

With respect to the effect of the exemptions for the admission to trading of shares resulting from options issued to employees we would like address the following issue.

In the event options are granted to employees these are in most cases non-transferable options. These options qualify as non-prospectus directive securities.

Grant of option

Article 3 paragraph 1 of the Dutch Securities Supervision Act ("Wte") states that it is forbidden to offer securities without a prospectus. Securities means transferable securities (the so called "Bte securities") or prospectus directive securities as described in article 1 sub a Decree Securities Supervision ("Bte"). The options are non-transferable and therefore do not qualify as Bte securities. As a result thereof the granting of the option is not covered by the prospectus directive. The offering of the options falls under article 3 paragraph 4 Wte: it is forbidden to offer other securities (being non-Bte securities, i.e. the options) without a prospectus. However, an exemption is foreseen in the event the securities are offered to, in short directors, supervisory board members and employees of the issuing company (article 1i paragraph 1 sub b Exemption Regulation Wte).

At some point the options will be exercised. Cesr stated in its Q&A that the exercise of the option is not an offer of the underlying shares. There is only one offer. Being the granting of the option. The double offer doctrine (One offer at the time of offering the convertibles and one offer at the time of conversion) (twee aanbiedingenleer) used by the AFM for convertibles is not applicable to the granting of options.

In the event the options are exercised and the underlying shares (as a result of the exercise) are admitted to trading the question arises whether the admission is exempted from the prospectus duty or not.

Admission to trading

The exemption of article 1d sub f of the Exemption Regulation Wte states that there is an exemption of the prospectus duty in the event the securities that are offered to, in short directors, supervisory board members and employees of the issuing company are admitted to trading and these securities are the same class as the shares already admitted to trading. To apply for this exemption there must be an offer of Bte securities. However in this case it relates to the admission of securities resulting from the exercise of the option but the exercise is not an offer of Bte securities because only the granting of the option (non-Bte securities) is an offer (see remarks above about the Cesr standpoint). The AFM is of the opinion that this exemption of the prospectus duty does not apply to the admission of securities as a result of the exercise of employee options. As a result thereof the situation arises that in the event securities are directly offered to employees no prospectus duty exist because an exemption applies but in the event the securities result from the exercise of a non-transferable option there is a prospectus duty in the event the securities resulting from the exercise are admitted to trading.

Applying for the exemption of article 1d sub 9 Exemption Regulation Wte (conversion exemption) is of no use either because this exemption applies to the admission to trading of securities resulting from the exercise of rights attached to Bte securities. The options are no Bte securities because they are non-transferable. De securities therefore do not result from the exercise of rights attached to Bte securities. This approach is also followed by the AFM.

The AFM is of the opinion that a security has to "enter" the prospectus directive once. In the event of the employee options this means that at the time of granting the options you do not enter the prospectus directive because the option is non-transferable and therefore the directive does not apply. The exercise of the option is not an offer (see Cesr) and therefore the prospectus is only entered at the stage of the admission to trading of the underlying securities and at that stage, no exemption applies because of the abovementioned reasons.

Cesr has been very clear in the Q&A about the fact that in the event of granting option there is solely one offer and that is the moment the option is granted. There is no offer at the moment of exercise. Cesr did not comment on the prospectus duty in the event the securities resulting from the exercise of the option are admitted to trading.

In the event there is a prospectus duty for the admission to trading of securities resulting from the exercise of the option this is burdensome for the issuing companies granting options to employees. The issuing company needs to decide to grant transferable options (which is undesirable) or they need to issue securities directly to employees because then the exemption applies. The question to be addressed to Cers is to get clarity on this issue. Also because the AFM is very strict in its approach and this results in a undesirable situation for issuing companies.