

# The Prospectus Directive

## Creating a single European passport

The *Prospectus Directive* (2003/71/EC) (the Directive) (see *Glossary*), amending the Consolidated Admissions and Reporting Directive (2001/34/EC) (CARD), forms a major component of the *Financial Services Action Plan*, which aims to create a single market in financial services for the EU.

The Directive came into effect on its publication on 31 December 2003 and requires member states to implement its provisions by 1 July 2005. A regulation implementing the general principles contained in the Directive through detailed technical measures (*Commission Regulation (EC) 809/2004, OJ 2004 L149/1*) (the Prospectus Regulation), was adopted by the European Commission on 29 April 2004 and will be directly applicable as law in member states from 1 July 2005.

Once implemented, the Directive, as a *maximum harmonisation directive*, will constitute a major step forward in the integration of the European securities markets, in particular through:

- A new EU-wide definition of what an “offer to the public” is and EU-wide transactional exemptions for non-public offers.
- A single regime throughout the EU governing the content, format, approval and publication of such prospectuses.

- The replacement of the current mutual recognition procedure with a new “single-passport” procedure.

Both EU and non-EU issuers need to be aware of the changes that the new regime will bring about. This article explains how that regime will operate, focusing in particular on:

- When a prospectus will need to be filed and published.
- The prescribed format and content of the prospectus.
- How a prospectus will need to be approved.
- Other requirements set out by the Directive relating to language, publication and advertising, and annual disclosure.
- The practical implications of the new regime for issuers.

### Filing and publication

A prospectus will need to be filed for approval with the competent national regulator (see *below Approval*) and published (see *Other matters: Publication and advertising*) on either of two events. These are:

- An offer of securities to the public within the EU.

- An application for admission to trading of securities on an EU regulated market.

(*Article 3(1) and 3(3), Directive.*)

Exemptions to the obligation to file and publish a prospectus on a public offer or an admission to trading exist for conversion offers, takeovers, mergers, bonus issues and employee and director stock ownership programmes, subject in certain cases to alternative disclosure requirements (*Article 4, Directive*).

### Offer of securities to the public

To ensure harmonisation throughout the EU, the Directive introduces, for the first time, a pan-European definition of an offer of securities to the public: “a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities” (*Article 2(1)(d), Directive*). While this definition is broad, it is unlikely that it would capture communications that do not refer to an offer price.

The following public offers are exempt from the obligation to file and publish a prospectus (exempt public offers):

Pierre-Marie Boury and Raj Panasar of Cleary Gottlieb Steen & Hamilton analyse the new EC regime governing prospectuses, and consider the implications for EU and non-EU issuers.

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- Offers made to qualified investors.
- Private placements made to fewer than 100 persons (other than qualified investors) in each member state.
- Offers with a minimum total consideration per investor or specified denomination per unit of EUR50,000.
- Offers of securities with a total consideration of less than EUR100,000 in any 12-month period.

Note that the above exemptions are not available in respect of an application for admission to trading on an EU regulated market.

Member states will not be able to allow any offer of securities to be made to the public within their territories without prior publication of a prospectus (*Article 3(1), Directive*). Given the broad definition of a public offer, and the absence of clear language in the Directive, there has been some discussion as to exactly what this requirement means for secondary market trading of listed securities. Under the broadest interpretation, any resale of listed securities would require a further prospectus or its own exemption. This interpretation would place either:

- An onerous obligation on investors to file and publish a prospectus; or



## The Lamfalussy process and CESR's role

The legislative process followed by the Prospectus Directive (2003/71/EC) is the so-called "Lamfalussy process", which promotes a four-level approach to harmonisation of financial services regulation throughout the EU:

- Level 1** Directives set out the broad framework principles and the European Commission's powers to implement level 2 technical measures.
- Level 2** Measures implementing the directives adopted by the Commission with the prior approval of the European Securities Committee (comprised of high-ranking officials of member state governments), or in certain cases by the EU Council of Ministers and based on the advice of the Committee of European Securities Regulators (CESR), an advisory committee comprised of representatives of member states' national regulators.
- Level 3** Strengthened co-operation between the competent authorities of the member states under the auspices of CESR to achieve a uniform application of EC regulation across the EU.
- Level 4** Strengthened enforcement by the Commission to ensure member state compliance with EC legislation.

On 4 March 2004 CESR began the consultation process for the creation of guidelines on the disclosure requirements contained in the Prospectus Regulation (*Regulation 809/2004/EC*), with the objective of ensuring consistent application throughout the EU. These guidelines, if CESR concludes they are necessary, will constitute level 3 measures and are intended to be completed by December 2004.

- An obligation to transfer the securities pursuant to a separate exempt public offer, which would be unworkable in the context of anonymous dealer trading systems where the identity and number of ultimate counter-parties are not known.

One alternative, and preferable, interpretation is that the provisions relating to prospectuses for public offers (including the restriction on resale of securities initially sold in an exempt public offer) are not applicable if the securities are or will be admitted to trading on an EU regulated market. Under this interpretation, the provisions requiring a prospectus for an application for admission to trading would apply instead (*see below Admission to trading of securities*) and sellers in the secondary market could ignore the restrictions on public offers. If the securities were not admitted to trading on an EU regulated market, a prospectus would only be required for a subsequent resale where the original offer was an exempt public offer. This would effectively maintain the current position in many EU member states. It remains to be seen whether this interpretation will be confirmed by implementing legislation.

### Admission to trading of securities

The Directive uses the term "admission to trading on a regulated market" (as defined by reference to the Investment Services Directive (93/22/EEC)), rather than the concept of "admission to official listing" contained in the CARD. Regulated markets will include the major EU stock exchanges, but may also include other markets designed for small- and medium-sized issuers where securities currently may not be regarded as "admitted to official listing." Member states will each provide a list of regulated markets within their jurisdiction. The inclusion of these smaller markets will significantly increase the costs of a listing for small- and medium-sized issuers, as the disclosure requirements for a listing on these markets will become similar to those applicable to a listing on a main stock exchange.

In certain cases, where the class of securities is already admitted to trading on a regulated market, applications for admission to trading may benefit from an exemption from the obligation to file and publish a prospectus, including where the admission to trading is for less than 10% of the number of shares of the same class already admitted to trad-

ing on an EU regulated market (but note that these exemptions are not available in respect of an offer of securities to the public).

### Format

A prospectus must consist of three principal components, which can be combined in a single prospectus or kept separate:

- **A summary.** This must, briefly and in a non-technical manner, convey the essential characteristics and risks associated with the issuer, any guarantor and the securities.
- **A registration document.** This must contain information relating to the issuer.
- **A securities note.** This must provide details of the securities to be offered or admitted to trading.

(Article 5(3), Directive.)

This tri-partite format facilitates the shelf-registration system introduced by the Directive. Under this system, registration documents that have already been approved and filed with the relevant national regulator (*see*



## Prospectus disclosure requirements: a comparison

The following table sets out disclosure requirements for share, retail debt and wholesale debt prospectuses under the Prospectus Directive (2003/71/EC) (see also box, *Further concessions for wholesale debt*, available online at [www.practicallaw.com/A40700](http://www.practicallaw.com/A40700)).

Shares	Retail debt	Wholesale debt
<b>Risk factors</b>		
Risk factors - issuer/industry	Risk factors regarding issuer's ability to fulfil its obligations.	Same as retail debt.
<b>Financial information</b>		
Three years' <i>IFRSs</i> accounts or in accordance with an equivalent standard (see box, <i>The impact of IFRSs for more detail</i> ).	Two years' <i>IFRSs</i> accounts or in accordance with an equivalent standard.	Two years' accounts - any generally accepted accounting principles but include qualitative analysis of differences with <i>IFRSs</i> .
Unaudited half-year interim financial statements if prospectus is dated more than nine months after the end of the last audited financials.	Same as shares.	N/A
Operating and financial review, or "MD&A" section.	N/A	N/A
Issuer's capital resources and cash flow, including a working capital statement (which need not be "clean" - that is, can disclose how any additional working capital will be provided).	N/A	N/A
Description of significant change in respect of financial or trading position of the group since last financial statements or negative statement.	Same as shares.	Same as shares.
Significant recent trends in production, sales and inventory, and costs and selling prices since last financial year. Information on known trends, uncertainties, demands, commitments, events that are reasonably likely to have a material effect on issuer's prospects for current financial year.	No material adverse change statement regarding prospects of the issuer since last audited accounts. Information on known trends, uncertainties, demands, commitments, events that are reasonably likely to have a material effect on issuer's prospects for current financial year.	No material adverse change statement regarding prospects of the issuer since last audited accounts.
Statement of indebtedness no older than 90 days before the date of the prospectus.	N/A	N/A
Pro-forma financial information in the event of certain significant transactions, and a report on this prepared by an independent auditor.	N/A	N/A
<b>Shareholders and management</b>		
Extensive disclosure regarding members of administration, management and supervisory bodies, including description of: <ul style="list-style-type: none"> <li>• Employment history.</li> <li>• Relevant expertise and experience.</li> <li>• Conflicts of interest.</li> <li>• Remuneration.</li> <li>• Share options.</li> <li>• Shareholdings in issuer.</li> </ul>	Disclosure limited to the names, address and functions and any conflicts of interest.	Same as retail debt.
Information on persons holding directly or indirectly a notifiable share interest under national law.  Description of any direct or indirect "control", including measures in place to ensure such control is not abused.	Disclosure limited to description of any direct or indirect "control", including measures in place to ensure such control is not abused.	Same as retail debt.
<b>Issuer</b>		
Description of issuer's current principal investments and principal investments in the preceding three years or to which issuer has committed to (including method of financing).	Disclosure limited to description of the issuer's principal investments since the date of the last published financial statements and to which the issuer has committed to for the future (including the anticipated sources of funds).	N/A
Summary of material contracts entered into by the issuer or a group member in the previous two years outside the ordinary course of business; and any other contract outside the ordinary course of business containing provisions that are material to the group.	Brief summary of such contracts that could be material to the issuer's ability to meet its obligations in respect to the securities.	Same as retail debt.

## A European home for non-EU issuers

The close interaction between the Prospectus Directive (2003/71/EC) (the Directive) and the proposed *Transparency Directive* for the purposes of designating a *home member state* is of particular importance to non-EU issuers of equity or *low denomination debt*.

Under the Directive, non-EU issuers will be “locked into” a single national regulator for all public offers and admissions to trading of equity securities and low denomination debt. This home member state will also be the home member state for the purposes of the Transparency Directive, which applies when an issuer has securities admitted to trading on a regulated market in the EU. This is of importance, as the designation of home member state for the purposes of the Transparency Directive will determine the applicable financial reporting obligations on an issuer (over and above the minimum pan-European requirements set out in the Transparency Directive).

Unlike the Directive, the Transparency Directive is not a *maximum harmonisation directive* and allows home member states to impose more onerous requirements on issuers. In addition, under the latest proposals for the Transparency Directive, member states are given the choice to implement specific grandfathering provisions and exemptions to the financial reporting obligations. Most important perhaps is the discretion given to member states to accept annual reports containing financial information prepared in accordance with third country national accounting standards deemed to provide a “true and fair view,” until the European Com-

mission considers the issue of equivalence of accounting standards on a Europe-wide level.

Non-EU issuers should, to the extent practicable, be careful not to take any inadvertent action after 31 December 2003 that may either be deemed an offer of securities to the public or an application for admission to trading (*see main text, Filing and publication*), and as a result select a home member state without full consideration of the implications. The potential for an inadvertent election is compounded by the uncertainty over how the concept of an “offer of securities to the public” should be interpreted between 31 December 2003 and the implementation date of the Directive in 2005.

The Commission has on a non-binding basis indicated that until the Directive is implemented by national legislation, the definition of “public offer” in the relevant national securities law (and any related exemptions for private offerings) is applicable. However, member states may take the view that the concept of “offer to the public” should be applied using the wider pan-European definition contained in the Directive when determining whether an issuer’s actions after 31 December 2003 elects a home member state.

The uncertainty as to which interpretation will be implemented into national legislation makes it impossible to determine accurately, until national implementation legislation is finalised in 2005, how an issuer’s actions after 31 December 2003 will impact on the election of a home member state. If the definitions contained in the Directive are

applied, countless non-EU issuers that have issued securities in the EU or otherwise made communications about securities - including placements to professionals of bonds, offers to employees of shares through share purchase plans and even seemingly innocuous actions, like the delivery of communications to employees about options that had been granted years earlier - may be deemed to have elected a home member state. It is unlikely that this was what the Directive intended.

The important elements in the choice of home member state include:

- An assessment of the risk of onerous provisions being imposed by a member state beyond the minimum floor of financial reporting obligations set out in the Transparency Directive.
- An assessment of the home member state’s language requirements to determine if such requirements are practicable for the issuer.
- Whether member states will accept particular national accounting standards before the Commission determines the question of equivalence on a pan-European level.

This assessment will obviously be easier to make once competent authorities give an indication of their position to market participants. However, the desire to “wait and see” needs to be balanced against the potential benefit of taking early specific action to choose a permanent home member state under the Directive to eliminate the risk of inadvertently selecting a different home member state.

*below Approval*) will be valid for 12 months (subject to the requirement to update with supplements, if necessary (*see Supplements*), and can be combined with a summary and securities note for further offerings or applications for admission to trading within this period. The summary and securities note will, however, require separate approval.

Those persons who have tabled the summary, including any translation of it, will be subject to civil liability if it is “misleading, inaccurate or inconsistent when read together with the other parts of the prospectus” (*Article 5(2)(d), Directive*). Whether market participants will take comfort from this limitation on liability in a context where the summary is the sole docu-

ment in the local language (*see Approval*) and consequently relied on to a greater extent than if the rest of the prospectus were also in the same language, remains to be seen.

Issuers of securities using debt programmes can continue to produce a prospectus in the format that is customarily used in these markets at the

moment instead of using the single issue format outlined above (see *box, Issuers of securities using debt programmes, available online at www.practicallaw.com/A40700*).

### Supplements

A supplement to the prospectus must be filed to reflect “every significant new factor, material mistake or inaccuracy capable of affecting the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or the time when trading on a regulated market begins” (*Article 16(1), Directive*). The appropriate regulator (see *below Approval*) must approve the supplement within seven working days. Investors who have already agreed to purchase or subscribe for the securities will have the right under the Directive to withdraw their acceptances within a prescribed period.

The requirement for separate regulatory approval of a supplement may well reduce the timing advantages of the shelf-registration system introduced by the Directive. The practicality and efficiency of the new system will depend in large part on the willingness of competent authorities to accommodate frequent issuers by reducing approval periods for supplements to a minimum.

Separate regulatory approval of a supplement is also required in the context of debt programmes (see *box, Issuers of securities using debt programmes, available online at www.practicallaw.com/A40700*). As a result, it will no longer be possible to include such information in the pricing supplement, as is current practice in certain jurisdictions in the EU. Instead, such information will need to be included in a supplement, which will trigger an approval requirement. Because of this, issuers may find that in practice they cannot make offerings under a debt programme for a certain period of time after the occurrence of a material event.

### Incorporation by reference

Information can be incorporated into the prospectus by reference (*Article 11, Directive*). The document being in-

corporated by reference is subject to the same restrictions on the use of languages as the prospectus into which it is being incorporated and must have been previously or simultaneously published, and approved or filed with the home member state (see *below Approval*). In practice, the use of incorporation by reference as a disclosure technique will be restricted by these conditions.

### Content

The detailed disclosure requirements of a prospectus, broadly based on the International Organization of Securities Commissions disclosure standards (see *box, Related information*) are included in the Prospectus Regulation.

The Prospectus Regulation adopts a “building-block” approach towards the content of the prospectus (*Article 3, Prospectus Regulation*). Accordingly, the level of disclosure will be determined by the identity of the issuer and the type of security involved. The specific disclosure items to be included in a prospectus will be determined based on a combination of:

- **Schedules.** These will contain the minimum disclosure requirements for the registration document and the securities note for different categories of securities and issuers.
- **Building blocks.** These will contain specific additional disclosure requirements for pro forma information, guarantees and asset-backed securities.

A table, attached as an annex to the Prospectus Regulation, will set out how the schedules and building blocks should be combined.

(For details of the disclosure requirements relevant to share, retail and wholesale debt prospectuses see *box, Prospectus disclosure requirements: a comparison. For disclosure requirements in relation to financial information, see box, The impact of IFRSs.*)

### Approval

The Directive introduces a pan-Euro-

pean regime under which the relevant regulator of a single designated member state (the *home member state*) (for instance, the Financial Markets Authority (*Autorité des Marchés Financiers*) in France) is responsible for approving prospectuses for *equity* and *low denomination debt* securities, and ensuring compliance with the Directive generally (*Article 13 and Article 2(m), Directive*). In contrast, issuers of *high denomination debt* can select a regulator on a case-by-case basis for each particular offering or application for admission to trading (*Article 13 and Article 2(m), Directive*).

For EU issuers of equity and low denomination debt securities, the single home member state regulator will be the competent authority of the member state in which the issuer has its registered office. For non-EU issuers, this regulator will be the competent authority of the member state in which the issuer, the offeror or (in the case of an admission to trading) the person seeking admission first makes an offer of such securities to the public or first applies for the admission of such securities to trading after 31 December 2003 (see *box, A European home for non-EU issuers*). The Directive also makes provision for non-EU issuers already admitted to trading on an EU regulated market to make a one-off election of their home member state before 31 December 2005 by notifying the relevant national competent authority.

The Directive provides that the competent authority of the home member state must approve a prospectus, or a securities note in the case of an issue relying on a previously approved registration document, within ten working days of the submission of the draft prospectus, or 20 working days in the case of an initial public offering. Where supplementary or omitted information is requested, these time periods will deem to commence when this information is provided. The Directive does not attempt to harmonise the substantive review process across the EU, and it is likely that depth and methodology of review will vary

## Glossary

**Equity securities.** These include:

- Shares or transferable securities equivalent to shares.
- Convertible bonds (that is, debt securities convertible into equity securities of the same issuer).
- Exchangeable bonds (that is, debt securities exchangeable into equity securities of another issuer), but only where the issuer of the overlying debt security and the issuer of the underlying equity security are members of the same group.

**Financial Services Action Plan (FSAP).** The FSAP aims to integrate and create a single market in financial services for the EU by 2005/2006. The Prospectus Directive, Transparency Directive and Market Abuse Directive form a major component of the FSAP.

**High denomination debt.** Non-equity securities with a minimum denomination of at least EUR1,000 (or its equivalent in a currency other than euro).

**Low denomination debt.** Non-equity securities with a minimum denomination of less than EUR1,000 (or its equivalent in a currency other than euro).

**Home member state.** The Directive in-

troduces a pan-European regime under which issuers of equity and low denomination debt securities have the relevant regulator of a single designated member state responsible for approving the prospectus, and ensuring compliance with the Directive generally.

**IFRSs.** International Financial Reporting Standards (formerly known as International Accounting Standards).

**Market Abuse Directive.** Directive 2003/6/EC on insider dealing and market manipulation must be implemented by member states by 12 October 2004. Its primary purpose is to enhance investor confidence in the market by further harmonising the rules on insider trading and market manipulation in respect of securities admitted to trading on an EU regulated market and requiring issuers whose securities are admitted to trading on such regulated markets to disclose any non-public price-sensitive information as soon as possible, subject to certain limited exemptions.

**Maximum harmonisation directive.** A maximum harmonisation directive achieves uniform regulation throughout the EU by prohibiting member states from setting more onerous provisions, in the implementing national legislation, than those set out in the directive.

**Minimum harmonisation directive.** A minimum harmonisation directive only prescribes a floor of regulation, leaving member states free to build on the provisions contained in the directive with “super-equivalent” requirements in national implementing legislation.

**Prospectus Directive.** Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, amending the Consolidated Admissions and Reporting Directive (2001/34/EC).

**Retail debt.** Debt securities with a minimum denomination of less than EUR50,000 (or its equivalent in a currency other than euro).

**Transparency Directive.** Establishes ongoing reporting requirements, including the obligation to publish periodic financial reports, for issuers with securities admitted to trading on an EU regulated market. The text has been adopted by the European Parliament and approved in principle by the EU Council of Ministers, which is expected to adopt the text, later this year, completing the legislative process.

**Wholesale debt.** Debt securities with a minimum denomination of at least EUR50,000 (or its equivalent in a currency other than euro).

from one competent authority to another.

Once a prospectus has been approved by the competent authority of the home member state, it can be used to offer securities to the public or for an admission to trading in any other member state (the host member state) without requiring any further approval. The only requirement that can be imposed by a host member state is to translate the summary section into the relevant local language (*see above Format*). This is a very significant improvement to the existing system of mutual recognition of prospectuses between member states.

### Other matters

#### Language

When an issuer is to make a public offer or seek admission to trading in one or more host member states, but not its home member state, the issuer will have an option to produce the prospectus in a “language that is customary in the sphere of international finance”, including, at least, English (*Article 19, Directive*). When an issuer is to make a public offer or seek admission to trading on a regulated market in both its home member state and a host member state or states, a prospectus must be prepared in:

- A language accepted by the competent authority of the home member state; and
- A language that is accepted by the competent authority of the host member state or states or a “language that is customary in the sphere of international finance”.

#### Publication and advertising

Publication of the prospectus can be achieved using a number of prescribed methods, including by insertion in a newspaper, publication in electronic form (which may be required by some home member states) and making it available for collection from prescribed

## The impact of IFRSs

EU registered companies admitted to trading on a regulated market are required by the Regulation on the application of international accounting standards (*Regulation 1606/2002/EC*) to publish consolidated financial statements in accordance with International Financial Reporting Standards (*IFRSs*) for each financial year starting on or after 1 January 2005 (with comparative financial statements for the prior year). Member states have the discretion to allow certain debt issuers and other issuers to delay the adoption of IFRSs until the financial year starting on or after 1 January 2007 (for more information on IFRSs, see *International financial reporting: regime change in the EU at www.practicallaw.com/A39825*).

### Disclosure of financial information in a prospectus

Under the Prospectus Regulation (*Regulation 809/2004/EC*), issuers are required to disclose two or three years of historical consolidated financial information, of which one, two or three years will have to be prepared or restated in accordance with IFRSs or an equivalent standard to IFRSs (depending on the type of security and the ultimate answers to the interpretive problems referred to below).

The Prospectus Regulation contains grandfathering provisions (*Article 35, Prospectus Regulation*) designed to ensure that EU issuers do not have to provide consolidated financial information prepared in accordance with IFRSs in a prospectus for any period before the year for which comparative IFRSs' financial information is required under the rules for first-time adoption of IFRSs. (These provisions, however, suffer from a lack of clarity; in particular, whether issuers that have a listing on 1 July 2005 may benefit from such grandfathering provisions is open to doubt.) In addition, certain non-EU issuers will be given a grace period from the obligation to restate historical financial information contained in the prospectus to IFRSs for any prospectus filed before 1 January 2007.

Overlying the obligation to include two or three years of historical financial information is the requirement that the latest two or latest year(s) of financial statements are "presented and prepared in a form consistent with that which will be adopted in the issuer's next published annual financial statements having regard to accounting standards and policies and legislation applicable to such financial statements" (contained in several of the disclosure schedules attached as annexes to the Prospectus Regulation). This language may be

interpreted to mean that any issuer (whether a seasoned or a new public company) would have to consider, at the time of any public offering or admission to trading on an EU regulated market of its securities, whether the accounting standards and policies that will be applied to its next financial statements will be different to the standards that have been applied to its last two years of financial statements.

The issuer would then be required to restate in the prospectus its historical financial statements to reflect the standards and policies that will be applied to its next financial statements.

If this broad interpretation is correct, the occurrence of financial statement restatements, with their associated liability considerations, is likely to increase significantly in the EU securities markets in the future. It seems, however, likely that these provisions should (and were intended to) mean that, for an issuer that becomes subject to IFRSs' reporting requirements for the first time as a result of an admission to trading, only the last one or two years (depending on the type of security) of historical financial information contained in the prospectus would need to be restated in accordance with IFRSs or equivalent generally accepted accounting principles (GAAP) from the previously used GAAP, and that the first year's historical financial information can be prepared under non-IFRSs, non-equivalent GAAP.

### Ongoing financial reporting

Subject to certain exemptions and limited grandfathering provisions, the current draft of the *Transparency Directive* will require annual and half-yearly financial statements of EU and non-EU issuers with securities admitted to trading on an EU regulated market to be prepared in accordance with IFRSs, or an equivalent standard.

### Equivalence

The European Commission will determine the issue of equivalence of accounting standards for the purposes of the Transparency Directive and the Prospectus Directive (*2003/71/EC*) and it is understood that the determination should occur before the middle of 2005. It is expected that the Committee of European Securities Regulators (CESR) (see box, *The Lamfalussy procedure and CESR's role*) will be given a 12-month mandate to provide the Commission with advice on this issue and will conduct a consultation accordingly. The accounting standards to be considered in the first round will include US, Canadian and Japanese GAAP.

locations (*Article 14, Directive*). The Prospectus Regulation stipulates that where a prospectus is published on a website, measures must be taken to avoid targeting residents in countries where the offer does not take place (*Article 29(2), Prospectus Regulation*).

The Directive contains very basic principles in connection with advertising; most importantly any advertisement must not be inaccurate or misleading and must be consistent with information contained in the prospectus (*Article 15(3), Directive*).

### Disclosure

Although the majority of ongoing reporting obligations for issuers admitted to trading in an EU regulated market will be contained in the *Transparency Directive* and *Market Abuse Directive* (*2003/6/EC*), the Di-



## Related information

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### Practice notes

Harmonisation of financial services: the Financial Services Action Plan [www.practicallaw.com/A20719](http://www.practicallaw.com/A20719)

### Articles

International financial reporting: regime change in the EU [www.practicallaw.com/A39825](http://www.practicallaw.com/A39825)

Prospectus Directive: offering a better regime? [www.practicallaw.com/A32779](http://www.practicallaw.com/A32779)

The Prospectus Directive [www.practicallaw.com/A29185](http://www.practicallaw.com/A29185)

Prospectus liability in Europe and the US: understanding the issues [www.practicallaw.com/A32108](http://www.practicallaw.com/A32108)

### Weblinks

International disclosure standards for cross-border offerings and initial listings by foreign issuers,  
International Organization of Securities Commissions [www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf](http://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf)

European Commission (Prospectus Directive webpage)  
[http://europa.eu.int/comm/internal\\_market/en/finances/mobil/prospectus\\_en.htm](http://europa.eu.int/comm/internal_market/en/finances/mobil/prospectus_en.htm)

rective will require issuers to provide an annual disclosure document to the competent authority in their home member state. This document must contain or refer to all information that the issuer has published or made available to the public over the preceding 12 months in member states and in non-EU countries in compliance with its obligations under EC or home country securities laws.

### Practical implications

The practical implications of the Directive will not be clear until the provisions have been implemented in national legislation and interpreted and applied by home member states. However, there is an opportunity for the Directive to be implemented and applied in a way that would represent a significant advance in many respects to the existing regime. In particular:

- Potential access by issuers to regulation by a single home member state could make for a more efficient and cheaper European capital market.
- Pan-European offerings to the public are likely to be much easier to undertake.
- The quality of disclosure docu-

ments in many European jurisdictions will be improved by being raised to a pan-European level that is similar in many respects to the existing disclosure regimes of the “gold-standard” European capital market centres.

However, this potential could very easily be undone. For example:

- The concept of home member state could be applied in a way that an issuer will be regulated by a member state that it has no desire to be governed by.
- A narrow interpretation of those generally accepted accounting principles that are equivalent to *IFRSs* could drive non-EU issuers away from the European capital markets.
- The “wrong” interpretation of

the financial statement requirements, and the consequential cost and liability implications for issuers, could drive issuers away from the European capital markets.

- The concept of public offer could be applied in a way that threatened secondary market trading.
- Potential pan-European liability issues could drive issuers away from the European capital markets.
- Inconsistent application of often unclear rules throughout Europe could result in a mass of confusion and a fragmented rather than unified European capital market.
- A poorly implemented Transparency Directive could jeopardise the goal of creating strong and efficient European capital markets.



*Pierre-Marie Boury is a partner, and Raj Panasar is an associate, at Cleary Gottlieb Steen & Hamilton in London. They would like to thank Mohamed Hassam for his assistance in the preparation of this article.*