

COMMITTEE OF EUROPEAN SECURITIES REGULATORS

Response to call for evidence by CESR on 13 November 2006

This response is a submission made on behalf of the Irish Proshare Organisation, an independent national association within the Irish Business and Employers Confederation (IBEC), which is engaged in promoting forms of employee financial involvement in Ireland.

This response is specifically related to obstacles to the implementation of employee share schemes in the European Union caused by the Prospectus Directive 2003/71/C and the Commission's Regulation on Prospectuses (EC 809/2004) as currently applicable in the European Union's Member States.

This submission relates primarily to the inappropriateness of applying a prospectus and passport requirement to non-EU parent companies who offer share schemes to their European employees, and divergent practices in Member States in respect of employee share scheme offers.

A) Restriction on Employee Share Scheme Exemption

Employee share schemes currently benefit from an exemption from the requirement to issue a prospectus under Article 4(1)(e) of the Prospectus Directive. However, this exemption is limited to employee share scheme offerings by employers who have shares listed on a "regulated market".

The definition of "regulated market", which is limited to designated stock exchanges of individual European Union countries, is inappropriate in this context, and gives rise to distorting effects in the European Union market. The definition excludes a number of exchanges within the European Union, such as the AIM in London. While this may be justified, the exclusion of all stock exchanges outside the European Union is inappropriate in the context of employee share schemes. This is because non-EU listed companies, particularly those listed in the USA, are more likely to have established remuneration policies under which they make regular offers to employees, usually on favourable terms.

The exemption for employee share schemes should be extended to include, at a minimum, offerings by employers who are listed on the New York Stock Exchange and NASDAQ. In addition, other fully regulated stock exchanges throughout the world, such as the Tokyo, Toronto and Zurich stock exchanges, should be included.

The exclusion of all non-EU exchanges has created unnecessary market distorting difficulties for multinational companies operating in the European Union. We cite a number of particular examples below:

- o Offers under an Irish Revenue approved tax-efficient share scheme operated by a US listed company were suspended on the basis that no exemption to a prospectus filing requirement was available. The size-related exemptions for offers to less than 100 people and for consideration of less than €2.5m were too small for this company.
- o A pan-European share purchase scheme operated by a US listed company had to be amended, so that employees in certain EU countries only take a cash equivalent, rather than shares in the company, thus discouraging share ownership in the employer.
- o A US listed company that has a listing in the EU of a particular type of security (but not its common stock) is able to avail of the employee share scheme exemption in Ireland as the Irish Regulations do not specify that the listing must be the same security as that offered to employees. However, the same company faces uncertainty in other EU jurisdictions as to whether the offer in Ireland must count towards the size-related exemptions in those other countries e.g. in calculating consideration for the €2.5m exemption.

The creation of barriers to employers with non-EU listings offering employee share schemes to their European staff will potentially detract from inward investment into the European Union and serves no positive regulatory purpose. It also discourages employers with non-EU parent companies from offering EU employees regular investment opportunities in the company's shares e.g. on an annual basis, as the costs of preparing a prospectus each year are perceived to outweigh the benefits of the employee offers.

B) Repeat Offers to Employees

If a prospectus is to be filed, it would be preferable for a company to have to file only once in respect of a particular scheme, so that all subsequent offers under that scheme are covered by the prospectus, provided all terms and conditions remained the same, with the exception of the relevant price payable, if any, for the shares for a particular offer.

C) Variations in Interpretation by Member States

Other issues that have arisen in the context of employee share schemes relate to variations of interpretation between EU Member States. For example:

- o CESR has offered guidance on stock options (Ref: CESR/06-296d), in particular to confirm that employee share options should not be regarded as transferable securities. However, as you will be aware this guidance was subject to a caveat as Germany, Italy and Poland have diverged from this position.
- o CESR has not recognised that employee share schemes may offer other types of share based award apart from share options. This has resulted in uncertainty in many jurisdictions as to whether the guidance on share options can be extended to other non-transferable employee awards.
- o The uncertainty about the availability of the employee share scheme exemption means that companies are looking to other exemptions for their employee share offers, in particular the 100 person limit and the €2.5m limit. However, in many cases because it is not possible to ascertain whether a particular employee offer should count towards either of these limits, it is difficult to ascertain whether those other exemptions are available.
- o We are aware of differences of opinion between jurisdictions as to whether the employee share scheme exemption is available only in respect of offers of securities of the same type as those listed in the EU, or whether a company with any listing of any type of security on a recognised exchange in the EU is sufficient.

The CESR, as the organisation which has taken the most positive and pro-active approach to the Prospectus Directive to date, is requested to put its authority behind calls to amend this particular provision of the Prospectus Directive. In the interim, it would also greatly assist companies and their advisers if further and more extensive guidance can be given in this area.

D) Q&A Section on the CESR Website

We wish to confirm that the CESR's Q&A on prospectuses is an extremely useful document, and one of the most helpful that has been published since the implementation of the Prospectus Directive. We would encourage the CESR to continue to provide such helpful guidance in the future.

December 18th 2006