

In case of discrepancies between the French and the English text, the French text shall prevail

Luxembourg, 15 December 2005

To all issuers of a third country (other than a Member State of the European Union and a State which is a contracting party to the European Economic Area agreement) that fall under the scope of the law of 10 July 2005 on prospectuses for securities (the **Prospectus Law**)

CIRCULAR CSSF 05/224

Re: Choice of the home Member State for third country issuers whose securities are admitted to trading at 1 July 2005 and notification by these issuers of their choice by 31 December 2005

Ladies and Gentlemen,

The Prospectus Law transposing Directive 2003/71/EC of 4 November 2003 (the **Prospectus Directive**) provides that issuers of securities admitted to trading on a regulated market of the EEA or subject to an offer to the public in the EEA, shall have a “home Member State” whose competent authority is in charge of various aspects regarding the authorisation and supervision in relation to the issue of securities, including notably the approval of the relevant prospectus. Within the context of this circular, “issuer” means, as the case may be, an issuer, an offeror or a person asking for the admission to trading on a regulated market or a person acting on behalf of one of these persons.

As far as third country issuers are concerned, article 2(1)(h), paragraphs (ii) and (iii) of the Prospectus Law (transposing article 2(1)(m), paragraphs (ii) and (iii) of the Prospectus Directive) provides that different regimes apply to the determination of the “home Member State”, depending on whether the securities of the issuer admitted to trading on a regulated market are either equity securities and non-equity securities whose denomination per unit amounts to less than EUR 1,000 (that is, low denomination debt) respectively or other securities than those mentioned above.

As regards equity securities and low denomination debt respectively, the home Member State shall be, at the choice of the issuer, the Member State where these securities are offered to the public for the first time after 31 December 2003 or where the first application for admission of these securities to trading on a regulated market is made. As regards securities other than those mentioned above, the home Member State shall be, at the choice of the issuer, the Member State where the issuer has its registered office (this option does of course not apply to third country issuers), where the securities were or are to be admitted to trading on a regulated market, or where the securities are offered to the public.¹

As regards third country issuers which already have securities admitted to trading on one or several regulated markets, article 62 of the Prospectus Law (transposing article 30(1) of the Prospectus Directive), provides that: *“Issuers which are incorporated in a third country and whose securities have already been admitted to trading on a regulated market situated or operating within the territory of Luxembourg may choose, under Part II, the CSSF as competent authority in accordance with Article 2(1)(h)(iii) and must notify the CSSF of their decision that Luxembourg is their chosen home Member State by no later than 31 December 2005.”*

On 3 October 2005, the European Commission’s services, Internal Market DG, published an interpretative note, appended to this Circular, expressing their views on article 30(1) of the Prospectus Directive with respect to the determination of the home Member State for third country issuers which have equity securities or low denomination debt admitted to trading on a regulated market and to which article 30(1) applies (i.e. third country issuers which already have securities admitted to trading on at least one regulated market at 1 July 2005.)

In this case, in accordance with the above provisions and referring to the interpretative note, the issuer chooses its competent authority in accordance with article 2(1)(h)(iii) of the Prospectus Law (transposing article 2(1)(m)(iii) of the Prospectus Directive) and shall notify its decision to the authority of its chosen home Member State by 31 December 2005 at the latest.

¹ Article 2(1)(h)(ii) of the Prospectus Law : *“for any issue of non-equity securities whose denomination per unit amounts to at least EUR 1000, and for any issues of non-equity securities giving the right to acquire any transferable securities or to receive a cash amount, as a consequence of their being converted or the rights conferred by them being exercised, provided that the issuer of the non-equity securities is not the issuer of the underlying securities or an entity belonging to the group of the latter issuer, the Member State where the issuer has its registered office, or where the securities were or are to be admitted to trading on a regulated market or where the securities are offered to the public, at the choice of the issuer, the offeror or the person asking for admission, as the case may be;”* and article 2(1)(h)(iii) of the Prospectus Law: *“for all issuers of securities incorporated in a third country, which are not mentioned in (ii), the Member State where the securities are intended to be offered to the public for the first time after the 31 December 2003 or where the first application for admission to trading on a regulated market is made, at the choice of the issuer, the offeror or the person asking for admission, as the case may be, subject to a subsequent election by issuers incorporated in a third country if the home Member State was not determined by their choice;”*

Such issuer may thus choose between the Member State(s) where its securities are admitted to trading on a regulated market at 1 July 2005 and, where applicable, the Member State where it has made for the first time an offer to the public between 31 December 2003 (date on which the Prospectus Directive came into force) and 31 December 2005 (date on which the third country issuers which have, at 1 July 2005, securities admitted to trading on at least one regulated market, must notify their choice of home Member State). Where an issuer has securities admitted to trading on several regulated markets in different Member States at 1 July 2005, the issuer may choose between the relevant Member States.

An offer to the public is only relevant to the determination of the home Member State in this context if it takes place after 31 December 2003. Moreover, where article 30(1) does not apply (as the issuer concerned did not yet have any securities admitted to trading on at least one regulated market on 1 July 2005), an application for admission is only relevant to the determination of the home Member State under article 2(1)(m)(iii) of the Prospectus Directive if it is made after 1 July 2005. Thus, the situation as at 1 July 2005 of the admitted securities is what determines the home Member State, irrespective of the date of their admission (including securities admitted before 31 December 2003).

Issuers that chose Luxembourg as home Member State in accordance with the Prospectus Directive shall notify their decision to the CSSF **by 31 December 2005 at the very latest**. Notifications to the CSSF can be made by post or e-mail to maf@cssf.lu. The CSSF presumes, for practical reasons, that issuers whose securities were admitted to trading on the Luxembourg regulated market at 1 July 2005 have chosen Luxembourg as home Member State. Despite this assumption, the CSSF would like to stress however that this practical approach does not alter the principle that the issuers concerned are still obliged to notify to the CSSF their decision that Luxembourg is their chosen home Member State by 31 December 2005 at the latest.

Yours faithfully,

COMMISSION DE SURVEILLANCE DU SECTEUR FINANCIER

Simone DELCOURT
Director

Arthur PHILIPPE
Director

Jean-Nicolas SCHAUS
Director general

Annexe

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.