

COMMENTS OF SEG
ON THE SUPERVISORY FUNCTIONING OF THE PROSPECTUS DIRECTIVE AND
REGULATION no 809

1. Obstacles to the proper functioning of the “passport”, and divergent practices, in Member States that pose a risk for the proper functioning of the single market.

1. Lack of harmonization

Implementation of the Prospectus Directive and Regulation 809 did not eliminate differences in the prospectus regimes that occur on the markets to which the Prospectus Directive applies.

The reasons for the situation is that national competent authorities imposed on companies requirements which go beyond the Prospectus Directive. Sometimes the national competent authority, ignoring the regulations of other binding bills in the Member State, imposes the Directive’s requirements, double previous requirements. Official translations of the Prospectus Directive and Regulation 809 are also burdensome. Official texts in different languages sometimes diverge in relevant aspects. In conclusion, the main goal of harmonization has not been achieved, neither has the expectation that changes will simplify the procedures and reduce costs. On the contrary, multiplication of the obligations raise the costs, similarly to tightened requirements on the national level, increase burdensome applying requirements; sometimes it obliges to double the obligations.

Obligation to publish a prospectus (article 3 section 1 and 3):

The principle that every offer of securities made to the public needs a prospectus is too burdensome for companies that already comply with applicable notification obligations and publish current reports. In our opinion, companies that already offered their securities during, for example, the last 18 months and comply with notification obligations without any reservations from the local authority, should be excluded from the obligation to publish a prospectus. In these cases the introductory document should only mention the conditions of the offer and aim of the issue, indicating a place where the reports which investors need to evaluate the company, are published.

The obligation to make a prospectus should be limited to the following instances: (i) changing the market of issuing (ii) spreading the offer of securities on new markets.

A similar solution was in force on the Polish market before implementation of the Prospectus Directive, facilitating completing the next offers. Conforming the requirements to Prospectus Directive not only caused resignation from this solution, but leads to standardization of the content of the introductory documents into the content of a prospectus (directive’s requirement about the uniformity of prospectus documents and applying them to the approval procedure. In conclusion, the directive’s exclusion from the obligation to prepare and publish a prospectus disappear. Many issuings of shares, which are outside the prospectus regime, require different introductory documents, which in fact means that a document similar to a prospectus is created, with the same approval procedure and annexing, compatible with the Directive.

Responsibility for a prospectus (article 6): The matter is left to national legislation, and the result is that there are different rules in Member States. It would be useful to clarify which liability regime applies in case of cross border offerings on different markets.

Time lines (article 13): National authorities do not cope with the time lines set forth by the Prospectus Directive, which does not provide for peremptory terms and sanctions up to the authorities in case of failure of the offer, in case of changing the conditions regarding the company which lengthen the approval process.

Supplements to a prospectus (article 16) for companies whose shares are admitted to trading on a regulated market, this article means that they have to make notifications twice; as a current report informing the market immediately (during 24 hours) about the event; as an annex which needs to be approved by the competent authority within 7 days. In conclusion, information which has to be approved is known to the participants of the market, which is burdensome, and can lead to lengthening an offer (after approving of the annex the issuer has to be given adequate time to be able to withdraw from a subscription).

Historical financial information and pro forma data: in this regard, the regulation foresees precise and exhaustive provisions. In spite of that, national competent authorities provide for additional provisions. It should be necessary to prevent such national practices which make the procedure more expensive and burdensome.

2. Range of investment opportunities and level of disclosure and protection that a prospectus regime provides investors.

It appears that from the aspect of protecting investors, the schemes for prospectuses provided for by the Prospectus Directive and Regulation do not increase the level of disclosure and protection. The exception is, of course, an investor's right to withdraw from a subscription, after publishing of an annex (supplement) to a prospectus.

3. Usefulness of CESR's Q & A on prospectuses

Questions and answers on a prospectus are a useful and flexible tool for the correct interpretation and application of the Prospectus Directive and Regulation. In our opinion, what is needed is to assure frequently up- dating of comments, and applying them also to other issues from other directives regulating the securities market.

Finally, we would like to propose the following changes to Regulation 809/2004:

1. Annex I (6.2) (business overview) : product separating in connection with income can be very burdensome and contain important information for a competitor, while not of material importance for investors.

2. Annex II (19) (related party transactions): the criterion of significance needs to be applied to transactions that are to be described in a prospectus. At present, a description is required for all related party transactions during the period covered by historical financial information.