

## INTERNATIONAL PRIMARY MARKET ASSOCIATION

### URGENT NOTICE FOR NON-EU ISSUERS OF SECURITIES

**As from a date in November 2003, non-EU issuers of equity or low-denomination debt securities to be offered to the public or listed within the EU will be permanently restricted in where they may apply for approval of an EU prospectus for such securities in future. They will have one single limited opportunity to choose the country where their prospectuses are approved, and where they file their ongoing disclosure, for all such securities in future. They should ensure that, in practice, their first listing of such securities after the relevant date is in the EU country they wish to choose permanently.**

The new EU Prospectus Directive is in final form but is not yet law in the EU Member States. One of its provisions, however, will effectively have retroactive effect as from its date of "entry into force", which will be determined by publication in the Official Journal and is expected to be a date in November 2003. The provision concerns the choice of mandatory home Member State for issuers from outside the European Union. "Home Member State" means the country where issuers must apply for approval of a prospectus and where they must file their ongoing disclosure. Member States may have different language requirements. The Directive does contain a provision that provides some transitional relief for issuers whose securities are currently listed on an EU stock exchange.

Issuers currently have a free choice of where they list their securities within the EU, and, hence, where their prospectus is filed. The Directive restricts this choice as from the date of entry into force of the Directive. After this date, non-EU issuers will have a single opportunity to nominate as their home Member State for all future issues of equity securities (including convertible bonds) or debt with a denomination of less than €1,000 (or near equivalent amount in another international currency) the EU country *either* where an issue of such securities is first listed *or* where such an issue is first offered to the public.

Both EU and non-EU issuers will still have a free choice of home Member State separately for each issue of straight debt securities with a denomination of €1,000 or more.

IPMA therefore advises each potential non-EU issuer:

- To take independent advice before structuring the first securities it intends to be listed or distributed in the EU after the date of entry into force of the Directive, which is expected to be in November 2003.
- To ensure that its first listed issue of equity or low denomination debt securities after the date of entry into force of the Directive is listed only in the Member State which it wishes to choose as its permanent home Member State for such securities.
- To notify the authority in its chosen home Member State of the choice before 31 December 2005.
- That there is no certainty as to what amount in other currencies might be "nearly equivalent" to €1,000. Issuers should therefore be very cautious.

Once the first issue is listed as above, issuers are free to list and offer elsewhere until the Directive is transposed into national law in the Member States in 2005.

5 November 2003

## QUESTIONS AND ANSWERS ON THE DETERMINATION OF THE HOME MEMBER STATE

### *Question 1: To which issuers does the IPMA Notice apply?*

The IPMA Notice to the Market is addressed to all issuers incorporated or organised outside the EU (including non-EU corporate issuers, banks, supranationals, sovereign, sub-sovereign and quasi-sovereign issuers) who, at any time in the future, may wish to issue or already have issued in the EU any type of (i) equity securities including convertible bonds of any denomination or (ii) non-equity securities in a denomination of below €1,000 (or its near equivalent in any other currency) (**Equity and Low Denomination Securities**). It points out that such issuers need to exercise extreme caution when they first offer or list such securities in the EU as from **November 2003** the new EU Prospectus Directive (the *Directive*) means that this action will fix **for all time** the EU Member State responsible for approving a prospectus in respect of such securities.

### *Question 2: What is the function of the Home Member State under the EU Prospectus Directive?*

The home Member State under the Directive is the EU country where the competent authority (stock exchange or securities regulator) will be responsible for the approval of a prospectus. Once a prospectus is approved by the home Member State, it will then be valid for a public offer or admission to trading of securities in any other Member State (the *host Member State*), provided only that the competent authority of the host Member State is notified. The home Member State can require that the prospectus is drawn up in a language accepted by it which, depending on the Member State, may not include English.

### *Question 3: What determines the Home Member State for non-EU issuers and when will this be determined?*

The relevant home Member State will be determined on a date after the Directive enters into force. The European Commission currently expects the Directive to enter into force in November 2003, but the date is not fixed. The first listing or public offer of Equity and Low Denomination Securities by any non-EU issuer after the date of entry into force of the directive will permanently fix the home Member State for the purposes of the Directive for such Equity and Low Denomination Securities. The home Member State will be that Member State where the securities are listed or offered to the public.

### *Question 4: How does the choice of home Member State affect the position of the issuer under the Transparency Directive?*

For non-EU issuers of Equity or Low Denomination Securities, the home Member State under the Transparency Directive is the same one chosen under the Directive.

### *Question 5: What is the treatment of Tier 1 bank capital?*

Tier 1 bank capital is not distinguished from other securities. Therefore, if it is in denominations of US\$ 1,000, and this is found not to be “nearly equivalent” to € 1,000, then the relevant home Member State will be the same as for other issues of Equity and Low Denomination Securities. Issues of Tier 1 capital with a denomination of € 1,000 will benefit from the choice of home Member State.

A number of different types of instrument qualify as Tier 1 capital, and Article 2.1 (b) of the Directive will determine whether a particular instrument will qualify as “equity” or “non-equity” for the purposes of the Directive and hence how the home Member State for the relevant issue is determined under Article 2.1 (m) (iii).

***Question 6: All securities outstanding at the date of entry into force of the Directive will need a home Member State with which to file annual information under Article 10 of the Directive. If the issuer neither lists nor offers to the public any further securities, how does it choose its home Member State for this purpose?***

Although Article 30.1 of the Directive appears to intend to create a different regime in these circumstances but its effect is unclear. IPMA has consulted the European Commission, which has provided a non-binding interpretation. The Commission's advice is stated to be advisory only and subject to subsequent changes in the Commission's views and any interpretation by the European Court of Justice.

The Commission has advised that an issuer with outstanding securities listed on an EU stock exchange on the date the Directive enters into force will have as its home Member State the country in which its securities are listed; provided, however, that if such an issuer lists Equity or Low Denomination Securities on an EU stock exchange after the Directive enters into force and it has not notified the competent authority of its choice under Article 30.1, the Member State where the new Equity or Low Denomination Securities are listed will be the home Member State.

However, if the issuer has given notice pursuant to Article 30.1, the choice made by that notice cannot be overridden by a later issue.

If the issuer has Equity or Low Denomination securities listed on more than one EU exchange in two or more Member States at the date of entry into force of the Directive, it is not clear which Member State will be its home Member State.

Non-EU issuers wishing to benefit from certainty as to their home Member State may wish to list an issue of Equity and Low Denomination Securities in the Member State they would like to be their home Member State for all outstanding securities and for all future issues of Equity and Low Denomination Securities before 31 December, 2005 and not to rely on notification to a competent authority pursuant to Article 30.1.

The Commission's advice does not refer to new public offers.

***Question 7: What should non-EU issuers do to fix into a particular Member State?***

In practice, non-EU issuers which have made a decision as to which state is their chosen home Member State should consider listing any Equity and/or Low Denomination Securities first in their chosen Member State after the Directive enters into force. In making their choice, issuers should consider whether the Member State will be able to deal appropriately with applications for approval of a prospectus and the language requirements which may apply.

It should be noted that the issuer has a choice under Article 2.1 (m)(iii) of the Directive between using its first application for admission to trading (which for these purposes includes an application for listing) after the Directive enters into force or its first offer to the public in a Member State to determine the home Member State. As it is always clear whether an application for listing has been made, and this is something which is in the control of issuers, we suggest that issuers should use a listing as the trigger for their choice of home Member State.

IPMA suggests that issuers keep a record of their first listing in a Member State after the Directive comes into force as evidence of their chosen home Member State.

***Question 8: What types of activities could ‘accidentally’ lock an issuer into a particular home Member State?***

As examples, here are some types of issuance that could trigger a ‘lock in’ to an unintended Member State. There are many other types of issuance that could trigger a ‘lock in’.

- Non-EU issuers with equity listed on EU exchanges may frequently and automatically list ‘new’ equity pursuant to share option schemes and employee share ownership plans. Depending on where the application is first made after November 2003, the home Member State will be fixed for all time.
- MTN Programmes or one-off debt issuance. Given the €1,000 benchmark, if an issuer does an issuance in a denomination of US\$1,000 which, given the exchange rates at the time, is not “nearly equivalent” to €1,000 and for marketing purposes decides to list this on, for example, the Athens Stock Exchange then notwithstanding that the issuer’s usual listing is on London or Luxembourg it would have locked into Greece as its home Member State for all time for all Equity and Low Denomination Securities. There is no guidance now (and none is expected for some time) on what amount in currencies other than the euro would be nearly equivalent to €1,000.

***Question 9: Are there any circumstances where the home Member State can be changed?***

No. The home Member State for the purposes of Equity and Low Denomination Securities cannot be changed once it is determined. However, if a non-EU issuer issues non-equity securities in a denomination of €1,000 or above (***Higher Denomination Securities***) (or its near equivalent in any other currency), it will have the ability to choose a different home Member State for the purposes of each issuance of Higher Denomination Securities (that is, the choice can be made on an issue by issue basis in respect of Higher Denomination Securities and irrespective of its home member state for Equity and Low Denomination Securities).

***Question 10: Can different companies in a group have different Home Member States?***

Yes. The choice of home Member State for Equity and Low Denomination Securities is made on an issuer-by-issuer basis with the result that different non-EU subsidiary companies within a group may have different Member States to be their home Member State. Special purpose vehicles are treated as any other issuer.

***Question 11: What about the case where an issue is guaranteed?***

Where an issue is guaranteed the home Member State for the purposes of the issue will be determined by reference to the issuer. If the issuer is registered in an EU Member State, its home Member State for Equity and Low Denomination Securities will be the Member State in which it is registered, regardless of the home Member State of the guarantor.

***Question 12: What about EU issuers? Does this apply to them?***

No. EU issuers, including subsidiaries of non-EU issuers, are automatically locked into the Member State where their registered office is located for issues of Equity and Low Denomination Securities. However, where an EU issuer issues Higher Denomination Securities, it can choose its home Member State on an issue by issue basis for the purposes of each issuance of Higher Denomination Securities.

***Question 13: The Directive is not required to be implemented in Member States until mid-2005. What happens until then?***

Until the Directive is implemented in Member States in mid-2005, issuers will continue to be subject to the existing regime. The competent authority in the jurisdiction where the public offer is made or admission to trading is sought will continue to have jurisdiction to deal with approval of a prospectus.

***Question 14: What about the new accession countries? Could one of these become the home Member State?***

A number of accession countries (see attached list) are expected to become members of the EU in May 2004. As these countries will become Member States after the Directive enters into force, if the first admission to trading or public offer of Equity or Low Denomination Securities in the EU is made after May 2004 in one of these Member States, such Member State will become the home Member State for the purposes of the Directive. An admission to trading or public offer of any securities in any of the accession countries before their admission as members of the EU in May 2004 will not impact upon the choice of home Member State.

***Question 15: The Directive refers to “admission to trading on a regulated market”. How does this relate to listing?***

The concepts of “admission to trading” and “regulated market” are taken from the proposed revision of the EU Investment Services Directive (“ISD 2”). EU Member States will each provide a list of regulated markets within their jurisdiction, which will not necessarily be identical with the current list. Until the Prospectus Directive and the ISD 2 are fully implemented, an application for listing will constitute an application for admission to trading on a regulated market for the purposes of the Prospectus Directive. However, in future, an application for admission to trading will not necessarily constitute an application for listing.

***Question 16: What should non-EU issuers do now?***

Non-EU issuers should:

- Consider the above points in detail when they next issue securities to be listed or distributed by way of a public offer anywhere in the EU or the accession countries, and in any case by 31 December 2005.
- Take their own advice immediately on the implications of their choice of home Member State under the Directive.

**LIST OF CURRENT EU MEMBER STATES**

Austria	France	Italy	Spain
Belgium	Germany	Luxembourg	Sweden
Denmark	Greece	The Netherlands	United Kingdom
Finland	Ireland	Portugal	

**LIST OF EU ACCESSION COUNTRIES IN MAY 2004**

Czech Republic	Latvia	Malta	Slovakia
Cyprus	Lithuania	Poland	
Estonia	Hungary	Slovenia	