on issues such as publication of prospectuses, advertising, approval of prospectuses, recognition of prospectuses submitted by third country issuers.

1.5 Under current EU rules the host country authority, in the case of recognition of prospectuses, is authorised to require additional information related to the domestic market, regulations and practices vary widely among the Member States. As a result EU capital markets are fragmented and it is rarely possible to use a prospectus to raise capital across frontiers. Although the current Listing Particulars Directive (80/390/EEC) provides for mutual recognition this is only granted to prospectuses meeting the information requirements in that Directive and there is no European recognition system for securities falling beyond the scope of that Directive.

2. General comments

2.1 It is most disappointing that the Commission failed to consult market practitioners fully prior to adopting the proposed Directive. The proposed Directive rightly stresses the need for improved and common disclosure standards for securities issued to the general public. Professional investors, issuers and financial intermediaries all acknowledge the need for retail investor protection including proper disclosure - but they also stress that in wholesale markets a lighter regime is

appropriate. In a number of places, as explained in this Opinion, the Directive does not demonstrate adequate acknowledgement of existing satisfactory legal and market practices. (Moreover, it differs in material ways from the FESCO paper on disclosure on which practitioners were consulted). The Committee also stresses the need for the reference to information about employees in Annex I of the Directive to include information about employee consultation procedures.

2.2 The proposed Directive deals with an important area where there is a clear need to achieve:

- greater convergence on the exemptions from prospectus and related requirements, in particular to facilitate institutional and private placements of securities (of particular benefit in relation to cross-border wholesale market activity);
- greater mutual recognition of prospectuses, in particular to reduce the need to produce translations of full offering documents where offerings are being made in more than one state (of particular benefit in relation to cross-border retail offerings of securities).

Achieving progress on these issues would make a real contribution to the development of the single pan-European market. However, there are a number of concerns as to the approach taken by the draft Directive towards addressing these issues.

2.3 The very welcome worthwhile aims of the Directive as set out in the Explanatory Memorandum and Press Release, which are broadly summarised in the preceding paragraphs of this Opinion, are not always consistent with the detailed text of the Draft Directive. The paragraphs subsequent to this discuss the following important topics:

- prospectus requirements appropriate for institutional and private placements and for retail investors;
- the right of the issuer to choose where to make issues, (the "Home State" principle);
- the implications for international debt markets in the EU, with particular effects on the Eurobond and multi-issuer Medium Term Note (MTN) markets;
- annual updating of documentation for companies also if they make no further new issues;
- the relationships between the proposed Directive and existing Directives;
- the effects on foreign issuers and on competition between regulated markets;
- other topics including the power of competent authorities to impose their requirements extra-territorially, jurisdictional responsibilities concerning advertising, and the relationship with the E-Commerce Directive.

3. Institutional and private placements

3.1 At present, a key obstacle to the development of Europe's wholesale capital markets is the differing approaches taken by Member States as to when offerings of securities should be treated as exempt from prospectus requirements. In particular, firms seeking to conduct cross-border institutional or private placements of securities must cope with the fact that individual Member States apply their prospectus requirements in very different ways. In one Member State, an offering to certain categories of professional investors may be exempt from prospectus requirements while in others minimum investment or other conditions may be met before any exemption is available.

3.2 One of the principal benefits potentially offered by the proposed Directive is the harmonisation of these exemptions in a manner which genuinely facilitates institutional and private placements, particularly for cross-border capital raising. However, the proposed Directive falls short of achieving this desired objective.

3.2.1 In particular, the draft Directive adopts a very narrow definition of the types of "qualified investor" to whom securities can be offered without triggering the requirement to register a prospectus. In particular, the draft Directive (Article 2.1.c) excludes even the largest and most sophisticated corporations and many other types of institutional investor (such as investment trusts and other closed-ended funds) from its definition of "qualified investor". (Of course it is necessary to take into account the different characteristics of different investment funds in order to determine whether or not they are "qualified"). The question of the distinction between professional and inexperienced retail investors is being considered in the current Commission consultation on the Investment Services Directive (ISD). It is possible that large corporations and experienced individuals (natural persons) will be categorised as "professional". The proposed Directive should refer to the ISD review in this regard. As noted above (§ 2.1) retail investor protection is essential but the proposed Directive would impose disproportionate regulation on the mainly inter-professional markets, particularly the international debt capital markets where some 95% of investors are professionals.

3.2.2 The draft Directive does not actually prevent Member States imposing pre-notification, filing or other requirements on offers of securities to qualified investors or other offers which are not treated as public offers. Member States should not be able to create barriers to institutional or private placements by imposing requirements of this kind.

3.2.3 The draft Directive does not address the common case where a public offer is being made in one Member State (or a third country) while an institutional or private placement is being made in another Member State. Firms conducting the offer should not be required to go through the mutual recognition process (which may require the translation of at least part of the prospectus) in order to make an institutional or private placement in one Member State merely because a public offer is being made elsewhere. Although Article 3.2 provides exemptions from prospectus requirements for certain types of investor or issues above a certain scale, the prospectus requirements are **always** triggered if the securities are admitted to trading (i.e. are listed). Because many professional investors are **only** allowed to invest in listed securities (whether because of national regulations or their own internal articles of agreement) the existing exemptions are insufficient to prevent triggering prospectus

requirements in debt capital markets. Therefore a further exemption should be applied to debt issues with denominations of EUR 40,000 and above. (This threshold exists in other legislation e.g. the Public Offer Directive; it would **not** damage disclosure to small retail investors).

3.2.4 The draft Directive (Article 3.3) inappropriately limits the scope of the exemptions in a number of other respects e.g. by excluding rights offerings and offerings of employee share options.

3.3 In this respect, the draft Directive appears to be significantly more restrictive than the original proposals made by the Forum of European Securities Commissions (FESCO) in its paper "A single passport for issuers". This is of particular concern because the draft Directive would seem to prevent Member States from taking a more liberal approach to the question of when prospectus requirements apply: in effect requiring Member States to restrict or abolish more generous existing private placement and other similar exemptions even though those exist today in conformity with the existing directives.

4. Home state principle

4.1 The draft Directive (Article 2.1.g) treats an issuer's country of incorporation as its "home state". An issuer must always submit a prospectus (or a securities note and summary document) for pre-vetting and approval to the competent authorities in its country of incorporation (Article 4) regardless of where the issuer proposes to conduct a public offer or to arrange for the listing or trading of its securities. Under the current Directives, an issuer that proposes to make a public offer (or to arrange listing of its securities) in another Member State can choose to have its prospectus pre-vetted in that Member State and, indeed, can use that prospectus to make a public offer in a third Member State under the existing mutual recognition procedure. The only exception to this is where the issuer is also making a public offer (or seeking a listing) in its country of incorporation.

4.2 There does not seem to be any compelling reason to prevent an issuer choosing to have its prospectus pre-vetted and approved in a Member State in which it proposes to make a public offer or in which it proposes to seek a listing or trading facility for its securities (as an alternative to using its home state authorities). It is true that it may be more convenient, in some cases, for an issuer's home state authorities to check facts concerning the issuer. However, listing authorities have for many years pre-vetted and approved prospectuses of issuers from other Member States or third countries without any notable difficulty (and indeed have sought to encourage foreign issuers to apply for cross-border listing). Fears of "regulatory arbitrage" or "a race to the bottom" are exaggerated. The most successful securities markets in the world are characterised by the most rigorous disclosure standards and a culture of transparency and compliance, giving confidence to investors and issuers alike.

4.3 In addition, removing the issuer's freedom to choose another Member State in this way would seem to cause a number of problems.

4.3.1 Consider the case, for example, where a French issuer wishes to raise capital in Germany by means of a public offering in Germany and to arrange for the listing of its shares in

Germany. The issuer does not wish to make a public offering in France. Nevertheless, the issuer would, under the draft Directive, be required to have its prospectus pre-vetted and approved by the French authorities.

4.3.2 Under the draft Directive the French authorities would be entitled to require that the prospectus be prepared in the French language (and be presented in the manner customary in France) (Article 7) and the German authorities could only require the issuer to prepare a translation of the summary section of the prospectus into the German language in order to make the offer in Germany (Article 16). However, as a practical marketing matter (particularly if the offer is targeted at German retail investors), the issuer may need to prepare a German language version of the whole prospectus (presented in a manner which is customary in Germany). Under the current Directives, the issuer could choose to have its prospectus pre-vetted and approved in Germany and would thus only have to prepare one language version of the prospectus.

4.3.3 Since the issuer is applying for listing of its shares in Germany, it will still have to apply to the competent authorities in Germany to establish compliance with the criteria for admission to listing (Article 15). In addition, it will still have to deal with the competent authorities with respect to the continuing obligations that fall on issuers of securities (such as ad hoc disclosure requirements). Furthermore, since it is marketing its securities in Germany, it will have to cope with a number of other German legal requirements as regards the manner in which its securities are offered to the public (e.g. Article 15.3). Under the current Directives, the issuer would (in this example) only have to address itself to German legal requirements as regards the management of the offering (and on an ongoing basis would only have to deal with a single regulator, namely the German regulator, as regards the continuing obligations that flow from listing). Under the draft Directive, the issuer would have to deal with the authorities in both Germany and France, both initially as regards the launch of the offer, and on an ongoing basis.

4.3.3.1 Clearly, the need for translation (see § 3.2.3, 4.3.2 and 4.3.3 above) due to the approval required by the authority in the country of incorporation as opposed to the country where the issue is to be made or listed, as well as the need for legal compliance in both countries (see § 4.3.3 above), are costly. The issuer may well thus decide that the burdens of making a cross-border offer and seeking a cross-border listing are excessive because of these additional requirements. It would be simpler for the issuer if it sought a listing in its home state and restricted the offer to investors in its home state. Thus, the draft Directive may in fact operate as a deterrent to cross-border offerings and listings and restrict competition between exchanges seeking to attract issuers to their markets.

4.3.3.2 Similarly, the proposals will affect issuers listed in one country who currently choose to obtain a London, Luxembourg or other non-domestic listing for their international debt securities. For example, a Spanish company whose shares are listed in Spain and traded on a Spanish exchange may, at present, seek a UK listing for its eurobonds. In connection with that listing application, it will prepare a disclosure document (listing particulars) in English for review by the UK authorities and the eurobonds will be sold to investors under private placement or similar exemptions. Typically, trading in the eurobonds will take place over-the-counter under the rules of the International Securities Market

Association rather than on the London Stock Exchange. There is no need to involve the Spanish authorities in relation to the issue.

4.3.3.3 Under the draft Directive, the issuer would be required to prepare a securities note and a summary note in relation to the offering and these would need to be scrutinised and approved by the Spanish authorities. However, if the Spanish authorities require those documents (and the base registration document) to be in the Spanish language and prepared in a format customary in Spain, the issuer may still, in practice, have to prepare an English language document in a format suitable for international investors (even if the UK authorities do not require a translation of the summary note into English). In addition, the issuer will still have to liaise with the UK authorities in connection with the application for listing and will need to comply with UK rules with respect to the continuing obligations applicable to listed issuers. Thus, the implementation of the Directive in its current form seems likely to involve at the very least an increase in costs for issuers seeking cross-border listing of their debt securities and will provide incentives for issuers to seek a domestic listing for their securities (at least if that is acceptable to international investors).

4.3.3.4 In addition, the draft Directive results in the loss of the efficiencies that issuers currently obtain as a result of the effective centralisation in Luxembourg and the UK of the review of listing and offering documents for large numbers of international issues of debt securities. By requiring that these matters always be dealt with in the issuer's country of incorporation, the draft Directive fragments what is currently a relatively efficient working system for the review of euromarket documentation. It is doubtful that the comitology procedure can achieve such a high degree of convergence in the method of dealing with individual cases. In the light of the above reasoning, Article 2.1.g (see paragraph 4.1 above) should be **amended** to define the "Home Member State" as the State where the issuer chooses to list or offer securities.

4.3.3.5 Clearly a lighter disclosure requirement for eurobonds, for which the market is professional, is appropriate.

4.3.4 Medium term note (MTN) programmes are facilities under which an issuer or group of issuers may establish something equivalent to a "shelf registration" facility under which they may from time to time issue debt securities intended to be listed on one or more stock exchanges. For example, a group of companies may wish to be able to arrange issues of debt securities, on short notice, by the parent company and various subsidiary companies, some of which may be incorporated in a Member State other than the parent company's country of incorporation (or third countries). Typically, the securities would be sold to institutional investors in a number of countries under private placement or similar exemptions.

4.3.4.1 At present, the issuers may apply for the listing of the programme on a single stock exchange and the competent authorities in the country of that stock exchange will pre-vet and approve a single disclosure document (a prospectus or listing particulars) which covers all issues of securities under the programme by all the issuers involved. There is no need for those issuers to seek the approval for the disclosure document from the authorities in their home Member States.

4.3.4.2 Under the draft Directive, if a German company wished to list an MTN programme on the Luxembourg Stock Exchange covering the issue of debt securities by it, and its subsidiaries in France, the Netherlands and the US, the prospectus would have to be approved by the competent authorities in Germany, France, the Netherlands and (because of the US issuer) Luxembourg. Thus, four competent authorities would have to pre-vet and approve the prospectus (and might impose their own language and other form and content requirements consistent with the Directive) even though it relates to a single programme for the issue of debt securities. Currently, it would be sufficient if, in this example, the Luxembourg authorities approved the programme documentation.

4.3.4.3 The requirements for pre-vetting and approval of a full securities note and summary document for all issues of securities would seem to result in considerable extra burdens for MTN programmes. Typically, under those programmes the issue of a tranche of securities under the programme only requires the filing of a pricing supplement (without the need for approval of that document). It is not uncommon for MTNs to be issued at present within 15-20 minutes, when the market opportunity arises. The Directive should be **amended** to enable offers or admission to trading on the basis of approval of a single prospectus for an entire programme without need for a separate prospectus for individual subsequent offers under that programme.

4.3.5 The fact that issuers are tied to their home country (in perpetuity) may affect the choice of country of incorporation for newly established companies as this will affect subsequent capital raising by that company. This could distort competition in the single market. Those setting up new companies may seek to avoid incorporating in countries which are perceived to have competent authorities that are unduly bureaucratic or inflexible in their procedures for review of prospectuses. It may be difficult at a later stage in the corporate lifecycle to restructure a group to change the location of the parent company (tax issues may well make this difficult). Thus, it will be critically important for new companies to select the "right" country of incorporation - even though they may not know at this stage where they are likely to seek to raise capital or to seek a listing for their securities.

4.3.6 National competent authorities (or exchanges) will have fewer incentives to seek to raise disclosure standards above the minimum standards set by the Directive (assuming that the draft Directive in fact allows this). Any enhanced disclosure standard will only apply to their domestic issuers and will not apply to issuers from other Member States that choose to list on their markets.

4.3.7 Similarly, national competent authorities will not be under competitive pressure to improve the standard of service that they offer to companies seeking approval for their prospectuses. Domestic companies will have no option but to deal with their domestic competent authority and issuers from other Member States will not have to have their prospectuses approved by the relevant competent authority even if they are making a public offer or listing their securities in its territory.

4.3.8 However, if notwithstanding this, a particular national competent authority chooses to impose disclosure requirements that exceed the minimum requirements imposed by the Directive (assuming that the draft Directive in fact allows this), then this also adversely affects issuers incorporated in that country as compared with the current situation. Currently, those issuers can choose to list their securities in another Member State. Under the draft Directive, those issuers would

nevertheless have to meet all the disclosure standards imposed by their home state regulator even if they do not wish to raise capital or list their securities in their home state.

4.3.9 Under the current directives, there is flexibility for the competent authority to grant derogations from disclosure requirements on a case-by-case basis (e.g. where the information is of minor importance only). Nevertheless, the prospectus or listing particulars can still, in principle, have the benefit of mutual recognition, albeit subject to certain conditions. Under the draft Directive, there is no flexibility for case-by-case derogations.

4.4 Again, the current proposals are significantly more restrictive than the proposals set out in the earlier FESCO paper on this subject. That paper would have allowed issuers at least to choose between their country of incorporation and the country in which they maintain their primary listing. It is also inconsistent with the treatment of non-EU issuers whose securities are not yet traded on an EU exchange. These issuers do have some right to choose their "home state" so long as they are able to control where their securities are first admitted to trading (but see below for the case where they are not).

4.5 Article 11.4 of the proposal for directive reads as follows:

"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."

The Committee finds this unacceptable and urges for this text to be deleted. Instead, it should be substituted by:

"If the competent authority fails to give a decision within the time limit laid down in paragraphs 2 and 3, this shall be deemed acceptance whereas any rejection shall give right to apply to the courts. If the competent authority needs more time to reach a decision, it should write to the issuer to say so."

5. **Compulsory shelf registration system**

5.1 The draft Directive proposes a system under which every issuer whose securities are admitted to trading on an EU regulated market must update its "registration document" every year (Article 9). The "registration document" is the part of a prospectus that provides information concerning the issuer's financial position and business. Under the draft directive, the registration document is supplemented (when the issuer plans a specific issue of securities) by a "securities note" (giving additional information on the particular securities being issued and details concerning the offer) and a "summary note" (which provides a summary of key information in the securities note and registration document) (Article 15). These three documents together form the prospectus. An outline of the proposed minimum contents of the registration document are set out in Annex II to the draft Directive but the Commission can, through the "comitology" procedure, develop more specific rules.

The annual update of the registration document must be filed with and scrutinised by the competent authority in the issuer's home state.

5.2 It seems that one of the primary reasons for this structure is to facilitate subsequent issues of securities by an issuer. An issuer would only be required, on a subsequent issue of securities, to prepare a securities note and summary note (unless there has been a material change or recent development since the last update of its registration document). The idea is that an issuer would then be able to issue securities on a "fast track" without the need to prepare a full prospectus on each occasion.

5.3 However, the requirement for an annual update of the registration document would also significantly increase the extent of ongoing disclosure by all issuers whose securities are admitted to trading on EU regulated markets. Effectively, every such issuer will be required annually to prepare the business and financial sections of a full prospectus and to have this scrutinised by its home state authorities. This is to be the case whether or not the issuer in fact plans a subsequent issue of securities. This will particularly affect small and medium-sized enterprises which only once raise new capital at the time of their initial admission to trading on a stock exchange.

5.4 The proposed regime may also create difficulties for issuers who are, at the time of the annual update, engaged in negotiations on a material transaction (e.g. an acquisition) which have not yet reached the stage where an ad hoc disclosure is required. It is unclear whether such an issuer would be able to ensure that the updated registration document fairly presents the required information without disclosure of the ongoing negotiations.

5.5 The proposed regime is also more burdensome than the regime originally proposed by FESCO in its earlier paper. That only suggested that "shelf registration" should be an option available to issuers.

6. Relationship with other Directives

6.1 The draft Directive would repeal Directives 80/390/EEC and 89/298/EEC. Those directives deal with the listing particulars to be published on the admission of securities to official listing and the prospectus to be published on the occasion of a public offer. The draft Directive does not distinguish between listed and unlisted securities that are admitted to trading on a regulated market. Moreover, it provides no definition of a "regulated market" although this question is being considered in the ISD review, to which reference should be made.

6.2 However, the draft Directive leaves untouched the provisions of Directive 79/279/EEC which co-ordinates the conditions under which securities are admitted to listing (including continuing obligations imposed on listed issuers). It also does not affect the provisions of Directive 82/121/EEC on the publication of half-yearly accounts by listed issuers. Thus, the draft Directive would continue to leave significant responsibilities with the competent authorities of the state in which admission to listing is sought. It also therefore does not affect the distinction between

listed and unlisted segments of regulated markets. These directives are also likely to be the subject of a separate review by the Commission.

6.3 It is unclear whether the Commission intends, as part of that review, to propose the abolition of "listing" as a concept. However, there are a number of reasons why it is likely to continue to be important to distinguish "listed" securities as a class. In particular, many existing investment restrictions in investment management or similar agreements or instruments (both within the EU and in third countries) effectively restrict investment by the institution concerned to securities that are "listed" on a stock exchange. It is unclear what the effects might be if the EU chose to abolish "listed" status altogether. At worst, it might result in many institutional investors being unable to invest in securities traded on EU markets.

6.4 It is also unclear whether the Commission intends to propose the transfer of some of the functions under those other Directives (which are currently allocated, under those other Directives, to the country of listing) to an issuer's "home state". Indeed, many of the issues raised by the current draft Directive interrelate with the issues that arise under those Directives. Most obviously, the imposition of compulsory updating requirements on issuers leads to an overlap between the requirements imposed by the draft Directive and the continuing obligations that are imposed on issuers under those other Directives (which also interrelate with the requirements for ad hoc disclosure imposed by the market abuse directive).

6.5 The draft Directive would clearly result in radical changes to the allocation of responsibilities between competent authorities. However, it is difficult to consider the consequences of these proposals without seeing the proposals for reform of those other Directives.

7. **Non-EU issuer**

7.1 The draft Directive could have adverse effects on foreign issuers. For example, a Danish regulated market may choose to admit the securities of a US issuer to trading on its market (without the consent of the US issuer - relying on the publication of a prospectus in the United States). As a result, Denmark would become the "home state" for the US issuer if it ever wishes to raise capital in the EU by a public offer or arrange for the admission of its securities to trading on another regulated market. This would be the case even though the US issuer did not wish to make a public offer of its securities in Denmark or seek admission of its other securities to trading on a Danish exchange.

7.2 The draft Directive also does not address the case where a non-EU issuer is making a public offer in two or more Member States (without admission of any securities to trading on a regulated market). It would appear to prohibit one of those Member States giving mutual recognition to the offer document approved by the other.

8. **Market competition**

8.1 There is a risk that the draft Directive could have adverse effects on the ability of regulated markets to admit securities to trading on their markets without the consent of the issuer. For example, at present, regulated markets can compete in the provision of trading services by admitting securities to trading on their markets whether or not the issuer has applied for that admission. The regulated market would normally only be able to do this where it is satisfied that sufficient public information exists to enable a proper market in the securities (e.g. because the securities are listed elsewhere). However, the structure of the draft Directive would make it significantly more difficult for regulated markets to do this. For example, it appears that a regulated market would be responsible for continuously verifying whether an issuer has complied with its obligations to update the prospectus (see Article 4). This seems to confuse the requirements with respect to the regulation of exchanges and trading platforms with the requirements regarding the regulation of issuers. As a result, it may in fact restrict competition between trading platforms.

9. **Extraterritoriality**

9.1 The provisions of the draft Directive appear to assume that the competent authorities can impose their requirements extraterritorially on an issuer merely because a domestic regulated market chooses to admit that issuer's securities to trading - whether or not the issuer has in fact sought (or consented to) that admission. For example, it is unclear how the provisions of Articles 15 and 21 would apply where the issuer has not consented to the admission of its securities to trading in another jurisdiction.

10. **Advertising**

10.1 Article 13 introduces pre-vetting of all advertising and notices by the Home Member State. This is inappropriate and disproportionate in the case of notifications of proposed new issues to professional investors (e.g. via the electronic financial news services) and the Directive should exclude all notices to professional investors. The article sets no deadline for the authorities to provide a decision and this is unacceptable. In addition, it is far from clear who is supposed to comply with the requirements contained in those provisions.

11. **E-Commerce**

11.1 The draft Directive does not address the question of when an offer is to be regarded as made "in" the territory of another Member State. In particular, it does not address the question of the interrelationship between this Directive and the country of origin rules in the E-commerce Directive.

12. **Book building**

12.1 At present it is possible to issue new securities up to 10% of the outstanding issue by value without the need for a prospectus. The proposed Directive should be amended to exempt a prospectus requirement for new issues or admission to trading of securities of a given existing type by up to 10%.

13. Conclusions

13.1 It is most disappointing that the Commission failed to consult market practitioners prior to adopting the proposed Directive. In a number of places, as explained in this Opinion, it does not demonstrate adequate acknowledgement of existing satisfactory legal and market practices.

13.2 The very welcome worthwhile aims of the Directive as set out in the Explanatory Memorandum and Press Release, which are broadly summarised in the preceding paragraphs of this Opinion, are not wholly consistent with the detailed text of the Draft Directive and a number of concerns arise:

- inadequate differentiation of prospectus requirements appropriate for institutional and private placements;
- which, unless amended, would impose burdensome, unnecessary requirements on institutional and private placements;
- the withdrawal of the right of the issuer to choose where to make issues, (the "Home State" principle);
- this gives rise to difficulties facing issuers hoping to raise funds in other national markets within the EU and international debt markets, with particular adverse effects on the Eurobond and multi-issuer Medium Term Note (MTN) markets;
- the costly requirement for translation when making cross-border issues resulting from the removal of freedom of choice of the competent authority.
- the effects of which could be to make raising of capital outside a company's own country less attractive but which creates the need for the Directive to incorporate some derogations to impose a less heavy-handed regime on the Eurobond and MTN markets which are primarily professional;
- the costs of annual updating of documentation for companies even if they make no further new issues;
- the ambiguity concerning the relationships between the proposed Directive and existing Directives;
- the potential adverse effects on foreign issuers and on competition between regulated markets.

13.3 There are ambiguities concerning the power of competent authorities to impose their requirements extraterritorially, jurisdictional responsibilities concerning advertising, and the relationship with the E-Commerce Directive.

13.4 Consequently, the detailed drafting of the Directive needs to be tightened up to remove ambiguities and it needs to display greater recognition of the needs of professional debt markets, while protecting the legitimate interests of retail investors, by incorporating derogations from the rather onerous prescriptive regime which is too heavy-handed for the inter-professional wholesale markets. Without such changes the Directive would impede market integration.

Brussels, 17 January 2002.

The President
of the
Economic and Social Committee

The Secretary-General
of the
Economic and Social Committee

Göke Frerichs

Patrick Venturini
