



Brussels, 30.4.2013  
C(2013) 2420 final

**COMMISSION DELEGATED REGULATION (EU) No .../..**

**of 30.4.2013**

**amending Regulation (EC) No 809/2004 as regards the disclosure requirements for  
convertible and exchangeable debt securities**

(Text with EEA relevance)

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE DELEGATED ACT

Adopted in 2003, the Prospectus Directive 2003/71/EC (“the Directive”) is an essential instrument to the achievement of the internal market, facilitating the widest possible access to investment capital on a Union-wide basis by granting a single passport to issuers. Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements (the "Regulation") sets out in detail the information for different kinds of securities which must be included in a prospectus.

The Directive was amended in November 2010<sup>1</sup> to further strengthen the framework's original objectives of investor protection and market efficiency. The Commission has notably been empowered by the Directive to adopt delegated acts in order to specify the requirements applicable to the format and the content of the prospectus and the elaboration of the various models of prospectuses taking into account the application of a proportionate disclosure regime where the issuer has not disapplied the statutory pre-emptive rights and where the issuer is a small and medium sized enterprise or a company with reduced market capitalisation.

In consideration of the technical developments on the financial markets in the Union, the amendments to the Prospectus Directive, and the objectives of increasing legal clarity and efficiency of the prospectus regime, the Commission has also deemed important to consider some technical adjustments and clarifications to a number of disclosure requirements of the Prospectus Regulation. A fact finding exercise performed by ESMA in 2010 has demonstrated certain differences among EU jurisdictions concerning the annexes to the Regulation applicable in case of an offer/admission to trading of convertible or exchangeable debt securities. These divergent practices hinder the proper functioning of the prospectus passport and the objective of ensuring a harmonised level of protection for all investors, discourage cross-border offers and undermine the completion of the Union's securities market. Therefore, the Commission considered that the issue of the prospectus disclosure requirements for convertible or exchangeable debt securities should also be included within the scope of coming delegated measures, and, in particular, in the context of the proportionate disclosure regime and the review of the provisions of the Regulation. Accordingly, the Commission extended the initial mandate to the European Securities and Markets Authority (ESMA) for technical advice on possible delegated acts to the offer/admission to trading of convertible or exchangeable debt securities.

It is therefore essential to achieve a level playing field, with respect to disclosure requirements for convertible/ exchangeable debt securities, for all market participants and ensure a uniform application of Union's legislation on prospectuses.

This Delegated Regulation is the vehicle for delivering the objectives established by the Directive, to ensure a single rulebook and level playing field.

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<sup>1</sup> Directive 2010/73/EU, OJ L 327, 11.12.2010, p. 1.

## **2. CONSULTATIONS PRIOR TO THE ADOPTION OF THE ACT**

This initiative is the result of extensive consultations with all major stakeholders, including public authorities (governments and securities regulators), issuers, intermediaries and investors.

It takes into consideration the technical advice from ESMA. ESMA set up a Task Force which developed and launched on 20 June 2012 a consultation on its technical advice on possible delegated acts concerning this specific point. The majority of respondents agreed with ESMA's proposals aimed at clarifying the disclosure regime applicable to convertible or exchangeable debt securities. In particular, they agreed that there was a need to clarify which of the current requirements are applicable to the underlying shares.

ESMA's final advice, also reflecting consultation comments, was received on 21 December 2012. The Expert Group of the European Securities Committee was also consulted.

The measures concerned by the present delegated regulation contribute to the achievement of several objectives (bring legal clarity, reduce administrative burdens for issuers while maintaining an adequate level of investor protection) also pursued by several previous measures and which have been considered within a previous general impact assessment (SWD(2012)77 FINAL, 30.3.2012). In particular, these measures are in line with the clarification and technical adjustments foreseen in the above impact assessment but not addressed in detail because of the absence of alternative options and their consistency with the general objectives of increased legal clarity and investor protection. These clarifications will benefit issuers in terms of legal certainty when drawing up a prospectus for convertible or exchangeable debt securities while having a minor impact in terms of administrative burdens.

Moreover, the present measures should also be read in the context of the objective of reducing administrative burdens on issuers and of the recent Commission Delegated Regulation (EU) No 486/2012<sup>2</sup> setting a proportionate disclosure regime for rights issues and securities issued by small and medium-sized enterprises (SMEs) and companies with reduced market capitalisation. This objective has been considered in detail in the above mentioned impact assessment.

At last, this Delegated Regulation is in line with the technical advice provided by ESMA on 21 December 2012 and the minor implications of the suggested measures have been detailed in the cost-benefit analysis undertaken by ESMA<sup>3</sup>.

## **3. LEGAL ELEMENTS OF THE DELEGATED ACT**

### **3.1 Subsidiarity and proportionality**

According to the principle of subsidiarity (Article 5.3 Treaty on the European Union), action at Union level should be taken only when the aims envisaged cannot be achieved sufficiently by Member States alone and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Union. As the Prospectus Directive creates a passport valid for the whole Union, a harmonised approach is essential for investor protection, legal certainty and harmonised supervision. Further, and since this issue is already covered by the *acquis* of the existing Prospectus framework, a consistent approach is essential in order to avoid regulatory arbitrage addressing the problems highlighted above. Moreover, the direct

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<sup>2</sup> Commission Delegated Regulation (EU) No 486/2012, OJ L 150, 9.06.2012, p. 1.

<sup>3</sup> ESMA's technical advice on possible delegated acts concerning the Prospectus Directive as amended by the Directive 2010/73/EU, 21 December 2012 ESMA/2012/864.  
<http://www.esma.europa.eu/system/files/2012-864.pdf>

applicability of a Regulation will reduce regulatory complexity and offer greater legal certainty for those subject to the legislation across the Union introducing core uniform rules and contributing to the functioning of the Single Market.

The principle of proportionality requires that any intervention is targeted and does not go beyond what is necessary to achieve the objectives. This principle has guided the process from the identification and evaluation of the envisaged measures to the drafting of this Delegated Regulation.

### **3.2. Detailed explanation of the proposal**

This proposal seeks to increase legal clarity concerning the prospectus disclosure requirements for convertible or exchangeable debt securities, in particular concerning the disclosure regime applicable to the issuer of the underlying shares or to the underlying shares themselves. The rationale behind the different disclosure regimes envisaged by the Prospectus Regulation for convertible or exchangeable debt securities does not rely solely on whether they are or are not equity securities (i.e. when the issuer of the underlying shares is the same issuer of the convertible or exchangeable debt securities or it is an entity belonging to the same group), but also on whether the underlying shares are or are not yet admitted to trading on a regulated market (when the underlying shares are admitted there is already some information available).

In addition, the Delegated Regulation expands the application of disclosure requirements concerning the statements on working capital and capitalization and indebtedness to convertible or exchangeable debt securities provided that they correspond to equity securities, pursuant to Article 2(1)(b) of Directive 2003/71/EC, and their underlying shares are not admitted to trading on a regulated market. These disclosure items constitute material information for investors who need to have at their disposal essential updated information relating both to the issuer's ability to continue as a going concern (information provided by the working capital statement) and to its indebtedness compared to its capitalization. The latter statement allows investors to obtain valuable information on the degree of the issuer's risk associated to the level of indebtedness. Both statements present an updated picture of the issuer's financial situation which would not be otherwise available to the market at the time of the investment decision. In addition, the regulatory burden is expected to be minor due to the fact that these items are only statements provided by the issuer.

The Delegated Regulation also applies the proportionate disclosure regime for rights issues to pre-emptive rights of debt securities convertible/exchangeable into new shares issued by the same entity issuing the debt securities and the proportionate disclosure regime set for small and medium sized enterprises and companies with reduced market capitalisation when they are issuing debt securities convertible or exchangeable into issuer's shares. Annex XVIII of Regulation (EC) No 809/2004 is accordingly updated in order to provide a clear picture on how to combine schedules and building blocks when drawing up a prospectus for such issues.

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**of 30.4.2013**

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Directive 2003/71/EC 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 and amending Directive 2001/34/EC<sup>4</sup>, and in particular Article 7(1) thereof,

Whereas:

- (1) Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements<sup>5</sup> sets out the minimum information to be included in a prospectus for different kinds of securities in order to comply with Article 7(1) of Directive 2003/71/EC.
- (2) The share registration document schedule should be applicable to shares and other transferable securities equivalent to shares but also to other securities giving access to the capital of the issuer by way of conversion or exchange where the underlying shares are not already admitted to trading on a regulated market.
- (3) Where the issuer of the underlying shares belongs to the same group as the issuer of the convertible or exchangeable debt securities but the underlying shares are not admitted to trading on a regulated market, information on the issuer is not easily available to investors. Therefore, the share registration schedule should be applicable to those underlying shares and should be added to the combinations used for drawing up the prospectus.
- (4) Where securities with warrants or derivative securities give the right to acquire the issuer's or group's shares and those shares are not admitted to trading on a regulated market, the relevant information set out in the securities note schedule for derivative securities should be provided to investors.
- (5) Where debt securities are exchangeable or convertible into shares already admitted to trading on a regulated market, information on the underlying shares is already available to shareholders and investors in general. Therefore, it should be clarified that it is sufficient to add a statement setting out the type of the underlying and details of

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<sup>4</sup> OJ L 345, 31.12.2003, p. 64.

<sup>5</sup> OJ L 149, 30.4.2004, p. 1.

where information on the underlying can be obtained in the combinations used for drawing up the securities note of the prospectus.

- (6) Where debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the security or by an entity belonging to its group and these underlying shares are not already admitted to trading on a regulated market, investors should also be provided with a working capital statement and a statement of capitalisation and indebtedness of the issuer of the underlying shares. Those statements would provide investors in the securities note with the same information on the ability of the issuer of the underlying shares to continue as a going concern and on its indebtedness compared to its capitalization as would be available when investing in shares directly.
- (7) Where the underlying shares are issued by a third party and are not admitted to trading on a regulated market the investors do not have easy access to a description of those underlying shares. Therefore, the additional building block describing the underlying share should be added to the combinations used for drawing up the securities note of the prospectus.
- (8) For reasons of legal certainty it is necessary to clarify, in the table set out in Annex XVIII to Regulation (EC) No 809/2004, how schedules and building blocks should be combined when drawing up a prospectus, including where only certain information items of schedules and building blocks are required, where certain information items may not be applicable due to specific combinations of schedules and building blocks in particular cases, and where the issuer, offeror or person asking for admission to trading on a regulated market may choose between different schedules and building blocks according to specific thresholds, such as the minimum denomination of debt securities, or conditions set out in Regulation (EC) No 809/2004.
- (9) The term “bonds” should be replaced by the term “debt securities” in order to ensure consistency of terminology within Regulation (EC) No 809/2004.
- (10) The application of the pro forma financial information building block set out in Annex II to Regulation (EC) No 809/2004 is conditional upon a significant gross change in the size of the issuer, therefore the words “(if applicable)” should be added to the heading of the column entitled "BUILDING BLOCK" applicable to the registration document in Annex XVIII to that Regulation to reflect the conditional applicability of Annex II to that Regulation.
- (11) Convertible or exchangeable debt securities can provide access to issuer’s new shares when the right to subscribe is exercised by their holders. Accordingly, rights issues of convertible or exchangeable debt securities into issuer’s new shares should also be able to benefit from the proportionate disclosure regime set out in Article 26a of Regulation (EC) No 809/2004 provided that the underlying shares are new shares issued by the same entity issuing debt securities. The prospectus for the offer or admission to trading on a regulated market of debt securities convertible or exchangeable into issuer’s shares issued by small and medium sized enterprises and companies with reduced market capitalisation should also benefit from the proportionate disclosure regime set out in Article 26b of Regulation (EC) No 809/2004. Accordingly, the combination of schedules and building blocks applicable to rights issues of debt securities convertible or exchangeable into issuer’s shares or to convertible or exchangeable debt securities issued by small and medium sized enterprises and companies with reduced market capitalisation should be included in Annex XVIII.

- (12) In consideration of the need to provide issuers with a transitional period to adapt to the new requirements introduced by this Regulation, this Regulation should only apply to prospectuses and base prospectuses which have been approved by a competent authority on the date of or after its entry into force.
- (13) Regulation (EC) No 809/2004 should therefore be amended accordingly,
- HAS ADOPTED THIS REGULATION:

*Article 1*

**Amendments to Regulation (EC) No 809/2004**

Regulation (EC) No 809/2004 is amended as follows:

- (1) In Article 6, the following paragraph 3 is added:
- “3. Where shares with warrants give the right to acquire the issuer’s shares and these shares are not admitted to trading on a regulated market, the information required by the schedule set out in Annex XII except item 4.2.2 shall also be given.”
- (2) In Article 8, the following paragraphs 3, 4 and 5 are added:
- “3. Where debt securities are exchangeable or convertible into shares already admitted to trading on a regulated market, the information required by item 4.2.2 of the schedule set out in Annex XII shall also be given.
4. Where debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the debt security or by an entity belonging to its group and these underlying shares are not already admitted to trading on a regulated market, information on the issuer of the underlying shares shall also be given in accordance with items 3.1 and 3.2 of the schedule set out in Annex III or, as the case may be, of the proportionate schedule set out in Annex XXIV.
5. Where debt securities with warrants give the right to acquire the issuer’s shares and these shares are not admitted to trading on a regulated market, the information required by the schedule set out in Annex XII except item 4.2.2 shall also be given.”
- (3) In Article 15, paragraph 2 is replaced by the following:
- “2. The schedule shall apply to securities which are not in the scope of application of the other securities note schedules referred to in Articles 6, 8 and 16, except for the cases mentioned in Article 6(3), Article 8(3) and (5) and Article 16 (3) and (5). The schedule shall apply to certain securities where the payment and/or delivery obligations are linked to an underlying.”
- (4) In Article 16 the following paragraphs 3, 4 and 5 are added:
- “3. Where debt securities are exchangeable or convertible into shares already admitted to trading on a regulated market, the information required by item 4.2.2 of the schedule set out in Annex XII shall also be given.
4. Where debt securities are convertible or exchangeable into shares which are or will be issued by the issuer of the debt security or by an entity belonging to its group and these underlying shares are not already admitted to trading on a regulated market, information on the issuer of the underlying shares shall also

be given in accordance with items 3.1 and 3.2 of the schedule set out in Annex III or, as the case may be, of the proportionate schedule set out in Annex XXIV.

5. Where debt securities with warrants give the right to acquire the issuer's shares and these shares are not admitted to trading on a regulated market, the information required by the schedule set out in Annex XII except item 4.2.2 shall also be given."
- (5) In Article 17(2), point 2 is replaced by the following:
- "2. provided that these shares or other transferable securities equivalent to shares are or will be issued by the issuer of the security, by an entity belonging to the group of that issuer or by a third party and are not yet traded on a regulated market or an equivalent market outside the Union at the time of the approval of the prospectus covering the securities, and that the underlying shares or other transferable securities equivalent to shares can be delivered with physical settlement."
- (6) The title of the Annex XIV is replaced by the following:
- "Additional information building block on the underlying share".
- (7) Annex XVIII is replaced by the text in the Annex to this Regulation.

#### *Article 2*

##### **Transitional provision**

1. This Regulation shall not apply to the approval of a supplement to a prospectus or base prospectus where the prospectus or base prospectus was approved before the date referred to in Article 3.
2. Where in accordance with Article 18 of Directive 2003/71/CE the competent authority of the home Member State notifies the competent authority of the host Member State with a certificate of approval in relation to a prospectus or a base prospectus approved before the date referred to in Article 3, the competent authority of the home Member State shall clearly and explicitly indicate in the certificate that the prospectus or base prospectus was approved before the date referred to in Article 3.

#### *Article 3*

##### **Entry into force**

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 30.4.2013

*For the Commission*  
*The President*  
*José Manuel BARROSO*

**ANNEX**  
**“ANNEX XVIII**

**Part I: Table of combinations**

N.	ANNEX XVIII Part I	REGISTRATION DOCUMENT								
		SCHEDULES					BUILDING BLOCK	SCHEDULES		
	TYPES OF SECURITIES	Share	Debt and Derivative (< eur 100.000)	Debt and Derivative (> or = eur 100.000)	Asset Backed Securities	Banks Debt and Derivative	Pro forma Information (if applicable)	Collective Investment Undertaking of the closed- end Type	States and their Regional and local Authorities	Public International Bodies/debt Securities guaranteed by a member state of the OECD
1	Shares (preference shares, redeemable shares, shares with preferential subscription rights, etc...)									
2	Debt securities (vanilla debt securities, income Debt securities, structured Debt securities, etc...) with a denomination of less than EUR 100.000		OR			OR				
3	Debt securities (vanilla Debt securities, income Debt Securities, structured Debt securities, etc...) with a denomination of at least EUR 100.000			OR		OR				
4	Debt securities guaranteed by a third party		OR	OR		OR				
5	Derivative securities guaranteed by a third party		OR	OR		OR				

6	Asset backed securities									
7	Debt securities exchangeable or convertible into third party shares or issuer's or group shares which are admitted on a regulated market			OR	OR		OR			
8	Debt securities exchangeable or convertible into third party shares not admitted on a regulated market	Issuer of debt Securities exchangeable or convertible		OR	OR		OR			
		Issuer of (Underlying) Shares								
9	Debt securities exchangeable or convertible into the issuer's shares not admitted on a regulated market									
10	Debt securities exchangeable or convertible into group's shares not admitted on a regulated market	Issuer of debt securities exchangeable or convertible		OR	OR		OR			
		Issuer of (underlying) shares								
11	Debt securities with warrants to acquire the issuer's shares not admitted to trading on a regulated market									
12	Shares with warrants to acquire the issuer's shares not admitted to trading on a regulated market									
13	Derivatives securities giving the right to subscribe or to acquire the issuer's shares									

	not admitted on a regulated market									
14	Derivatives securities giving the right to acquire group's shares not admitted on a regulated market		OR	OR		OR				
15	Derivatives securities giving the right to subscribe or to acquire issuer's or group shares which are admitted on a regulated market and derivatives securities linked to any other underlying than issuer's or group shares which are not admitted on a regulated market (including any derivatives securities entitling to cash settlement)		OR	OR		OR				

N.	ANNEX XVIII	SECURITIES NOTE							
	Part I	SCHEDULES				ADDITIONAL BUILDING BLOCKS			
	TYPES OF SECURITIES	Share	Debt (< eur 100.000)	Debt (> or = eur 100.000)	Derivatives securities	Guarantees	Asset backed securities	Underlying share	
1	Shares (preference shares, redeemable shares, shares with preferential subscription rights, etc...)								
2	Debt Securities (vanilla Debt Securities, income Debt Securities, structured Debt Securities, etc...) with a denomination of less than EUR 100.000								
3	Debt Securities (vanilla Debt Securities, income Debt Securities, structured Debt Securities, etc...) with a denomination of at least EUR 100.000								

4	Debt Securities guaranteed by a third party			OR	OR				
5	Derivative securities guaranteed by a third party								
6	Asset backed securities			OR	OR				
7	Debt Securities exchangeable or convertible into third party shares or issuer's or group shares which are admitted on a regulated market			OR	OR	AND only item 4.2.2			
8	Debt Securities exchangeable or convertible into third party shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		(Underlying) Shares							AND except item 2
9	Debt Securities exchangeable or convertible into the issuer's shares not admitted on a regulated market		AND only items 3.1 and 3.2	OR	OR				
10	Debt Securities exchangeable or convertible into group's shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		(Underlying) Shares	AND only items 3.1 and 3.2						
11	Debt securities with warrants to acquire the issuer's shares not admitted to trading on a regulated market			OR	OR	AND except item 4.2.2			
12	Shares with warrants to acquire the issuer's shares not admitted to trading on a regulated market					AND except item 4.2.2			

13	Derivatives securities giving the right to subscribe or to acquire the issuer's shares not admitted on a regulated market				AND except item 4.2.2			
14	Derivatives securities giving the right to acquire group's shares not admitted on a regulated market				AND except item 4.2.2			
15	Derivatives securities giving the right to subscribe or to acquire issuer's or group shares which are admitted on a regulated market and derivatives securities linked to any other underlying than issuer's or group shares which are not admitted on a regulated market (including any derivatives securities entitling to cash settlement)							

**Part II: Table of combinations regarding rights issues of debt securities convertible or ex-changeable into issuer’s shares and debt securities convertible or exchangeable into issuer’s shares where such rights issues and debt securities are issued by small and medium sized enterprises (‘SMEs’) or companies with reduced market capitalisation (‘Small Caps’) (proportionate disclosure regime)**

However, issuers may choose to draw up the prospectus in accordance with the full disclosure regime.

N.	ANNEX XVIII Part II: PDR		REGISTRATION DOCUMENT								
			SCHEDULES					BUILDING BLOCK	SCHEDULES		
	TYPES OF SECURITIES	Share	Debt and Derivative (< EUR 100.000)	Debt and derivative (> or = EUR 100.000)	Asset backed securities	Banks debt and derivative	Pro forma information (if applicable)	Collective investment undertaking of the closed-end type	States and their regional and local authorities	Public international Bodies/debt securities guaranteed by a member state of the OECD	
1	Rights issues of Debt Securities convertible or exchangeable into issuer’s shares, when the issuer has shares of the same class already admitted on a regulated market or MTF if conditions in Art. 26.a(2) are fulfilled										
2	SMEs and Small Caps Debt securities exchangeable or convertible into third party shares or issuer’s or group shares which are admitted on a regulated market			OR	OR		OR				
3	SMEs and Small Caps Debt Securities	Debt Securities exchangeable		OR	OR		OR				

	exchangeable or convertible into third party shares not admitted on a regulated market	or convertible									
		(Underlying) Shares									
4	SMEs and Small Caps Debt Securities exchangeable or convertible into the issuer's shares not admitted on a regulated market										
5	SMEs and Small Caps Debt Securities exchangeable or convertible into group's shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR		OR				
		(Underlying) Shares									

N.	ANNEX XVIII Part II: PDR	SECURITIES NOTE								
		SCHEDULES						ADDITIONAL BUILDING BLOCKS		
	TYPES OF SECURITIES	Share	Debt (< EUR 100.000)	Debt (> or = EUR 100.000)	Derivatives Securities	Guarantees	Asset backed securities	Underlying share		

<b>1</b>	Rights issues of debt securities exchangeable or convertible into issuer's shares, when the issuer has shares of the same class already admitted on a regulated market or MTF if conditions in Art. 26.a(2) are fulfilled		AND only items 3.1 and 3.2	OR	OR				AND except item 2
<b>2</b>	SMEs and Small Caps Debt Securities exchangeable or convertible into third party shares or issuer's or group shares which are admitted on a regulated market			OR	OR	AND only item 4.2.2			
<b>3</b>	SMEs and Small Caps Debt securities exchangeable or convertible into third party shares not admitted on a regulated market	Debt Securities exchangeable or convertible		OR	OR				
		Underlying Shares							AND except item 2
<b>4</b>	SMEs and Small Caps Debt securities exchangeable or convertible into the issuer's shares not admitted on a regulated market		AND only items 3.1 and 3.2	OR	OR				
<b>5</b>	SMEs and Small Caps Debt securities exchangeable or convertible into group's shares not admitted on a regulated market	Debt securities		OR	OR				
		(Underlying) Shares	AND only items 3.1 and 3.2						

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