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Public statement

CESR starts work on Employee Share Scheme Prospectuses:

European Commission's request to CESR for assistance on employees share schemes

CESR is publishing today a letter from Commissioner Charlie McCreevy to CESR's Chairs requesting CESR's assistance on the issue of employee share schemes. The European Commission is requesting regulators to adopt a common light-touch approach under the Prospectus Directive and Regulation for offers to employees.

The work requested by the Commission fits well into CESR's Prospectus Expert group's current work plan. Following market participants' comments on the need to remove existing obstacles for offers to employees (par. 113 to 121 CESR's Report on the supervisory functioning of the Prospectus Directive and Regulation (Ref.CESR/07-225)), CESR has decided to undertake Level 3 work on this issue to alleviate, to the extent possible, the negative impact that the Prospectus Directive appears to be having on employee share schemes until new legislative actions can be undertaken.

Following this letter from the European Commission, it is CESR's intention to analyse the possibility to agree a short-form disclosure regime for offers to employees in those cases where a prospectus is required. In particular, CESR will discuss the application of Article 23.4 of the Prospectus Regulation with the aim to permit the omission of certain information requirements contained in the different Annexes, on the basis that they may not be pertinent to the specific case of an offer to employees.

Given the urgency of the European Commission's request and the fact that this situation is causing serious difficulties for some employers with a consequent negative effect on EU employees, CESR intends to follow a fast track procedure to publish its views on this issue. Therefore, CESR will probably publish its views in the form of Questions and Answers, thus updating CESR document on "Frequently asked questions regarding Prospectuses" (Ref. CESR/07-651).

At this stage, CESR does not envisage to undertake a formal consultation process. Market participants have already expressed their concerns on this issue in several CESR consultation processes, and have provided their views on possible solutions. Nevertheless, CESR will welcome further feedback and encourages market participants to send their comments on this issue by 31 January 2008 to the following email: prospectus@cesr.eu.



Annex

Letter received from European Commission requesting assistance on employees share schemes

CHARLIE McCREEVY
MEMBER OF THE EUROPEAN COMMISSION

B-1049 BRUSSELS

11.09.2007 D/001751

Mr Eddy Wymeersch,
Chairman CESR
11-13 Avenue de Friedland
F - 75008 Paris

Subject: Request for assistance on employee share schemes

Dear Eddy,

In my letter of 18th July, I referred to the problems that the Prospectus Directive is causing for a number of companies that operate share schemes for their European employees. I am very concerned by the negative impact that the Directive appears to be having on equity participation schemes in the EU. As you may be aware, the application of the Directive is uneven and essentially arbitrary. This is because the organising concepts in the PD do not map onto the various forms taken by employee participation schemes. Some share schemes that are structured as an offer of non-transferable options are outside its scope entirely, so no prospectus is required. However, others that involve the direct purchase of shares (whether immediately or at the end of a savings period) are caught and will be subject to the requirement for a full equity prospectus unless an exemption is available. However, the fact that a prospectus is required for some forms of scheme but not for others cannot be justified in terms of substance: there is no discernible difference between the various formal arrangements in terms of the potential benefits or risks for the employee.

This is unfair to employers who may be restricted in the forms of scheme they offer by other legal considerations such as tax treatment, and also disadvantages those employees whose share schemes have been or may be suspended as a result of the increased and, arguably, unnecessary burdens imposed on employers by the PD. In my view, the requirement to produce a full equity prospectus for offers made in the context of an employee share scheme is not an effective means of informing employees about the risks and benefits of this very particular kind of offer, and imposes excessive costs on employers that are not justified in terms of investor protection.

Accordingly, we envisage that, in the wake of our review in 2008, the Commission will propose an amendment to the Directive to alleviate these problems, possibly by widening the current exemption for offers to employees.

In the meantime, I promised that we would come forward with proposals for a light touch application of the Prospectus regime to employee share offers, which I would encourage regulators to apply pending the likely amendment to the Directive. There is a good regulatory precedent for a light touch approach. As you may know, offers to employees were excluded from the predecessor to the PD – the 1989 Public Offers Directive (89/298/EEC). Accordingly, it was left to the discretion of Member States whether to regulate the disclosure required for such offers. Statistics provided to us by an international law firm indicate that 16 of the 25 Member States surveyed did not regulate employee share offers as public offers at all. Of the 9 Member States that did, 4 required various notifications and filings rather than the publication of a prospectus, and at least 2 allowed a 'light touch' level of disclosure rather than a full equity prospectus.



We believe that there is sufficient legal basis for regulators to adopt a light-touch approach under the Directive and the implementing Regulation. The overriding standard for a prospectus is set out in Article 5 PD, which provides that a prospectus should contain all the information which is necessary to enable investors to make an informed assessment of the issuer and the securities. Article 7 PD indicates that when prescribing the minimum information, the Commission should take account of, among other things, the various types and characteristics of offers, suggesting that different disclosure may be appropriate for different kinds of offer. While the implementing Regulation does not currently impose different information requirements for different kinds of offers, Article 23(4) does provide that, by way of derogation to the detailed items set out in the various Annexes, prescribed information may be omitted from a prospectus if it is not pertinent to the issuer, *the offer*, or the securities.

In our view, these provisions would support a short-form disclosure regime for offers to employees in those cases where a prospectus is required. The items specified in Annexes I and III to the Regulation (the schedules for registration document and securities note for shares) are drafted with regard to the information needs of the 'arms length' investors that are likely to participate in a standard IPO. The participants of an employee share scheme are unlikely to need the same information as investors that are not otherwise involved in the business of the issuer. In determining the information needs of employees, it is relevant to take into account the fact that they will almost certainly receive information about their rights and benefits under the scheme from a source other than the prospectus. The specific nature of offers made in the context of an employee share scheme, the particular relationship that scheme participants have with the issuer, and the availability of other explanatory material and scheme documentation all suggest that a significant amount of information that would otherwise be required in an equity prospectus is not pertinent to employee share offers and may be omitted in accordance with Article 23(4) of the Regulation.

I would appreciate the support of CESR in encouraging regulators to use this power in relation to share scheme prospectuses, so as to alleviate the disproportionate burdens imposed by the Directive until they can be addressed through legislative amendment.

A common approach is obviously necessary to ensure the harmonised application that is fundamental to the operation of the Prospectus regime. I would therefore ask CESR to co-ordinate work on which information items are likely to be pertinent to share scheme offers, and which are not. This could be done by examining the relevant Annexes item by item, but such work may be difficult since in practice omissions would be decided in relation to each particular prospectus, having regard to circumstances of the individual case. It might therefore be more productive if competent authorities agree as a matter of principle the typical information needs of share scheme participants and, conversely, the information that is not pertinent to a typical employee share offer. If such principles are established and made public, companies and regulators could then apply them to the circumstances of the particular case.

Given the ongoing difficulties that the Prospectus Directive is causing for some employers, and the possibility that EU employees might lose employee benefits as a result, I should be grateful if this work could be prioritised. My officials are ready to assist in any way that they can.

I am very grateful for your help.

Yours sincerely,

Charlie McCreedy