

PROSPECTUS DIRECTIVE

Determination of home Member State for third country issuers with traded securities

This note expresses the views of staff members of the Internal Market DG, and does not bind the European Commission as an institution. The Commission would be entitled to take a position different to that set out in this note in any future judicial proceedings, including infraction procedures, concerning the relevant provisions. The views expressed in this note are also subject to the further caveat that only the European Court of Justice can give a legally binding interpretation of provisions of EC legislation.

Article 30(1) of the Prospectus Directive contains transitional provision in respect of the determination of the home Member State in the case of a third country issuer which already has equity securities or low denomination debt admitted to trading on a regulated market in at least one EU Member State. For Article 30(1) to apply, those securities must have been admitted to trading before, and must still be traded on that market on 1st July 2005 (the transposition deadline of the directive). In a case where Article 30(1) applies, the issuer must choose its home Member State in accordance with the mechanism for determination set out in Article 2(1)(m)(iii) and notify that decision to the competent authority of its chosen home Member State by 31st December 2005.

Article 2(1)(m)(iii) provides generally that the home Member State of a third country issuer, in respect of its equitable securities and low denomination debt, is either the Member State where securities of that kind are intended to be offered to the public for the first time after 31st December 2003, or the Member State where the first application for the admission of such securities to trading on a regulated market is made.

An offer to the public which is capable of determining the home Member State of a third country issuer must take place after 31st December 2003, whereas there is no such restriction on the timeframe in which an application for admission to trading must take place if it is to be relevant to the determination of the home Member State.¹

In the case of a third country issuer which has securities admitted to trading on a regulated market on 1st July 2005, the Commission services consider that the Article 30(1), read with Article 2(1)(m)(iii), should be interpreted as follows –

- (i) where an issuer does not make an offer to the public in the period between 31st December 2003 and 31st December 2005 (the date by which its choice of home Member State must be notified), its home Member State is a State which is eligible by reason of the admission of the securities of the issuer to a regulated market;
- (ii) where an issuer does make an offer to the public which is capable of determining its home Member State in accordance with Article 2(1)(m)(iii) in the period between 31st December 2003 and 31st December 2005, it may choose as its home State either the State where that offer is made, or the State which is eligible by reason of the admission of the securities of the issuer to a regulated market. That choice may be made at any time before 31st December 2005.

How to determine the State which is eligible by reason of the admission of the securities of the issuer to a regulated market

¹ In a case where Article 30(1) does not apply, only an admission to trading taking place after 1st July 2005 is capable of determining the home Member State of a third country issuer under Article 2(1)(m)(iii).

A *Securities admitted to trading on a regulated market in one Member State*

Where a third country issuer has equity securities or low denomination debt admitted to trading on a regulated market in only one Member State on 1st July 2005, that will be the State which is eligible by reason of the admission of the securities of the issuer to a regulated market.

If an offer of equity securities or low denomination debt to the public has not been made in a Member State before the 1st July 2005, but one is made between that date and the 31st December 2005, the State where that offer is made is eligible to be chosen (over the State where the issuer's securities are admitted to trading) as the home Member State of that issuer.

B *Securities admitted to trading on a regulated market in more than one Member State*

Where a third country issuer has securities admitted to trading on a regulated market in more than one Member State on 1st July 2005, the Commission services take the view that the issuer may choose its home Member State between –

- (a) any of those States where the issuer has equity securities or low denomination debt admitted to trading on a regulated market at that date; and
- (b) the Member State where the issuer first makes an offer of equity securities or low denomination debt to the public after 31st December 2003.

If an offer to the public has not been made in a Member State before the 1st July, but one is made between that date and the 31st December 2005, the State where that offer is made is eligible to be chosen (over a State where the issuer's securities are admitted to trading chosen in accordance with (a) above) as the home Member State of that issuer.

This interpretation of Article 2(1)(m)(iii), as read with Article 30(1), does not require the issuer to identify the State where the *first* application for admission to trading was made. As a matter of legal construction, an application for admission to trading taking place before the transposition deadline of the Directive cannot² determine the home Member State of an issuer for the purposes of the Directive. The determination is made by a choice which takes place after that deadline, when the provisions of a Directive have effect.

In the view of the Commission services, the best way of reconciling that point of construction with the text of Article 2(1)(m)(iii) in a case where Article 30(1) applies is to interpret the reference in that provision to the Member State where the first application for admission to trading is made as a reference to the State where the securities are already traded. That is consistent with the general purpose of Article 30(1), which - because it makes specific provision for those issuers - clearly implies that Article 2(1)(m)(iii) should operate differently in relation to third country issuers which already have securities admitted to trading as compared with those that do not. The reference to the first application for admission to trading does not narrow the States which are eligible to be the home Member State of such an issuer in this context, because the States where an issuer has securities admitted to trading are, as it were, 'equal first' as at the 1st July when the Directive is required to have effect in Member States. Accordingly, the third country issuer may choose as its home Member State any State where it has equity securities or low denomination debt admitted to trading on a regulated market at 1st July 2005.

² In the absence of express provision of the kind included in Article 2(1)(m)(iii) in relation to offers to the public.