

EUROPEAN PARLIAMENT

Working Documents

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DOCUMENT 1-48/82

REPORT

drawn up on behalf of the Legal Affairs Committee

on the proposal from the Commission of the European Communities to the Council (Doc. 1-891/80) for a ~~directive~~ coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when securities are offered for subscription or sale to the public

Rapporteur : Mr I. DALZIEL

By letter of 9 February 1981 the Council of the European Communities consulted the European Parliament on the proposal of the Commission of the European Communities for a Directive co-ordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when securities are offered for subscription or sale to the public. (Doc 1-891/80).

On 11 February 1981 the European Parliament referred this proposal to the Legal Affairs Committee as the Committee responsible and to the Committee on Economic and Monetary Affairs for its opinion.

On 18 March 1981 the Legal Affairs Committee appointed Mr Dalziel rapporteur.

It considered this proposal at its meetings of 27/28 January 1982 and 17/18 March 1982; at the latter meeting, the committee adopted the amendments and the motion for a resolution contained in Mr Dalziel's report.

The motion for a resolution was adopted by 17 votes to 1.

The following took part in the vote: Mrs Veil, chairman; Mr Luster, vice-chairman; Mr Dalziel, rapporteur; Mr D'Angelosante, Mr Fischbach, Mr Geurtsen, Mr Goppel, Mr Herman (deputizing for Mr Gontikas); Mr Janssen van Raay, Mrs Macciocchi, Mr Megahy, Mr Poniridis, Mr Prout, Mr Schwencke (deputizing for Mrs Vayssade); Mr Sieglerschmidt, Mr Tyrrell, Mr Vetter and Mr Vié.

The opinion of the Committee on Economic and Monetary Affairs is attached to this report.

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The Legal Affairs Committee hereby submits to the European Parliament the following amendments and motion for a resolution together with explanatory statement:

Amendments proposed by the
Legal Affairs Committee

Text proposed by the Commission
of the European Communities^(x)

Proposal for a Council Directive coordinating
the requirements for the drawing up, scrutiny
and distribution of the prospectus to be
published when securities are offered for
subscription or sale to the public (Doc. 1-891/80)

Preamble unchanged

(x) See OJ No. C355 of 31.12.80, p.39 et seq or Doc. 1-891/80

Amendments proposed by the
Legal Affairs Committee
No. 1

Article 1

1. This Directive shall apply to securities which are offered for subscription or sale to the public within a Member State provided that the securities are not admitted to official listing on a stock exchange situated or operating in that Member State.

For the purposes of applying this Directive, the term "security" shall be taken as meaning any share, debenture or other interest in the share or loan capital of any undertaking, or any right to acquire any such share, debenture or other interest.

No. 2

2. For the purposes of applying this Directive, securities shall be considered to be offered for subscription or sale to the public where the offer is not addressed exclusively to a restricted circle of persons.

The term 'restricted circle of persons' shall be defined as comprising an identifiable category of persons or bodies known to the offeror, to whom the offer is directly communicated by the offeror or his appointed agent so that only members of that category may accept the offer, and that such members

Text proposed by the Commission of
the European Communities

Article 1

1. This Directive shall apply to securities which are offered for subscription or sale to the public within a Member State provided that the securities are not admitted to official listing on a stock exchange situated or operating in that Member State.

2. For the purposes of applying this Directive securities shall be considered to be offered for subscription or sale to the public where the offer is not addressed exclusively to a restricted circle of persons.

The Member States shall determine what is meant by 'restricted circle of persons' having regard to the number of persons to whom the offer is addressed and, if appropriate, having regard also to their nature, to the amount of the offer, and to the means of publicity used for making the offer.

Amendments proposed by the
Legal Affairs Committee

Text proposed by the Commission of
the European Communities

undertake not to resell the
securities offered within a
specified period of time.

Article 2

This Directive shall not apply to:

- (a) units issued by collective investment undertakings other than the closed-end type; or
- (b) securities issued by a State or by its regional or local authorities; or
- (c) securities issued in connection with a takeover offer; or
- (d) securities issued in connection with a merger involving the acquisition of another company or the formation of a new company the division of company, the transfer of all or part of an undertaking's assets and liabilities or as consideration for the transfer of assets other than cash; or
- (e) shares allotted free of charge to holders of shares; or
- (f) shares issued in substitution for shares if the issuing of such new shares does not involve any increase in the company's issued share capital; or
- (g) shares allotted directly or indirectly to employees or to Trustees holding them on behalf of employees.

No. 3

(h) securities issued in a currency other than that of the State in which the issuer maintains its seat or principal place of business, and which are offered for sale outside that state.

No. 4

(i) securities which are not offered by the issuer or by financial intermediaries acting on behalf of the issuer.

Amendments proposed by the Legal
Affairs Committee

Text proposed by the Commission of
the European Communities

No. 5

- (j) shares resulting from the conversion
of convertible debt securities or
shares created after an exchange
for exchangeable debt securities
or shares resulting from the
exercise of the rights conferred
by warrants.

Article 3

unchanged

Article 4

unchanged

Article 5

unchanged

Article 6

unchanged

Article 7

Article 7

No. 6

(1) Deleted

No. 7

(2) Deleted

Member States may allow the authorities responsible for checking the prospectus within the meaning of this Directive (hereinafter referred to as 'the competent authorities') to provide for partial or complete exemption from the obligation to publish a prospectus in the following cases:

1. where the securities are not offered by the issuer or by financial intermediaries;
2. where the securities offered are:
 - (a) shares resulting from the conversion of convertible debt securities or shares created after an exchange for exchangeable debt securities; or
 - (b) shares resulting from the exercise of the rights conferred by warrants;

and, where appropriate, the information provided for in Chapter 2 of Schedule A is published in accordance with Article 19 and Article 20(1);

3. where the securities offered are:

- (a) shares of which either the number or the nominal value or, in the absence of a nominal value, the accounting par value, amounts to less than 10 % of the number or of the corresponding value of shares of the same class as have already been offered to the public in the Member State where the offer is made, and of which the nominal value, or in the absence of a nominal value, the accounting par value, is in any event less than 25 000 UA;

- (b) debt securities issued by companies and other legal persons which are nationals of a Member State and which
 - in carrying on their business, benefit from State monopolies, and
 - are set up or governed by a special law or pursuant to such a law or whose borrowings are unconditionally and irrevocably guaranteed by a Member State or one of a Member State's federated States; or

- (c) debt securities issued by legal persons, other than companies, which are nationals of a Member State and
 - are set up by special law, and
 - the activities of which are governed by that law and consist solely in:
 - (i) raising funds under State control through the issue of debt securities, and
 - (ii) financing production by means of the resources which they have raised and resources provided by a Member State, and
 - the debt securities of which are, for the purposes of admission to official listing, considered as debt securities issued or guaranteed by the State; or

- (d) supplementary certificates representing shares issued in exchange for the original securities where the issuing of such new certificates has not brought about any increase in the company's issued share capital, provided that the document which the competent authorities consider to contain equivalent information to that contained in the prospectus required by this Directive and relating to the certificates representing such shares has already been published in the same Member State as that in which the offer to the public is made;

Amendments proposed by the
Legal Affairs Committee

Text proposed by the Commission of
the European Communities

and where

- in all the cases referred to in the points mentioned above information concerning the number and type of securities to be offered and the circumstances in which such securities have been issued has been published in accordance with Article 19 and Article 20(1).

No. 8

2. where the offer relates to debt securities issued in a continuous or repeated manner by credit institutions which regularly publish their annual accounts and which, within the Community, are set up or governed by a special law, or pursuant to such a law, or are subject to public supervision designed to protect savings.

No. 9

3. where the offer relates to securities issued in respect of transactions of such a nature as to attract investment primarily from investors within a particular locality, provided that the nominal value, or in the absence of a nominal value, the accounting par value of such securities is in any event less than 100,000 U.A.

Amendments proposed by the
Legal Affairs Committee

Text proposed by the Commission of
the European Communities

Article 8

unchanged

Article 9

unchanged

Article 10

unchanged

Article 11

unchanged

Text proposed by the
Legal Affairs Committee

Text proposed by the Commission
of the European Communities

Article 12

10

Article 12

Deleted

1. Where the offer relates to debt securities issued in a continuous or repeated manner by credit institutions which regularly publish their annual accounts and which, within the Community, are set up or governed by a special law, or pursuant to such a law, or are subject to public supervision designed to protect savings, the Member States may provide that the prospectus shall contain only:

- the information provided for in heading 1.1 and Chapter 2 of Schedule B; and
- information concerning any events of importance for the assessment of the securities in question which have occurred since the end of the financial year in respect of which the last annual accounts were published. Such accounts must be made available to the public at the issuer's offices and at those of the financial organizations retained to act as the latter's paying agents.

2. Where the debt securities referred to in paragraph 1 are issued at very short intervals, the Member States may provide that the prospectus shall only contain information on the characteristics of such debt securities.

Article 13

unchanged

Article 14

unchanged

Text renumbered accordingly

Article 14

No. 11

- a subsidiary 95% or more of which is owned by one or more credit institutions within the meaning of the preceding indent, the commitments of which towards the holders of certificates are unconditionally guaranteed by that credit institution and which is subject, *de jure* or *de facto*, to the same supervision;
or

Text renumbered accordingly

Article 15

1. Where the offer relates to certificates representing shares, the prospectus must contain the information, as regards certificates, provided for in Schedule C and the information, as regards the shares represented, provided for in Schedule A.
2. However, the competent authorities may relieve the issuer of the certificates of the requirement to publish details of its own financial position, when the issuer is:
 - a credit institution which is a national of a Member State and is set up or governed by a special law or pursuant to such law or is subject to public supervision designed to protect savings; or
 - a subsidiary 95 % or more of which is owned by a credit institution within the meaning of the preceding indent, the commitments of which towards the holders of certificates are unconditionally guaranteed by that credit institution and which is subject, *de jure* or *de facto*, to the same supervision; or
 - an 'Administratiekantoor' in the Netherlands governed, for the safe custody of the original securities, by special regulations laid down by the competent authorities.
3. In the case of certificates issued by a securities transfer organization or by an auxiliary institution set up by such organization, the competent authorities may dispense with the publication of the information provided for in Chapter 1 of Schedule C.

Article 16

unchanged

amendments proposed by the
Legal Affairs Committee

Text proposed by the Commission
of the European Communities

SECTION III

Arrangements for the scrutiny and publication of the
prospectus

Article 16

Article 17

1. Member States shall appoint one or more competent authorities and shall notify the Commission of the appointments of such authorities, giving details of any division of powers among them. Member States shall also ensure that this Directive is applied.

12

Where the issuer of securities comprises a number of legal persons from more than one Member State, only the authority of the Member State to which the financial institution with principal responsibility for the transaction applies for the prospectus to be approved, shall be competent to do so.

2. No prospectus may be published until it has been approved by the competent authorities.

3. The competent authorities shall approve the publication of the prospectus only if they are of the opinion that it satisfies all the requirements set out in this Directive.

Member States shall ensure that the competent authorities have the powers necessary for them to carry out their task.

4. This Directive shall not affect the competent authorities' liability, which shall continue to be governed solely by the national law.

Text renumbered accordingly

Amendments proposed by the
Legal Affairs Committee

Text proposed by the Commission
of the European Communities

Article 18

unchanged

Article 19

unchanged

Article 20

unchanged

Article 21

unchanged

Article 22

unchanged

Text renumbered accordingly

13

Article 22

Where offers of the same securities
are made simultaneously or within
short intervals of one another in
more than one Member State, the
prospectus is to be published in
the national or official language or
languages of the Member State to whose
competent authority the lead manager of
the issue has applied for approval of
the prospectus: any translation of
this prospectus must indicate the
language in which the approved
version is published.

Text renumbered accordingly

SECTION IV

Cooperation between the Member States

Article 23

1. Where offers of the same securities are made simultaneously, or within short intervals of one another within several Member States, the competent authorities shall exchange information and use their best endeavours to achieve maximum coordination of their requirements concerning the prospectus, to avoid a multiplicity of formalities and to agree to a single text requiring at the most translation, where appropriate, and the issue of supplements as necessary to meet the individual requirements of each Member State concerned.

2. Where an offer is made in a Member State of securities which have been offered in another Member State less than six months previously, the competent authorities of the former Member State shall contact the competent authorities of the latter and shall, as far as possible, exempt the issuer of those securities from the preparation of a new prospectus, subject to any need for updating, translation or the issue of supplements in accordance with the individual requirements of the Member State concerned.

Article 24

unchanged

Article 25

unchanged

Article 26

unchanged

Article 27

unchanged

Article 28

unchanged

MOTION FOR A RESOLUTION

embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a directive coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when securities are offered for subscription or sale to the public

The European Parliament

- having regard to the proposal from the Commission to the Council (COM (80) 893 final)¹
 - having been consulted by the Council (Doc. 1-891/80)
 - having regard to the report of the Legal Affairs Committee and the opinion of the Committee on Economic and Monetary Affairs (Doc. 1-48/82)
1. Welcomes the extension of the Community's information policy in the field of capital investment to the market in unlisted securities;
 2. Recognises that a complete and accurate prospectus will better enable the investor to evaluate the risks involved in investment of this kind;
 3. Regrets, however, the lack of precision regarding the field of application of the directive, without which the desired degree of harmonisation would not be achieved;
 4. Recognises that certain categories of securities issues to investors who are sufficiently protected by reason of their commercial sophistication or their relationship to the issuer would be impeded by the prior publication of a prospectus, and that any exemption of such issues from the ambit of the directive should be clearly defined;
 5. Notes that the directive as proposed does not specifically exempt from its scope certain professional markets where the requirement of a prospectus would undermine the structure of those markets which function rapidly and with the minimum of formality, and feels, therefore, that their exemption should be expressly laid down;

1 OJ C 355/39, 31 December 1980

6. Welcomes the recognition of the difficulties of secondary issuers, but is of the opinion that a uniform rule on this matter throughout the Community would better accord with the objectives of the directive.
7. Points out that in most Member States where securities are being offered on a continuous basis by certain credit institutions, the protection offered by close legal supervision is more than adequate, and proposes that Member States be allowed to exclude such constant issues from the directives provisions:
8. Recognises the need to encourage small issues of securities for projects of mainly local interest, and therefore suggests their exemption from the directive.
9. Agrees to the desirability of cooperation between the competent authorities of the Member States, but is nevertheless of the opinion that a clear rule regarding the place and language of publication of the prospectus will better serve the interests of both the investor and the issuer.
10. Subject to the reservations expressed above, approves the proposal for a directive.

EXPLANATORY STATEMENTI. INTRODUCTION(a) Previous Community action.

1. This proposed directive continues the Commission's programme of harmonisation of rules regarding the capital market in the member states. Four earlier measures should be mentioned in this context:

- Commission recommendation 77/534/EEC¹ concerning a European code of conduct relating to transactions in transferable securities; adopted by the Commission 25 July 1977.
- Directive 79/279/EEC² coordinating the conditions of admission of securities to official stock exchange listing: adopted by the Council on 5 March 1979, entered into force March 1981.
- Directive 80/390/EEC³ coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing (the 'Listing Particulars Directive'): adopted by the Council on 17 March 1980, will enter into force in September 1982.
- **Directive 82/121/EEC on information to be published** on a regular basis by companies whose transferable securities are admitted to official stock exchange listing; submitted by the Commission to the Council on 19 January 1979⁴, European Parliament's opinion adopted 13 March 1980⁵, amended proposal transmitted to Council 25 June 1980⁶, **adopted by the Council on 15.2.82, enters into force 30.6.83.**⁷

2. The Commission now proposes that the Member States set up a system of control for trade in unlisted securities similar to that which is already in place for securities quoted on official stock exchanges: this proposal for a directive thus mirrors closely the provisions of the listing particulars directive.³ The usual difficulties of harmonisation of national rules have been exacerbated by the fact that the degree of regulation of this market varies considerably throughout the Community: five of the Member States

1 OJ L212/37, 20 August 1977

2 OJ L66/21, 16 March 1979

3 OJ L100/1, 17 April 1980

4 OJ C29/5, 1 February 1979

5 OJ C85/63, 8 April 1980

6 OJ C210/5, 16 August 1980

7 OJ L48/26, 20 February 1982

do not require the publication of a prospectus on the issue of unlisted securities (Denmark, Germany, Greece, Italy and the Netherlands), while the information contained in the prospectuses required by the laws of the other five Member States differs in many respects.

(b) Objectives of the proposed directive

- Investor protection

3. Supplying the potential investor with as much information about the issuer and the particular offer as is practicable, provided the information is accurate, constitutes one method of balancing the inevitable risk involved in investment in securities, whether listed or unlisted.

Thus informed, the investor will be able to assess and minimise the risk and have the confidence to invest his capital.

4. The fact that five of the Member States of the Community have not felt obliged to regulate this sector of the domestic capital market might appear to give lie to that line of argument; it is not denied that in these countries the market in unlisted securities functions satisfactorily, comprising up to or over half the total dealings in securities. Different considerations apply to a European Community-level market, however, where differences in the standards governing investor information could discourage investors from moving their capital to another Member State's market (see paragraph 5 below).

- Creation of a common capital market

5. While the abolition of obstacles to the free movement of capital is mentioned in Article 3(c) of the Treaty of Rome as one of the fundamental activities of the Community, it is no secret that progress in this area has been rather limited, and that the first two movements of capital directives of 1960 and 1962 have been eroded by a series of exemptions granted by the Commission to various Member States.¹

6. Despite these restrictions, the proposed directive may be seen as encouraging the interpenetration of national securities markets, creating, as it would, the conditions in which investors would at least be assured that when buying unlisted securities in other Member States they would benefit from the same safeguards as on their national market. Where requirements regarding the offer for subscription or sale are similar throughout the Community, the issuers would equally be encouraged to make their offers in more than one Member State.

¹ See Collomb Report on the creation of a European stock exchange, paragraph 8. (Doc 1-290/81)

(c) Legal basis for the directive

7. Like the two previous directives, on conditions for admission to listing and listing particulars, this proposal is based on Articles 54(3) (g) and 100 of the Treaty of Rome.

Article 54 deals with the Institution's programme for the abolition of restrictions on the right of establishment, "in particular;

(g) by coordinating to the necessary extent the safeguards which for the protection of the interests of members and others, are required by Member States of companies or firms within the meaning of article 58, with a view to making such safeguards equivalent throughout the Community."

Under Article 100 the Council issues directives harmonising provisions of national law which "directly affect the establishment or functioning of the common market."

8. In your rapporteur's opinion, the articles cited constitute a satisfactory and appropriate legal basis for the proposed measure.

II PROPOSED SYSTEM OF INVESTOR PROTECTION

9. Subject to a number of exceptions exhaustively defined in Article 2, all securities offered for subscription or sale to the public which are not admitted to official listing are covered by the directive's provisions. Member States must ensure that the person making, or responsible for, each offer publishes a prospectus containing the information set out in the relevant schedule.

10. Article 7 of the proposed directive allows the Member States to empower the competent authority - the body charged with vetting prospectuses prior to publication - to grant exemptions from the obligation to publish, in certain defined cases such as secondary offers or issues whose nominal value does not exceed 10% of the value of shares of the same class previously issued. In such cases, a minimum of information regarding the offer must be available to the public when the offer is opened.

11. Information of minor importance, or whose disclosure would be contrary to the public interest or seriously detrimental to the issue may be withheld where this non-disclosure would not mislead the public. Likewise, for certain types of securities (mostly debt securities), the directive would allow Member States to lessen the requirements regarding the information contained in the prospectus.

12. Publication of a prospectus must take place before or at the time of the offer: three schedules are annexed to the proposal for a directive giving the detailed layout of the prospectus for shares, debt securities and certificates representing shares respectively.

13. The competent authorities of Member States are obliged to cooperate with one another to minimise the formalities of an issue of shares where shares of the same class have recently been, or are simultaneously being, issued in another Member State.

III OBSERVATIONS ON THE SYSTEM PROPOSED

14. While your rapporteur welcomes the directive in principle and supports the objectives it sets out to attain, the measure as currently proposed would give rise to a number of problems in certain areas of the unlisted securities market.

(a) Definition of "security"

15. No definition of the term "transferable security" is proposed in the directive; the fact that certain types of security are specifically excluded from the ambit of the directive (Article 2) and others may be excluded at the Member States' discretion, would lead your rapporteur to conclude that all other types of unlisted security are intended to be covered. While there is no difficulty in recognising what constitutes a security admitted to listing on an official stock exchange, this is not true of the unlisted securities market.

16. Article 189 of the Treaty of Rome defines a directive as "binding as to the result to be achieved:" the absence of so basic a definition as "transferable security" renders the result which the directive will achieve wholly unpredictable. Similarly, the Court of Justice has, on several occasions, emphasised the fundamental importance to the Community's legal order of the principle of the uniform application of Community law¹ and of legal certainty.² Legislation so uncertain in its drafting will hardly lead to a uniform legal position regarding unlisted securities throughout the Member States. Taking note of the opinion of the Committee on Economic and Monetary Affairs, at paragraph 9, your rapporteur has proposed a definition of the term "security" (see amendment 1)

(b) Definition of "restricted circle of persons"

17. The remarks contained in the preceding paragraph could equally well apply to Article 1(2) of the proposal where the Commission appears to have shied away from defining another term fundamental to the directive's efficacy: "restricted circle of persons," the term which delimits the scope of application of this Community measure. It is accepted universally that a private placement of shares should not be considered a public offer, though the definition of these concepts remains somewhat problematic even within Member States.

1 See caselaw cited in Sieglerschmidt report on the uniform application of Community Law (Doc 1-414/81)

2 See, for example, Defrenne v Sabena 43/75 (1976) ECR 455 or Commission v France 167/73 (1974) ECR 359

18. The very variation in definitions argues strongly in favour of harmonisation at the Community level given such agreement on the principle, if any real coordination of the regulations governing the unlisted securities markets is to be hoped for. An offeror in one Member State should know whether his particular offer will be considered public or private in the other Member States. An investor should know the legal character of the offer he had been made and hence how much information he is entitled to receive. Your rapporteur therefore proposes the definition of "restricted circle of persons," contained in amendment 2.

(c) Exemptions for certain types of issue

- Eurobonds

19. The principle that dealings between sophisticated investors should not be subjected to the full rigour of the law in all its details has already been recognised in the Listing Particulars Directive,¹ at Article 10, which allows a reduction in the information required in an application for admission to official listing,

"Where the application . . . relates to debt securities nearly all of which, because of their nature, are normally bought and traded in by a limited number of investors who are particularly knowledgeable in investment matters."

20. The Eurobond market in unlisted securities is by nature a **professional market between principals where considerations of protection of the investors** enforced by a "competent authority" do not have sufficient weight to balance the inconvenience that the requirement of a prevetted prospectus would cause. It is also difficult to see, under the present proposal what authority would be competent, and how it could operate rapidly enough to permit this market to function efficiently. Your rapporteur considers it desirable therefore, that the directive explicitly exclude Eurobonds from its ambit and that "Eurobond" be defined for this purpose. (See amendment 3).

- Secondary offerings

21. Special provision is made in the proposed directive, at Article 7(1) for secondary offerings: the competent authorities may be empowered to grant an exemption, partial or complete, from the obligation to publish a prospectus before the offer for sale or subscription as such an offeror may not always have access to the information required.

22. Your rapporteur feels, however, that from the perspective of a closer coordination of the Member States' rules on unlisted securities, it would be preferable to exempt such secondary offerings from the prospectus requirement; entirely the same reasoning which prompted the Commission to allow such an exemption by the back door, as it were, speaks in favour of an exclusion from the ambit of the directive. (See amendment 4; as a result of this amendment, **Article 7(1) would fall, see amendment 6**).

- Convertible securities

23. Equally, convertible securities should be included in the exceptions to the directive rather than amongst those cases where Member States would have a discretion to exempt from or reduce publication requirements, by analogy with shares issued in substitution for shares, fully excluded by Article 2(f). (See amendment 5; as a result of this amendment, Article 7(2) would fall, see amendment 7).

- Constant issuers

24. In a number of Member States, unlisted securities are issued on a continuous basis or at relatively short intervals, notably by credit institutions who are hence subjected to close legal supervision. As with the Eurobond market, the speed with which the constant issues market operates is of fundamental importance and the requirement that a prospectus be prepared, vetted and published would impede its functioning to an unacceptable extent.

25. The proposed directive recognises the particular difficulties constant issuers would encounter under its provisions: Article 12 gives the Member States the discretion to permit a much reduced prospectus in the case of such offers. However, it is the fact of being required to publish a prospectus with the offer which would undermine this type of issue rather than the amount of information to be disclosed. The investor's interests are given a high degree of protection in the law of the Member States and, from that point of view, application of the directive would not be necessary. Furthermore, it must be borne in mind that the considerable extra costs involved in producing such prospectuses would inevitably be passed on to the investor. Accordingly, your rapporteur proposes that Member States be allowed to exempt such constant issuers from the requirement to publish a prospectus where the interests of the investor are adequately protected by other means. (See amendment 8 :as a result of this amendment, Article 12 would be without object, see amendment 10).

- Small local issues

26. Your rapporteur considers that no useful purpose would be served by requiring the publication of a prospectus for small local issues of unlisted securities: such a market is not of a kind to attract many investors from outside the locality nor, a fortiori, investors from other Member States. As with constant issues, the price of this kind of investor protection is out of all proportion to the possible benefits and, hence, Member States should be permitted to grant exemptions from the prospectus requirement in respect of such offers. (See amendment 9)

(d) Obligation to publish information on financial position

27. A minor amendment is proposed to Article 15(2), which deals with exemptions from the requirement for an issuer to publish information concerning its own financial position, in order to take account of the existing situation in certain Member States (amendment 11).

(e) Responsibility for vetting prospectus in cases of simultaneous issue in several Member States

28. In the perspective of a common market in capital it is essential that one national authority be identified as responsible for approving a prospectus where the offer in question is made by a syndicate of offerors from different Member States, and hence to avoid a multiplicity of approval procedures in several countries with the consequent delay and inconvenience. Your rapporteur has therefore adopted a solution analogous to that proposed in paragraph 30 below, ie, that the national authority to which the lead manager applies be alone required and competent to approve the prospectus. (See amendment 12)

(f) Language in which the prospectus is to be submitted

29. The proposed directive follows, mutatis mutandis, the Listing Particulars Directive¹ in providing for a certain degree of cooperation between the competent authorities in cases of simultaneous offer of securities in several Member States; no rule, however, is laid down or appears to regulate the question of the language in which the listing particulars or the prospectus, respectively, should be submitted.

30. If a prospectus for the issue of unlisted securities in several Member States had to be translated into, approved and then published in the language of each of those Member States, there can be little doubt that the excessive delay and extra expenditure resulting from such a procedure would discourage those offers; and the possibility of those markets closing all together cannot be dismissed. To avoid this obviously undesirable scenario, your rapporteur suggests that the prospectus be published - and vetted before publication - only in the language of the lead manager and in one other language, being a translation of the approved version. Not only does this correspond to the current accepted practice, but any other rule - or absence of a rule - would tend to discourage any attempted interpenetration of national unlisted securities markets. (See amendment No 13).

¹ OJ L100/1, 17 April 1980

OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS

Draftsman : Mr F. HERMAN

On 15 April 1981 the Committee on Economic and Monetary Affairs appointed Mr Herman draftsman of an opinion.

At its meeting of 2 October 1981 it considered the draft opinion and adopted it unanimously.

The following took part in the vote: Mr J. Moreau, chairman;
Mr Herman, rapporteur; Mr Beazley, Mr Beumer, Mr Bonaccini, Mrs Desouches,
Mr Hopper, Mr Nyborg, Mr Percheron (deputizing for Mr Schwartzberg);
Mr Petronio and Mr von Wogau.

INTRODUCTION

1. In 1966 the Commission instructed a group of experts chaired by Mr Segre to define and set out the objectives for the creation of a European capital market. Amongst other measures, their report proposed the confirmation, at Community level, of the general principle that when the public is invited to purchase securities, a prospectus should be drawn up which accurately sets out the rights attached to the securities on offer and gives a complete, sincere and faithful description of the situation of the company or institution issuing them. It suggested that this general principle should be supplemented by a list of those items of information which it was absolutely essential to provide.

A sample prospectus for the issue of securities and their official stock exchange listing was drawn up to demonstrate how this suggestion would work in practice.

2. In the event, the Commission took a more cautious line. The first of its two proposals, submitted in December 1972, merely set out the requirements for the drawing up and distribution of the prospectus to be published for the admission of securities to official stock exchange listing; the second, submitted in March 1976, merely set out the requirements for the admission of securities to official stock exchange listing. Although the obligation to provide information was as useful in respect of public issues as in respect of admission to official stock exchange listing - if not more so - the Commission, noting that information on public issues was obligatory in only three countries (Belgium, France and Luxembourg), whereas it was mandatory on admission to official stock exchange listing in five Member States, considered it preferable to harmonize the requirements existing in the majority of the Member States rather than introduce new obligations in several of them at the same time.

This clearly demonstrates that the Commission's lack of boldness or its caution - not to say pusillanimity - is not a recent phenomenon. Yet despite the limited nature of the objectives, it was not until March 1979 and March 1980 respectively that the Council adopted the two directives¹.

We may well ask ourselves why the Council took seven years to adopt measures which entailed nothing revolutionary in the organization of the capital market but merely institutionalized a practice that was already widespread.

3. Still proceeding with caution the Commission submitted, on 29 April 1976, a proposal for a directive on collective investment undertakings in transferable securities. That proposal is still before the Council.

¹ OJ No. L 66, 16.3.1979 and OJ No. L 100, 17.4.1980

In August 1977 the Commission published a code of conduct relating to transactions in transferable securities¹. Under Article 155 of the Treaty this recommendation is not binding on the Member States. In February 1979 the Commission submitted to the Council a proposal for a directive on information to be published on a regular basis by companies whose transferable securities are admitted to official stock exchange listing²; that proposal is still before the Council. We must therefore look at the present proposal for a directive in the light of the Segre report and the directives, proposals for directives and code of conduct already published.

I. OBJECTIVES OF THE COMMISSION'S PROPOSAL FOR A DIRECTIVE

4. Like the directives on the conditions of admission to official stock exchange listing and on the prospectus to be published for the admission of securities to official stock exchange listing, the present Commission proposal pursues a dual objective:

- firstly, it aims to harmonize the guarantees concerning the information to be given to purchasers of securities so as to protect and encourage investments;
- secondly, it aims to encourage the creation of a European capital market by coordinating national legislative provisions, thereby providing issuers with easier access to the various financial markets and enabling investors to purchase securities on any financial market.

In this connection it should be pointed out that the substance of the measures hitherto adopted or proposed will meet the requirements of the first objective more effectively than those of the second.

Measures for cooperation between the Member States are admittedly provided for in the proposals for directives, but they are not binding. The competent authorities 'shall use their best endeavours to achieve maximum coordination of their requirements concerning the prospectus'³. To expect national authorities to cooperate actively and spontaneously on this matter is to ignore their inflexibility, especially since some of the countries involved remain unconvinced of the benefits of the free movement of capital and since some of them hold the view that domestic savings should primarily be invested in the home country.

This proposal for a directive draws heavily on the directive on the prospectus for admission to official stock exchange listing and constitutes a direct extension thereof.

¹ OJ No. L 212, 20.8.1977

² OJ No. C 29, 1.2.1979

³ Proposal for a directive, Article 23(1)

5. It is justified on several counts:

- (a) even in those Member States where the official stocks exchange is the central market for transferable securities, a number of public offers take place outside the stock exchange, and this deprives investors of the safeguards associated with admission to official stock exchange listing;
- (b) the criteria relating to investor protection when transferable securities are offered to the public are not the same in the various Member States, and the information required is different. In that respect they form a barrier to the integration of the capital markets;
- (c) discrimination between issuers whose securities are admitted to official stock exchange listing and those whose securities are not so admitted might lead to a number of issuers preferring not to request the admission of their securities to official stock exchange listing.

II. SCOPE

6. The proposal does not define what is meant by a subscription or sale, but from the explanatory memorandum and the text of the directive we may assume that the directive covers cases where the issuer himself invites the public to invest as well as those where persons other than the issuer offer existing shares for sale.

7. Nor is the concept of transferable securities defined. From the text itself and the attached schedule we may assume that they are conventional transferable securities, shares, debt securities and certificates representing shares. The more sophisticated and more recent types of investment are therefore not covered, although as regards the information to be published, some countries apply rules similar to those covering transferable securities.

We refer in particular to rights in movable or immovable property held by associations, joint holdings or groupings.

8. Only offers to the public are covered here, i.e. those which are not exclusively offered to a restricted circle of persons. The Member States are to define what is meant by a 'restricted circle of persons', taking account of the number of persons to whom the offer is addressed and, where appropriate, their nature, the amount of the offer and the means of publicity used for making the offer.

Of course, it must have been difficult to try to bring the various national systems and practices into line with each other. Nonetheless, the instructions given to the Member States on how to define a 'restricted circle of persons' are really too vague. The Legal Affairs Committee should table an amendment worded as follows:

Article 1(2)

Add the following new paragraph:

'In order to determine what is so meant, the Member States might apply the following criteria:

Ten mutually independent persons fully entitled to dispose freely of their own personal assets, or five mutually independent legal persons shall no longer constitute a restricted circle when the means used to inform them is confidential;'

9. Article 2 of the proposal for a directive lists the types of transferable securities to which it does not apply. We must therefore assume that it applies to all others, whatever the legal nature of the issuer may be. That means that it covers not only the companies referred to in Article 58 of the Treaty of Rome - i.e. companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community - but also companies established in a third country and other bodies, whether international or not.

III. THE PROSPECTUS

10. The directive is based on two principles. A prospectus must be published to ensure that the public is provided with all the necessary information. Furthermore, this prospectus must be scrutinized by a competent authority appointed by the appropriate Member State. The prospectus must contain the information which is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profits and losses and prospects of the issuer and of the rights attaching to the securities.

11. The Commission goes further than merely stating the principle. It specifies the information to be given and attaches three schedules relating respectively to shares, debt securities and certificates representing shares. By and large, these schedules are drawn up along the same lines as those attached to the directive on the prospectus for admission to official stock exchange listing.

The same additions are prescribed as regards additional information coming to light between the moment when the content of the prospectus is finalized and when the public offer is drawn up. The same flexible adjustments and the same exemptions are laid down should the schedule prove inappropriate to the activity or legal nature of the issuer or should the cost of publishing a full prospectus be disproportionate to the information required by the public.

12. Nevertheless, a supplementary exemption has been introduced which goes too far and needs to be rectified.

This is the case provided for in Article 7 where the securities are not offered by the issuer or by financial intermediaries. Working from the principle that in such a case the person making the offer may not be in a position to give all the information on the issuer required by the schedule, the directive provides for complete exemption from the obligation to publish a prospectus. This seems excessive.

The Segre report put forward a more satisfactory solution for dealing with a case of this nature whereby the prospectus would contain:

- a note to the effect that it had been drawn up solely on the basis of the information available to the person making the offer,
- the reasons why the offer was being made, and
- information on the person making the offer.

The Legal Affairs Committee should table an amendment calling for the restoration of these requirements.

13. Under Article 8 the competent authorities may authorize omission from the prospectus of certain information provided for by the directive in three cases.

The first two cases present no problems and are identical to those in the directive on the prospectus for admission to official stock exchange listing. The third case is where the person making the offer is a person other than the issuer or the person acting on his behalf. This flexibility may be justified, but when taken in conjunction with the possibility of complete or partial exemption from the obligation to publish a prospectus, it could significantly reduce the scope of the directive in terms of the harmonization of national legislative provisions.

IV. ARRANGEMENTS FOR THE SCRUTINY AND PUBLICATION OF THE PROSPECTUS

14. The system is largely based on the directive on the prospectus for admission to official stock exchange listing and is quite acceptable. At most, with regard to the powers available to the authorities, we might deplore the fact that the directive restricts itself to laying down that the Member States should ensure that they have the powers necessary for them to carry out their task.

This is inadequate, especially in the case of those Member States which have not yet set up authorities equivalent to those existing in other Member States which have established and recognized powers.

In conclusion, the Committee on Economic and Monetary Affairs:

1. Emphasizes the need for the Community to encourage the effective interpenetration of national securities markets and to this end to abolish generally the barriers arising from widely differing requirements in the various Member States;
2. Considers in this respect that Community investors must be provided with adequate and equivalent information on securities which are being offered for the first time for subscription or sale to the public;
3. Takes the view, however, that the proposal for a directive should define more precisely the concept and criteria of a public offer to a 'restricted circle' which is exempt from its scope;
4. Considers further that the provision in Article 7 exempting the person making the offer from the requirement to publish information when he is a person other than the issuer or a financial intermediary is not strict enough and should be amended;
5. Considers, finally, that despite efforts at harmonization by means of a directive a number of differences are still bound to remain between national legislative provisions, and hopes, therefore, that both the issuers and the competent authorities will act in concert and with the good of the Community in mind;
6. Approves, subject to these reservations, the proposal for a directive, which is an essential supplement to the March 1979 Directive on the conditions of admission of securities to official stock exchange listing; calls on the Commission and Council to pursue without delay their efforts to achieve harmonization in this field.

