

# EUROPEAN CENTRAL BANK

## OPINION OF THE EUROPEAN CENTRAL BANK

of 16 November 2001

**at the request of the Council of the European Union on a proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading (COM(2001) 280 final)**

(CON/2001/36)

(2001/C 344/05)

1. On 5 July 2001 the European Central Bank (ECB) received a request from the Council of the European Union for an opinion on a proposal for a Directive of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading (COM(2001) 280 final) (hereinafter referred to as the 'proposed Directive').
2. The ECB's competence to deliver an opinion is based on the first indent of Article 105(4), of the Treaty establishing the European Community (hereinafter referred to as 'the Treaty'), since the proposed Directive constitutes an instrument essential to ensure the integrity of the Community financial markets and to enhance investor confidence in those markets and contains provisions with a bearing on the issuance of securities by the ECB. The ECB also notes that Article 105(1) of the Treaty and Article 2 of the Statute of the European System of Central Banks and of the European Central Bank state that the ESCB shall support the general economic policies in the Community. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the ECB, this opinion has been adopted by the Governing Council of the ECB.
3. The main objective of the proposed Directive is the introduction of a single passport for issuers offering securities at European Union level. It provides the possibility of offering securities or admitting securities to trading on the basis of a simple notification of the prospectus approved by the home competent authority. In order to attain this objective, the proposed Directive introduces the necessary harmonisation of the rules applicable to public offer and of the information contained in a prospectus thus ensuring equivalent protection for investors at Community level. The disclosure standards introduced by the proposed Directive are in line with international standards regarding public offer of securities and admission to trading.
4. The ECB generally welcomes and supports the aims pursued by the proposed Directive, as the ECB sees the proposal as an effective means of advancing European financial markets integration. The Eurosystem has a keen interest in the developments of financial markets. The achievement of the primary objective of the Eurosystem, the maintenance of price stability, requires that monetary policy impulses be transmitted in a smooth way throughout the euro area by means of integrated and efficient financial markets. Securities markets, together with the unsecured money market and the banking sector, play a key role in this respect. The existence of some degree of segmentation of financial markets in the jurisdiction of a central bank is not an uncommon phenomenon. However, obstacles to the integration of securities markets in the euro area may slow down or distort the transmission of monetary impulses to the economy. In addition, the Treaty states that without prejudice to the objective of price stability, the Eurosystem shall contribute to the achievement of the objectives of the Community. A prominent objective of the Community is to achieve balanced and sustainable development, by establishing a common market. In this respect, the introduction of a single currency is proving to be a powerful triggering event, leading towards easier access to borrowing and investment opportunities. Ultimately, this will enhance the capacity of issuers to raise capital on an EU-wide basis, by reducing the cost of financing and improving the efficiency of the allocation of financial resources throughout the euro area. Therefore, it is in the interest of the Eurosystem that obstacles to the integration of securities markets do not thwart the full benefits of EMU.
5. Generally, efficient and integrated securities markets can facilitate economic growth and reduce the cost of raising capital in the EU. In addition, European securities markets will become more liquid, therefore attracting more investments and also more issuers from third countries. The proposed Directive, with the introduction of a single passport for issuers, will improve market access for raising capital in the EU and eliminate existing obstacles to cross-border offering of securities. On account of the new language regime for multinational offerings and admissions to trading costly translation will be significantly reduced. Regulatory compliance will be simplified, since host Member States will be deprived of the possibility of requiring adherence to additional national rules. As a consequence, raising capital should become easier and cheaper for companies of all sizes. The introduction of harmonised and enhanced disclosure standards in line with international standards for public offer of securities

and admission to trading is likely to increase investor confidence, in particular as regards investing on an EU-wide basis. However, a high level of disclosure has to be balanced against the need for an efficient issuance process, with costs proportional to the size of the issuing company and the type of security issued. Standardised, easily available and regularly updated information will improve and widen the basis for well-founded decision making by investors. The positive implications of the proposed Directive for both issuers and investors will enhance the ability of the financial markets to fulfil their function of efficient capital allocation, as they become more liquid and efficient. Moreover, the ECB holds the view that the enhancement of issuer disclosure will favour selection by investors of new investment projects and reduce information asymmetry, leading in turn to greater market liquidity. The ECB also notes that the above-mentioned benefits are in principle a consequence of any enhancement in corporate disclosure. In this respect, the ECB notes that the Lisbon European Council urged that steps be taken to enhance the quality and the comparability of corporate disclosure for listed companies, and that the Commission has already launched a number of new initiatives, which aim to build a new EU regime on disclosure requirements.

6. The ECB welcomes the proposed introduction of a harmonised definition of public offer, which will avoid different interpretations of Community rules and ensure the same level of investor protection throughout the EU. The ECB notes that Article 3(2) of the proposed Directive defines offers to which the obligation of publishing a prospectus does not apply as offers either to qualified investors for their account, or to a restricted circle of persons, or concerning securities which can be acquired only for a consideration of at least EUR 150 000 per investor. In this respect, the ECB welcomes the fact that clarification and adaptation of the exemptions are under comitology procedure in order to ensure the necessary degree of flexibility. In addition, the ECB notes that the definition of qualified investors should also include the ECB and the central banks of the Member States.
7. The ECB welcomes the use of the comitology procedure in the proposed Directive, as recommended by the Committee of Wise Men. Following the endorsement by the resolution of the Stockholm European Council of March 2001, the new approach aims to make the European Union securities legislation more effective and transparent, allowing adequate and timely response to dynamic market developments. Generally, the ECB holds the view that the application of the comitology procedure to securities market regulation should take account of the advisory role that the Treaty confers on the ECB, by allowing for the incorporation of the ECB's views in the regulatory process. More specifically, as regards the proposed Directive, the ECB notes that for the sake of clarity as to the application of the procedure it may be advisable either to restate in Article 22(2) the articles subject to the comitology procedure or, as a minimum, to assemble all implementing measures subject to the comitology procedure in one single article.
8. The ECB notes that Article 6(2) of the proposed Directive refers to the work of the International Organisation of Securities Commissions (IOSCO), by stating that rules concerning the information to be included in the prospectus, adopted by the Commission under comitology procedure, shall be in accordance with the information requirements set out by IOSCO, where it is possible and appropriate. The ECB welcomes the aim of bringing European securities legislation in line with IOSCO standards. The adoption of internationally accepted principles such as those enacted by IOSCO would lead to convergence of international financial systems towards a more harmonised securities disclosure regime. The ECB also notes that Article 18(1) of the proposed Directive stipulates conformity with IOSCO standards as a necessary requirement for the approval by a Member State of a prospectus drawn up for an offer or admission to trading in a third country.
9. In addition, the ECB holds the view that greater clarity could be obtained regarding the coverage of the Directive if reference was made to existing international and European standards such as ESA95. This applies in particular to the definition of the term 'securities' and the identification of the 'sector' of the issuer. While Article 2 of the proposed Directive defines the term 'securities', further elaboration is needed to obtain a common definition of securities that takes into account debt and equity securities. A possible starting point could be the definitions used in ESA95. Finally, the ECB notes that the proposed Directive shall apply to issuers except *inter alia* Member States and certain international organisations. Greater clarity would be desirable as to which economic entities are within the scope of the proposed Directive or conversely, to define which entities fall outside its scope. Again, the ESA95 definitions could be a good reference point.
10. The ECB welcomes the exclusion from the scope of the proposed Directive of securities issued by the ECB. In this respect the ECB wants to underline that this exclusion is vital for the unhampered conduct of the single monetary policy of the Eurosystem. The single monetary policy relies on a number of different instruments, *inter alia* ECB debt certificates, which might be issued with the aim of adjusting the structural position of the Eurosystem vis-à-vis the financial sector so as to create (or enlarge) a liquidity shortage in the market, in accordance with section 3.3 of the general documentation on Eurosystem monetary

policy instruments and procedures, November 2000 (Annex 1 to Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem)<sup>(1)</sup>. As the formulation and the implementation of the Eurosystem monetary policy lies within the exclusive competence of the ECB's decision-making bodies, as laid down by the Treaty, the use of the instruments necessary to fulfil that task should be as smooth and unhampered by legal and operational obstacles as possible. Consequently, the necessary degree of transparency of the conditions applicable to the securities issued by the Eurosystem will be ensured by the publication of the applicable legal documentation (the aforementioned Guideline ECB/2000/7 as well as the respective legal documentation of the national central banks). Any additional formal requirements might compromise the necessity of the Eurosystem to react quickly and flexibly to financial market developments. In the light of the above-mentioned considerations, Article 1 of the proposed Directive should also exclude the national central banks from the scope of the Directive.

11. The ECB notes that it appears desirable to clarify in the proposed Directive the regime applicable to public offers of debt securities issued by credit institutions. As regards such intermediaries, it must be taken into account that the raising of capital from the public by issuing debt instruments falls within their institutional activities, and that they are subject to public supervision and to specific transparency requirements in order to protect savings. Therefore, it could be considered retaining the provision existing in the current Directive, which allows Member States to exempt credit institutions from the obligation to publish a prospectus when the latter are issuing debt securities or other transferable securities equivalent to debt securities in a continuous or repeated manner.
12. The ECB supports the requirement that the issue prospectus shall be available in an electronic format to the general public on the websites of the competent national authorities. The information should be made available to any holder or potential holder immediately on request. In this context the ECB wants to emphasise the importance of ensuring timely publication and updates, and would therefore propose introducing a minimum time frame for publishing the prospectus before the security is issued. Regarding the detailed technical rules referred to in Article 12(7) of the proposed Directive, the ECB would suggest that they be extended to the reporting of the prospectuses (in addition to publication and availability).
13. The ECB notes that Article 19 requires each Member State to designate the administrative authority competent to carry out the duties introduced by the proposed Directive, listing the powers given to the competent authority. In the explanatory memorandum the Commission refers to the need to ensure the independence of the competent authorities, avoiding possible conflicts of interest. The ECB notes that the avoidance of conflicts of interest will gain importance as more and more exchanges are transformed into for-profit entities while these exchanges remain entrusted with listing and certain 'public functions' such as the formal approval of prospectuses. Consequently, there is a need to find appropriate regulatory means to address and solve potential conflicts of interest resulting from the changing nature of the exchanges.
14. The ECB holds the view that the proposed Directive might envisage a broader scope for supervisory cooperation. The proposed Directive refers solely to cooperation between the 'competent authority' of the home and the host Member States in the field of supervision as defined by the proposed Directive, and in particular, it does not foresee the possibility or obligation of cooperation between the competent authorities in the field of supervision under the proposed Directive and the competent authorities in the field of supervision of regulated entities (credit institutions, insurance undertakings, and investment firms and perhaps also collective asset management firms). The ECB suggests that the usefulness be considered of a provision foreseeing the possibility or even obligation of close cooperation between supervisors in the meaning of the proposed Directive and supervisors of regulated entities. Both functions may benefit from cooperation and exchange of information between the respective supervisory authorities. Regulated entities may simultaneously be involved both as 'issuer' (see Article 2(1)(d)), 'person making the offer' (see Article 2(1)(e)), and as 'the financial institution in charge of the public offer procedures' (see Article 21(1)). Transactions in these capacities with indications hinting at misconduct may give rise to reputational risk or question the adequacy of management procedures of an institution under supervision by a competent authority.
15. The ECB notes that, while it is generally understood that at least some regulated financial entities may act as 'the financial institution in charge of the public offer procedures' it is less clear how this wording, used in Article 21 of the proposed Directive, fits with the definitions used for this kind of service in the sectoral directives. The ECB suggests that it be considered using harmonised definitions to the widest extent possible. In this respect it might be clarified with regard to the proposed Directive whether 'underwriting' is encompassed

<sup>(1)</sup> OJ L 310, 11.12.2000, p. 1.

by an 'offer of securities to the public'. While the proposed Directive includes 'placing of securities through financial intermediaries' in the definition of such an offer, the Investment Services Directive (93/22/EEC) <sup>(1)</sup> in paragraph 4 of Section A of its Annex introduces a distinction between 'underwriting' and 'the placing of such issues'. Furthermore, the codified Banking Directive (2000/12/EC) <sup>(2)</sup> refers in paragraph 8 of Annex I to 'participation in securities issues and the provision of services related to such issues' when listing the activities that are subject to mutual recognition. Thus, the ECB sees benefits in a clearer identification and further harmonisation of what constitutes an offer and the placing of

securities in the proposed Directive, also in the light of the current review of the Investment Services Directive.

16. This opinion shall be published in the *Official Journal of the European Communities*.

Done at Frankfurt am Main on 16 November 2001.

*The President of the ECB*

Willem F. DUISENBERG

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<sup>(1)</sup> OJ L 141, 11.6.1993, p. 27.

<sup>(2)</sup> OJ L 126, 26.5.2000, p. 1.