

Amendment of Commission Regulation (EC) No. 809/2004 : Complex Financial Histories

Working document ESC/ 16/2006

Important note: This document is a working document of DG Internal Market for discussion and consultation purposes.

It does not purport to represent or pre-judge the formal proposals of the Commission.

Recitals

1 Article 5(1) of the Directive 2003/71/EC¹ of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading imposes the general requirement that a prospectus should contain "all information which, according to the particular nature of the issuer and of the securities offered to the public or admitted to trading on a regulated market, is necessary to enable investors to make an informed assessment of the assets and liabilities, financial position, profit and losses, and prospects of the issuer and of any guarantor, and of the rights attaching to such securities".

2 Commission Regulation (EC) No 809/2004² implementing Directive 2003/71/EC as regards information contained in prospectuses sets out in detail the information which must be included in a prospectus, for different kinds of securities, in order to comply with Article 5(1) of that Directive. Those detailed information requirements cover, among other things, the financial information which must be included in a prospectus and the period for which historical financial information must be provided.

3 The primary purpose of including financial information in a prospectus is to allow investors to understand the financial position of the issuer. The historical financial information should therefore provide a record of the issuer's business as operated and accounted for by the issuer during the period for which such information is required.

4 Normally the historical financial information required under Regulation (EC) No 809/2004 will reflect the entire business of the issuer throughout the required period, including significant acquisitions or disposals. However, there are certain circumstances in which the entire business carried on by the issuer at the date of the prospectus is not covered by the historical financial information prepared by the issuer, but is covered instead by the financial information of another legal entity drawn up during the period for which the historical financial information is required under this Regulation. Such circumstances may include cases where the issuer has acquired that other entity, or a business undertaking from that other entity, or has been carved out from another entity, during that period. In cases of this kind, the financial history of the issuer may be highly relevant for an investor, but the details of that history may not be fully or accurately represented by the requirements relating to financial information which apply under Commission Regulation (EC) No 809/2004.

5 There is legal uncertainty about the extent to which the provisions of Commission Regulation (EC) No 809/2004 cover, in cases where an issuer has a complex financial history,

¹ OJ L 345, 31.12.2003, p.64

² OJ L 149, 30.4.2004, p.1

the range of financial information that may be necessary to ensure that the prospectus contains all the information required under Article 5(1) of Directive 2003/71/EC.

6 Because Article 3 of Commission Regulation (EC) No 809/2004 prohibits competent authorities from requesting the inclusion of information which is not included in the Annexes, it is necessary to amend this Regulation in order to ensure that competent authorities have the clear and express power to require the inclusion in a prospectus of financial information relating to legal entities other than the issuer in any case where the issuer has a complex financial history and that information is necessary for investors to make an informed assessment of the financial condition and prospects of the issuer itself.

7 In view of the fact that the requirements of Commission Regulation (EC) No 809/2004 in relation to the inclusion of pro forma information apply only to those classes of securities that are covered by the Shares Registration Document, it is appropriate that the supplementary financial information which may be required in cases where the issuer has a complex financial history should have a similar scope. Accordingly, supplementary financial information may only be requested in those cases where the prospectus relates to an offer to the public or the admission to trading on a regulated market of securities requiring the shares registration document: that is, either shares or transferable securities equivalent to shares; or other securities which can be exchanged for or converted into, or otherwise give rights to acquire, untraded shares or such equivalent securities of the same issuer.

8 It is not possible to provide a comprehensive list of cases that should be treated as issuers with a complex financial history. It is likely that new and innovative forms of transaction might be developed that would fall outside the cases specified in any such list. Therefore it is appropriate and more effective to provide a broad definition of the circumstances in which an issuer should be treated as having a complex financial history, and to enable competent authorities to require the inclusion in a prospectus of supplementary financial information on a case-by-case basis, taking into account the structure and financial history of the particular issuer and its business.

9 However, by way of example, cases where the issuer has a complex financial history, requiring the inclusion in the prospectus of supplementary financial information if that is necessary to comply with Article 5(1) of Directive 2003/71/EC, might include: cases where the issuer is a newly incorporated holding company inserted over an established business; cases where the issuer is composed of companies that, during the period for which historical financial information is required, were under common control or ownership but which never formed a legal group; and cases where the issuer has been incorporated or formed as a separate legal entity as part of, or following, the division of an existing business (a 'carve out'). In all such cases, all or part of the business undertaking of the issuer will have been carried on by another entity during the whole or any part of the period for which the issuer is required to provide historical financial information. As a consequence, the entire business undertaking of the issuer may not be covered by the historical financial information which the issuer is required to provide under item 20.1 of Annex I to Commission Regulation (EC) No 809/2004, but will be covered instead by financial information drawn up by another entity.

10 Cases where the issuer has made a firm commitment or entered into a binding agreement to acquire or dispose of a significant entity or business, which is not yet completed at the date of the approval of the prospectus, should also be subject to the same requirements as apply where the issuer has already completed an acquisition or disposal, provided that the agreed transaction, on completion, would give rise to a significant gross change in the assets

and liabilities and earnings of the issuer. For this purpose, recital 9 of Commission Regulation (EC) No 809/2004 is relevant to the determination of whether the transaction is likely to give rise to a significant gross change.

11 Given the complexity of circumstances of each specific case, it would be neither practicable nor efficient to specify detailed rules that should be applied by competent authorities uniformly to all cases where the issuer has a complex financial history. A flexible approach is necessary to ensure, on the one hand, that disclosure requirements are effective and proportionate and, on the other hand, that the investor is adequately protected through the provision of sufficient and appropriate information.

12 Accordingly, competent authorities should determine what supplementary financial information (if any) is necessary in each individual case where the issuer has a complex financial history by reference to guidelines specified in this Regulation. Because the powers of competent authorities to require further information in such cases apply only where the prospectus concerns shares or other securities giving rights to shares, it is appropriate that, when making that determination, competent authorities should take into account the requirements set out in item 20.1 of Annex I to the Prospectus Regulation as regards the content of financial information and the applicable accounting and auditing principles. However, those provisions should be subject to any modification which is appropriate in view of the economic substance of the transactions by which the issuer has acquired its business undertaking, the specific nature of that undertaking, and the range of information that is already included in the prospectus.

13 When making that determination by reference to item 20.1 of Annex I to the Prospectus Regulation, competent authorities should have regard to the overriding regulatory principles of proportionality, materiality and reasonableness, which also underlie Article 5(1) of Directive 2003/71/EC. For example, supplementary financial information relating to a subsidiary of the issuer, or parts of business of the issuer, should only be required if that subsidiary or that part of its business is significant in relation to the issuer's undertaking as a whole, since a subsidiary or a part of a business which is not significant is not likely to be relevant to the investor's assessment of the issuer and the securities. For this purpose, a subsidiary of a part of a business should normally be considered as significant if it represents more than 25% of the issuer's entire business undertaking, as determined by reference to a commonly accepted indicator of size. Similarly, a competent authority should have regard to whether the issuer has access to financial information relating to another entity: it would not be reasonable to require the inclusion of such information where the issuer cannot acquire that information with reasonable effort. This consideration is likely to be relevant, in particular, in the context of a hostile takeover. Furthermore, it may not be proportionate or reasonable to require the inclusion of financial information which does not exist at the time when the prospectus is drawn up.

14 In cases where there are alternative ways of satisfying the standard in Article 5(1) of Directive 2003/71/EC through the disclosure of different kinds of supplementary financial information, or the presentation of that information in different formats, the competent authority should be constrained by the principle of reasonableness to take the costs to the issuer into account when determining what supplementary financial information should be required, its extent and its form. In such cases, the competent authority should not oblige the issuer to satisfy the standard in Article 5(1) in a way that is more costly or onerous than an adequate alternative.

15 Those guidelines should be applied in a uniform manner, which is predictable for issuers, in all Member States. While competent authorities should consider the appropriate supplementary financial information requirements on a case by case basis, issuers nevertheless need to be confident that competent authorities exercise their flexible powers to require that information in a similar way. Although it is not possible to specify fully harmonised information requirements for cases where the issuer has a complex financial history, a consistent approach by competent authorities is necessary for the proper functioning of the passport under the Directive. Effective harmonisation should be achieved through convergent regulatory practice. The Commission therefore sees an important role for the Committee of European Securities Regulators in providing guidance as regards the uniform application of the new requirements for supplementary financial information in all Member States.

1. [Subject Matter]

2. The following new paragraphs shall be inserted after paragraph (2) of Article 4 of Commission Regulation (EC) No 809/2004:

"3 Notwithstanding the restriction in the second paragraph of Article 3, where the issuer of a security falling within paragraph 2 –

- (a) has a complex financial history; or
- (b) has made a significant financial commitment,

the competent authority of the home Member State shall require that the registration document include, in addition to the information items included in the schedule set out in Annex I and [(if applicable)] Annex II, such supplementary financial information as is necessary to ensure that the prospectus complies with the requirements set out in Article 5(1) of Directive 2003/71/EC.

4 For the purposes of paragraph 3, an issuer has a complex financial history if, as a result of any acquisition or disposal undertaken by the issuer, the entire business undertaking of the issuer at the time that the prospectus is drawn up is not covered by or represented in the historical financial information which the issuer is required to provide under item 20.1 of Annex I.

5. For the purposes of paragraph 3, an issuer shall be treated as having made a significant financial commitment if it has entered into a binding agreement to undertake a transaction which, on completion, will give rise to a significant gross change in the assets and liabilities and earnings of the issuer. For the purposes of this paragraph, an agreement shall also be treated as binding if the firm commitment of the parties is conditional on the outcome of the offer of the securities that are the subject matter of the prospectus.

6 The supplementary financial information mentioned in paragraph 3 may include –

- (a) financial information relating to significant subsidiaries of the issuer covering the preceding three financial years or such shorter period that the subsidiary has been in operation;

- (b) financial information relating to any part of the business undertaking of the issuer which, at the time when the information was drawn up, was carried on by an entity other than the issuer;
- (c) financial information relating to an entity or business undertaking which the issuer has undertaken to acquire pursuant to a significant financial commitment of a kind mentioned in paragraph 5.

7. When deciding how the obligation imposed by Article 5(1) of Directive 2003/71/EC should be satisfied in cases covered by paragraph 3, and in particular the extent of the supplementary financial information which should be required and the form in which it should be presented, the competent authority shall take into account the requirements set out in item 20.1 of Annex I as regards the content of financial information and the applicable accounting and auditing principles, subject to any modification which is appropriate in view of –

- (a) the facts of the case, including the economic substance of the transactions by which the issuer has acquired or disposed of its business undertaking or any part of it, and the specific nature of that undertaking; and
- (b) in cases where the issuer has made a significant financial commitment, the availability to the issuer of financial information relating to an entity other than the issuer.

Where the obligation imposed by Article 5(1) of Directive 2003/71/EC may be satisfied in more than one way, the competent authority shall take into account the costs to the issuer and shall not require that the obligation is satisfied in a way that is more costly or onerous than an adequate alternative. "

3. The following sentence shall be inserted after the first sentence of the first paragraph of item 20.1 of Annex I to Commission Regulation (EC) No 809/2004:

" If the issuer has changed its accounting reference date during the period for which historical financial information is required, the audited historical information shall cover at least 36 months (or, if shorter, the entire period for which the issuer has been in operation). "