BACKGROUND NOTE

Draft Commission Regulation amending Commission (EC) No. 809/2004 implementing Directive 2003/71/EC ('the Prospectus Directive') as regards supplementary financial information in prospectuses where the issuer has a complex financial history

Important Disclaimer

This note accompanies the draft amendment to Regulation (EC) No. 809/2004. Its purpose is explanatory: it outlines the reason why amendment of that Regulation is considered by the Commission Services to be necessary, and discusses the provisions of the draft Regulation. It is intended to assist interested parties in understanding and assessing the regulatory changes that would be brought about the draft amendment, if adopted. As such, it has no interpretative value and cannot be legally binding.

In particular, it does not constitute the official view of the European Commission, which would be entitled to take a position different to that set out in this note in any future judicial proceedings concerning the relevant provisions. Moreover, only the European Court of Justice can give a legally binding interpretation of provisions of EC legislation.

INTRODUCTION

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 ('the Prospectus Directive') came into force on 31st December 2003, and was required to be implemented by Member States by 1st July 2005 at the latest.

The Prospectus Directive requires the publication of a prospectus, drawn up in accordance with the Directive and its implementing measures, where securities are offered to the public or admitted to trading on a regulated market, unless an exemption from that obligation is available. The principal purposes of this measure are two-fold.

The first is to ensure that all investors who receive a public offer of securities in the EEA, or who wish to purchase securities through a regulated market, enjoy the same high level of protection. Regardless of where he or she is located, an investor will have access to a prospectus containing detailed and harmonised information about those securities. The contents of a prospectus will be the same, irrespective of which Member State's law applies to its production and approval.

The second is to confer an effective 'passport' for issuers that wish to make a public offer or admit securities to trading on a regulated market in more than one Member State. Once a prospectus has been approved by the competent authority of the issuer's home Member State, it is valid – subject to any requirements for translation imposed in accordance with the Directive - for use throughout the EEA without any need for further scrutiny or approval by any other authority. This 'passport' functions by means of a simple notification by the competent authority of the

issuer's home State to its counterpart in any 'host State' where the prospectus is to be used, and 'host' competent authorities are prohibited under the Directive from imposing any further administrative requirements in relation to that prospectus.

These two objectives are closely inter-linked. Because the regime established by the Prospectus Directive is designed to harmonise the contents of prospectuses and to ensure that every prospectus is subjected to the same standard of approval, it is unnecessary to duplicate the approval of the competent authority of the home Member State when the prospectus is used elsewhere in the Community. It flows automatically from this proposition that the harmonised disclosure requirements should be comprehensive, and capable of dealing with the full range of cases that confront competent authorities. The philosophical under-pinning of the passport would be eroded if Member States and their competent authorities cannot be confident that all authorities responsible for approving prospectuses will apply the same criteria and ensure that all prospectuses meet the same standard of completeness. If cases emerge that are not covered by the regime, it is therefore necessary to amend the legislation to rectify the omission.

The Prospectus Directive follows the four-level 'Lamfalussy' approach (essential principles, implementing measures, co-operation and enforcement), as endorsed by the Stockholm European Council in March 2001 and the European Parliament in February 2002. That is, as a ‘level 1’ directive, it contains framework principles, agreed by the Council and the European Parliament through co-decision, which need to be developed and elaborated by detailed ‘level 2' implementing measures. These technical measures are adopted by the Commission through the ‘comitology’ procedure established by decision 1999/468/EC, after consultation with the European Securities Committee, which is the competent regulatory committee in the field of securities, and taking into account the views of the European Parliament.

The Prospectus Directive is supplemented by a 'level 2' implementing Regulation: Regulation (EC) No. 809/2004 of 29 April 2004. References in this note to 'the Prospectus regime' mean the Prospectus Directive (as implemented in Member States) and Regulation (EC) No. 809/2004. The principal function of Regulation (EC) No. 809/2004 is to prescribe the detailed contents requirements for prospectuses, although it also lays down rules concerning other issues such as the form and means of publication of a prospectus, the information that can be incorporated by reference, and the dissemination of advertisements.

Annexed to that Regulation are a series of schedules and building blocks setting out in detail the information items that must be included in the component elements of a prospectus – the Registration Document and the Securities Note – for the principal types of equity, debt and derivative securities. A prospectus must be compiled using the schedules and, where relevant, the building blocks that are appropriate to the type of securities in question.

The detailed information requirements set out in the Regulation (EC) No. 809/2004 ensure that the minimum contents of prospectuses are fully harmonised to the extent that is necessary for investor protection. The Regulation confers some necessary flexibility in cases where a prospectus relates to a security of a type that does not fall squarely within any of the Annexes. Where such a security is comparable to one or more types of securities that are covered by the Regulation, the prospectus must be compiled by combining information, drawn from the securities note schedules applicable to the comparable securities, that is relevant to the securities

that are the subject matter of prospectus. In more extreme cases where a person wishes to offer or admit to trading a new type of security that is not comparable to the types covered by the Regulation, the competent authority must decide what information should be included in the prospectus in order to ensure that it meets the standard required under the Prospectus Directive. The authority is required to notify the Commission in such cases. A recurrence of cases of this kind might suggest that the Regulation should be amended to cover such cases.

However, this limited flexibility aside, the Prospectus regime does not currently allow competent authorities to require the inclusion in a prospectus of additional information that is not specified in the applicable schedules and building blocks.[1] This restriction helps ensure that issuers can be certain about the information they will be required to disclose. However, if a case arises that does not fall within the scope of the flexibility and power to adapt that is permitted by the Regulation, an authority cannot require the inclusion in a prospectus of additional information items, even if it considers that such information is necessary for an investor to make an informed assessment of the issuer and the securities.[2] Issuers with a 'complex financial history' represent a case of this kind.

The problem: financial information where the issuer has a 'complex financial history

Regulation (EC) No. 809/2004 contains a number of requirements relating to historical financial information: that is, the financial statements and reports of the issuer relating to a specified period immediately preceding the offer or admission to trading for which the prospectus is published. Item 20.1 of Annex I to the Regulation, which contains the schedule of items which must be disclosed in a registration document for shares, is typical. This item requires the inclusion in a prospectus of "audited historical information covering the latest 3 financial years (or such shorter period that the issuer has been in operation), and the audit report in respect of each year".[3]

A possible deficiency in relation to this provision became apparent when regulators were faced with issuers that have a complex financial history. We use this term to refer to cases where financial information covering the principal business undertaking of the issuer, for the whole of the period for which historical financial information is required, is not included in the financial statements drawn up by the issuer, but is provided, either in whole or in part, in financial statements drawn up by other entities. A case of this kind could arise, for example, where an issuer had made a major acquisition during the relevant period and the acquired company or business was not yet represented in the issuer's own financial statements. Alternatively, it could arise where the issuer is a newly incorporated holding company inserted over established entities which have produced their own financial statements. In such cases, disclosure of financial

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[1] The second paragraph of Article 3 of the Prospectus Regulation provides: "A prospectus shall contain the information items required in Annexes I to XVII depending on the type of issuer and securities involved, provided for in the schedules and building blocks set out in Articles 4 to 20. A competent authority shall not request that a prospectus contains information items which are not included in Annexes I to XVII.

[2] This does not, of course, preclude issuers in such cases from including such additional information on a voluntary basis, or by agreement with the competent authority.

[3] The other provisions relating to historical financial information are the following: item 13.1 of Annex IV (debt and derivative securities with a denomination per unit of less than €50,000); item 8.2 of Annex VII (asset backed securities); item 11.1 of Annex IX (debt and derivative securities with a denomination per unit of at least €50,000); item 20.1 of Annex X (depository receipts issued over shares); item 11.1 of Annex XI (debt and derivative securities issued by banks).

information relating to other entities – those acquired or from which a business has been acquired by the issuer, or those pre-existing subsidiaries of the newly incorporated issuer – may be necessary to enable an investor to make a proper assessment of the issuer and the securities in question.

There is some uncertainty as to whether the requirement under item 20.1 of Annex I, and the other relevant provisions of the Regulation, is restricted to financial information relating to the issuer, or whether it extends to historical financial information in respect of entities which are legally separate from, but which are closely linked to the issuer. Since Article 3 of the Regulation prohibits competent authorities from requesting the inclusion of information which is not included in the Annexes, it is essential to clarify the scope of those provisions to ensure that competent authorities have the ability to require all the information which is necessary in any particular case, and that issuers and their advisers can be certain about what is properly required of them. The provision of the full range of financial information which is relevant in a particular case is essential for proper investor protection. Furthermore, any lack of legal certainty about the scope of a statutory or regulatory requirement could be detrimental to the efficient functioning of markets and can impose additional compliance costs on issuers.

Accordingly, the Commission proposes to amend Regulation (EC) No. 809/2004 so as to eliminate uncertainty as to the scope of those provisions and to ensure that the requirements in relation to historical financial information extend to the entire range of information which may be necessary to enable investors to make an informed assessment of the issuer and the securities, in any case where financial information relating to legal entities other than the issuer may be relevant to the financial condition and prospects of the issuer itself.

The draft amendment is based upon advice provided by CESR.[4] That advice recommended that Regulation (EC) No. 809/2004 should be amended to enable competent authorities to require issuers that have a complex financial history to provide financial information relating to entities or business undertakings which, when that information was drawn up, were legally separate from the issuer but which form part of its business at the time the prospectus is produced. The advice does not prescribe the information which should be required. Rather, the intention is to allow competent authorities sufficient discretion to deal flexibly with cases which, by their nature, are atypical and may be unique.

The draft amendment retains the necessary element of flexibility to determine, on a case by case basis, the additional financial information that must be included in a prospectus where the issuer has a complex financial history.

The draft Regulation does three things:

(1) it amends the second paragraph of Article 3 of Regulation (EC) No. 809/2004, which prohibits competent authorities from requesting that a prospectus contain information items not specified in the applicable Annexes, so that they are not prevented from requiring the additional information that may be necessary in certain cases;

[4] The advice is available on CESR's website: http://www.cesr-eu.org/

(2) it inserts into the Regulation a new Article 4a, which defines the kinds of cases in which additional information can be required, and establishes and circumscribes the scope of such information;

(3) it makes a small technical amendment to item 20.1 of Annex I to the Regulation, in order to clarify the extent of historical financial information that must be included in a prospectus in a case where the issuer has changed its accounting reference date during the three year period for which historical financial information is required.

The following sections describe in more detail the operative provisions of the draft amending Regulation.

DISCUSSION OF THE DRAFT REGULATION

Scope of application

Kinds of securities

The draft amendment applies only to cases where the share registration document schedule in Annex I to Regulation (EC) No. 809/2004 applies. These are specified in Article 4(2) of the Regulation, as being cases where the prospectus relates to shares, other transferable securities equivalent to shares, or securities that can be converted into or exchanged for shares or other equivalent transferable securities, provided that the underlying are issued by the same issuer, are not yet traded on a regulated market or third country equivalent, and can be physically settled. Accordingly, the draft amendment does not apply when the prospectus relates to any other kind of security, including both wholesale and retail debt, or other kinds of derivatives. This mirrors the scope of application of the pro forma requirements in item 20.2 of Annex I, and Annex II.

Circumstances in which new provision will apply

New Article 4a will apply in two circumstances. The first is where the issuer has a 'complex financial history', and the second is where the issuer has made a 'significant financial commitment'. Both of these concepts are defined.

Paragraph 4 of new Article 4a provides that an issuer should be treated as having a complex financial history if one or both of two sets of conditions are met. These are -

(a) the issuer came into existence as a legal entity during the three year period immediately before the date when the prospectus is filed, and information relating to the business it carries on at that date is included in financial information relating to another entity;

(b) the issuer has completed one or more transactions which, individually or in combination, have given rise to a significant gross change in the issuer's business which is not yet reflected in the historical financial information that the issuer is required to provide under item 20.1 of Annex I.

Normally the issuer's financial statements that must be provided by way of historical financial information in accordance with item 20.1 of Annex I will reflect the entire business of the issuer throughout the required period, including significant acquisitions or disposals. By contrast, the

common factor in the situations that constitute a 'complex financial history' is that the issuer's historical financial information does not cover, or accurately represent, its business, its assets or its capital structure, at the time that the prospectus is being prepared. This may be the case, for example, if –

- the issuer is a newly incorporated holding company inserted over an established business;
- the issuer is composed of companies that were under common control or ownership but which never formed a legal group;
- the issuer has been formed as a separate legal entity following the division of an existing business);
- the issuer has made a significant acquisition that is not yet reflected in its own audited consolidated financial statements;
- the issuer has disposed of a significant part of its business since the last audited accounts.

In such cases, all or part of the business undertaking of the issuer has been carried on by another entity during the period for which the issuer is required to provide historical financial information, and the financial statements of that other entity may be necessary to supplement the issuer's own historical financial, in order to provide potential investors with a full and accurate picture of the issuer's own assets and liabilities, financial position, profits and losses, and prospects.

The concept of a 'significant financial commitment' is explained in paragraph 5 of draft Article 4a. This provides that an issuer should be treated as having made a significant financial commitment if it has entered into a binding agreement to undertake a transaction which, when completed, is likely to give rise to a significant gross change in the issuer's business. This is designed to cover situations where, at the time the prospectus is drawn up, the issuer has irrevocably agreed to enter into a transaction which is likely to have significant effects on the issuer's business, but that transaction has not yet been completed.

The two sets of circumstances in which draft Article 4a will apply are therefore intended to mirror each other. In the first, a transaction has already happened that significantly changes the business or capital structure of the issuer in relation to that which is reflected in the issuer's historical financial information. In the second, the issuer is committed to undertake such a transaction, but it has not yet been completed. In the first situation, investors may need access to financial information relating to entities that have been acquired by the issuer, or which have formerly been responsible for a business undertaking now carried on by the issuer. In the second situation, investors may need access to financial information relating to entities which the issuer has agreed to acquire, or which are responsible for a business undertaking which is to be taken over by the issuer.

<u>What is a 'significant gross change'?</u>

Both point (b) of the definition of a 'complex financial history' and the definition of a 'significant financial commitment' refer to transactions giving rise to a '*significant gross change*'. The concept of a significant gross change is also used in item 20.2 of Annex I to Regulation (EC) No. 809/2004, which indicates the circumstances in which pro forma information must be included in a prospectus. It is intended that the concept should have the same meaning in all these provisions.

The draft Regulation now defines that concept. Paragraph 6 of draft Article 4a provides that a significant gross change means a variation of more than 25% in the situation of an issuer, relative to one or more indicators of the size of the issuer's business. However, situations where merger accounting is required are expressly excluded. The new definition applies for the purposes of the provisions on pro forma information, as well as for the purposes of determining whether an issuer has a complex financial history or has made a significant financial commitment within the meaning of Article 4a.

The substance of the definition of 'significant gross change' is not new. It is derived from the description of the term that is currently provided in recital 9 of Regulation (EC) No. 809/2004. However, the inclusion of a definition in the operative provisions removes doubts about the status or binding nature of the recital, and increases legal certainty.

The new definition does not specify what is meant by 'indicators of the size of the issuer's business'. It is intended to cover any standard indicator that might be appropriate to the case in question, and more detailed specification is not considered to be necessary. However, CESR has already provided guidance on this matter. That guidance was produced in relation to the explanation of 'significant gross change' in recital 9 of Regulation (EC) No. 809/2004, but it will be relevant to the definition in Article 4a(6) of the draft Regulation. That guidance states as follows –

> "Thus, in order to assess whether the variation to an issuer's business as a result of a transaction is more than 25%, the size of the transaction should be assessed relative to the size of the issuer by using appropriate indicators of size prior to the relevant transaction. A transaction will constitute a significant gross change where at least one of the indicators of size is more than 25%.
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> A non-exhaustive list of indicators of size is provided below:
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> − Total assets
>
> − Revenue
>
> − Profit or loss
>
> Other indicators of size can be applied by the issuer especially where the stated indicators of size produce an anomalous result or are inappropriate to the specific industry of the issuer, in these cases the issuers should address these anomalies by agreement of the competent authority.
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> The appropriate indicators of size should refer to figures from the issuer's last or next published annual financial statements."[5]

It should be noted that an issuer may be covered by point (b) of the definition of a complex financial history in draft Article 4a(4) if it has carried out either a transaction that, on its own, gives rise to a significant gross change in the issuer's business, or a series of transactions that, taken together, give rise to a significant gross change. In the latter case, an issuer that has acquired a number of subsidiaries or businesses which may not be individually significant in relation to that issuer's undertaking as a whole, should consider the significance of those

[5] CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses nº 809/2004, [CESR/05-054b], paragraphs 91 to 94.
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subsidiaries or businesses in aggregate when assessing whether financial information relating to such subsidiaries or businesses should be included in the prospectus.

What is a 'binding agreement'?

Draft Article 4a only applies to an agreement to enter into a relevant transaction if that agreement is 'binding'. An agreement will be binding if failure to complete constitutes a breach of contract (with any legal consequences that might flow from that breach).

The fact that the completion of a transaction might be subject to conditions does not necessarily prevent the agreement to undertake that transaction from being binding for the purposes of draft Article 4a. An agreement that contains such conditions will be treated as binding if it is reasonably certain that those conditions will be fulfilled. This general principle is stated in the second subparagraph of paragraph 5, and is designed to prevent evasion of the additional requirements that might apply by virtue of draft Article 4a, through the adoption of artificial or commercially unnecessary conditions that are certain to be met.

The third subparagraph of paragraph 5 clarifies the effect of one specific kind of condition. Its purpose is to eliminate any doubt that an agreement should be treated as binding where it makes the completion of the transaction conditional on the outcome of the offer for which the prospectus has been prepared. This applies, among other things, to the case of a proposed hostile takeover. In such cases, it should not prevent a planned takeover from being treated as a binding on the issuer if the offer covered by the prospectus has the objective of funding that takeover. However, this specific example is not intended to restrict the broader principle set out in the third subparagraph. Similarly, the specific kinds of condition referred to in the third subparagraph are not intended to limit the general principle, stated in the second subparagraph of paragraph 5, that a conditional agreement should be treated as binding if it is reasonably certain that those conditions will be fulfilled (and the transaction therefore completed).

However, conditional agreements that are not covered by the second and third subparagraphs should not be treated as binding. For example, as a matter of commercial practice acquisition agreements generally make the acquisition subject to a number of standard conditions: these include competition clearance and other necessary regulatory or internal approvals. An agreement that it subject to conditions of this kind should not normally be considered as binding, and therefore as triggering the application of draft Article 4a, until those conditions are satisfied.

Information required under new Article 4a

Paragraphs 1 and 2 of draft Article 4a indicate the range of supplementary information that might be required to be included in a prospectus if the issuer has a complex financial history or has made a significant financial commitment. Such information will be additional to the historical financial information expressly required by item 20.1 of Annex I to Regulation (EC) No. 809/2004. Paragraph 2 also sets out factors that may limit the scope of that information in appropriate cases.

The starting point for establishing what additional information, if any, is required is Article 5(1) of the Prospectus Directive. That Article imposes the general requirement that a prospectus must 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".

The detailed information requirements set out in the Annexes to Regulation (EC) No. 809/2004 are designed to satisfy that test in nearly all foreseeable cases. Those requirements include the obligation to disclose historical financial information relating to the issuer, and this is ordinarily sufficient.

However, in cases covered by draft Article 4a, financial information relating to entities other than the issuer might be necessary for an investor to make a properly informed assessment. Accordingly, paragraph 1 of the draft Article provides that, where such information is required to satisfy the overriding standard imposed by Article 5(1) of the Prospectus Directive, that additional information should be deemed to relate to the issuer. The effect of this provision is to align the additional information with item 20.1 of Annex I to Regulation (EC) No. 809/2004, since that item deals with financial information concerning the *issuer's* assets and liabilities, financial position and profits and losses. The approach taken is consistent with the fact that a case covered by draft Article 4a will be one in which the financial position of the issuer is so closely linked with that of another entity that the position of the issuer cannot be assessed without information about that other entity.

Paragraph 2 reinforces the alignment of the additional information that may be required under paragraph 1 with the historical financial information that is always required, by stipulating that competent authorities must base any request on the requirements set out in item 20.1. This means that any requirement to provide additional information relating to an entity other than the issuer must, as regards its contents and the applicable accounting and auditing principles, be based on the requirements relating to the issuer's historical financial information.

However, the requirements of item 20.1 do not apply rigidly to any request for additional information made by a competent authority pursuant to paragraph 1 of draft Article 4a. The rules laid down in that item should be applied flexibly, and adapted as appropriate to the facts of each individual case. In this regard, paragraph 2 sets out factors which a competent authority must take into account when requesting additional information. These are –

(a) the nature and range of information already included in the prospectus;

(b) the existence of financial information relating to another entity in a form that can be included in a prospectus without modification;

(c) the facts of the case, including the economic substance of the transactions undertaken by the issuer that give rise to its 'complex financial history', and the specific nature of any undertakings it has acquired or disposed of in the course of those transactions;

(d) the ability of the issuer to obtain financial information relating to another entity with reasonable effort.

These factors are designed to secure that any disclosure requirements imposed under draft Article 4a would be proportionate, and take into account the costs to the issuer. For example, they will require the authority to consider whether the information that is disclosed in accordance with all

the other applicable requirements of Regulation (EC) No. 809/2004, including pro forma information, provides the investor with some or all of the information that would be provided by financial information relating to entities other than the issuer. They will also require the authority to consider whether such financial information exists in an appropriate form, or whether it would have to be adapted or restated for inclusion in a prospectus. For example, it would not be proportionate or reasonable to apply the restatement requirements under item 20.1 to financial information relating to an entity, if the obligation in Article 5(1) of the Prospectus Directive is satisfied without restatement. Furthermore, application of the obligation under draft Article 4a should not require an issuer to disclose information that it cannot obtain with reasonable effort, for example because the information is not within the issuer's control. This consideration is likely to be relevant, in particular, in the context of a hostile takeover.

Moreover, the last paragraph of draft Article 4a(2) stipulates that an issuer should not be required to incur excessive costs in complying with an obligation under that Article when the standard in Article 5(1) of the Directive can be satisfied in a way that is cheaper or less onerous. The competent authority is prohibited by this provision, coupled with the second paragraph of Article 3 of Regulation (EC) No. 809/2004, from imposing requirements under Article 4a that go beyond those set out in item 20.1, or from adapting them in a way that make the Article 4a requirements more onerous.

In summary, draft Article 4a is designed to confer a flexibility to adapt the disclosure requirements imposed by this Article to the circumstances of the individual case, so as to maintain investor protection while avoiding the imposition of an unreasonable or disproportionate burden on issuers.

In order to ensure that necessary flexibility, the draft Article does not stipulate the kinds of information that can or should be required in such cases. This would not be possible, since the kinds of cases to which draft Article 4a applies vary widely, and may not be foreseeable. However, by way of example, the kinds of information that might be required in such a case to satisfy the obligation in Article 5(1) of the Prospectus Directive, might include –

- up to three years of financial information relating to significant subsidiaries of the issuer that have been so recently acquired that they are not included in the issuer's consolidated accounts;

- 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; financial information relating to an entity or business undertaking that the issuer is committed to acquire; or

- pro forma information illustrating either the effects of a completed transaction or the anticipated effects of a transaction that is not yet completed.

The fact that pro forma information might be requested under draft Article 4a is indicated expressly by the second paragraph of paragraph 1. The purpose of this provision is to clarify that pro forma information, prepared in accordance with Annex II to Regulation (EC) No. 809/2004, can be used to illustrate the anticipated effects of a transaction that is the subject matter of a

'significant financial commitment'. The provision also indicates generally that, in appropriate cases, pro forma information can satisfy the obligation for additional information that arises from the fact that an issuer has a complex financial history or has made a significant financial commitment.

Duty of the competent authority

In cases covered by draft Article 4a, competent authorities must request the disclosure of any additional financial information relating to entities other than the issuer that is necessary to meet the requirements of Article 5(1) of the Prospectus Directive. That is, in cases where additional information is necessary, competent authorities do not have a discretion whether to request that information or not. As a matter of legal consistency, a duty is necessary. A power for competent authorities to require that information (which they may choose not to exercise) would be inconsistent with Article 5(1). If information is necessary to ensure that the prospectus satisfies that Article, competent authorities should always ensure that it is included in the prospectus.

However, as explained above, competent authorities do have flexibility when applying the requirement under draft Article 4a to respond to the circumstances of a particular case. Equally, if no additional information is necessary – because the information specified in the applicable Annexes to the Regulation is in itself sufficient to satisfy the obligation in Article 5(1) – then no requirement will be imposed by draft Article 4a, and the competent authority cannot request any further disclosure. The fact that the issuer has a complex financial history or has made a significant financial commitment does not, per se, trigger an obligation for additional disclosure under draft Article 4a. It is a necessary condition that, without items of financial information relating to an entity other than the issuer, the prospectus will be incomplete, inaccurate or misleading, and fail to comply with Article 5(1).

Moreover, the Prospectus regime already confers a limited flexibility on competent authority in appropriate circumstances. The competent authority responsible for approving a prospectus has a power to authorise the omission of information specified in the applicable Annexes and building blocks in a number of limited circumstances.[6] That power is available if disclosure of the information is contrary to the public interest, or if it would be seriously detrimental to the issuer and, in this latter case, the omission is not likely to render the prospectus misleading.[7] In addition, competent authorities may also authorise the omission of information that is of minor importance for a specific offer or admission to trading and will not influence the assessment of the financial position and prospects of the issuer, offeror or guarantor,[8] and, more specifically, of information items specified in the applicable schedules or building blocks that are not pertinent to the specific issuer, securities or offer in question.[9] These powers will apply in relation to information required under draft Article 4a, as they apply to items specified in the Annexes.

Finally, it is important to emphasise that the obligation on the competent authority to request additional information under draft Article 4a(1) does not remove or in any way modify the legal obligations of the persons who are responsible for the completeness and the accuracy of the

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[6] Prospectus Directive, Article 8(2).
[7] Points (a) and (b) of Article 8(2) PD.
[8] Point (c) of Article 8(2) PD.
[9] Article 23(4) of Regulation (EC) No. 809/2004.

prospectus under national law, including the measures implementing Article 6(1) of the Prospectus Directive.[10] This point is put beyond doubt by paragraph 3 of draft Article 4a.

Need for convergent practice

Draft Article 4a confers the flexibility for competent authorities to assess the need for additional financial information, and the way in which that need should be met, on a case by case basis. However, the requirement to include such additional information as is necessary to satisfy the requirements of Article 5(1) of the Prospectus Directive may be capable of varying interpretations by authorities, and may be discharged in diverse ways. To preserve the harmonising approach of the Directive, all competent authorities should exercise that flexibility in a similar way. It is fundamental to the smooth and effective operation of the passport under the Prospectus Directive that a prospectus should contain the same information, regardless of the home Member State of the issuer. Inconsistent interpretation and application of these new requirements by competent authorities could undermine the passport, and frustrate the aims of the Directive. Equally, issuers need to be confident that competent authorities approach that function in a consistent and predictable way.

Accordingly, the Commission would encourage harmonisation of requirements imposed under draft Article 4a through convergent regulatory practice. To this end, the Committee of European Securities Regulators could play a significant and positive role in assessing the kinds of concrete circumstances in which supplementary financial information may be needed, and providing guidance as regards the uniform application of the new requirements in all Member States.

Change of accounting reference date

Finally, paragraph 3 of the draft Regulation makes a technical amendment to item 20.1 of Annex I to Regulation (EC) No. 809/2004, in order to clarify the extent of historical financial information that must be included in a prospectus in a case where the issuer has changed its accounting reference date during the three year period for which historical financial information is required. Where necessary, this amendment will feed through to supplementary financial information (relating to an entity other than the issuer which changed its accounting reference date) by virtue of the cross-reference to item 20.1 in paragraph 2 of draft Article 4a.

[10] Article 6(1) requires Member States to ensure that a minimum set of persons are legally responsible for the information disclosed in a prospectus. Those are, as appropriate: the issuer or its administrative, management or supervisory bodies; the offeror; the person asking for admission to trading on a regulated market; or the guarantor.