

**ANNEX 4**  
**Report on the STEP Information Memorandum**

**INFORMATION REQUIREMENTS IN THE EU**

DRAFT 12 September 2003

## **Information requirements in EU Member States**

This Annex contains brief descriptions of the existing national information requirements, as reported in the EFMLG Report,<sup>1</sup> and takes into account some recent developments in France and the United Kingdom.

### Belgium

In Belgium, for each CP programme a prospectus is to be made available in accordance with Article 5 of the Law on Commercial Paper and Certificates of Deposit of 22 July 1991 and part 2 of the Royal Decree on Commercial Paper and Certificates of Deposit of 14 October 1991. The prospectus must be lodged with the Banking Commission (CBF) and agreed by the same authority.

### Germany

In Germany, a prospectus is required under section 7 of the Prospectus Act (Verkaufsprospektgesetz) of 1998. In practice, exemptions apply in case of restricted subscribers, minimum tradable lots beyond DEM 80.000 or maturities below 1 year. Prospectuses have to be deposited with the Federal Financial Supervisory Agency (BAFin).

### Spain

In Spain, under the Law, Article 26(d)), before issue, a prospectus must be presented to and registered (with some exceptions) with the CNMV (Comisión Nacional del Mercado de Valores: Spanish securities supervision agency). The prospectus must contain enough information for an investor to make a judgement on the proposed investment. It must state the conclusion of the mandatory audits as per Article 27 of the Law, the obligations derived from the securities, and the procedure for placing the security on the market. The prospectus must follow the models approved by the CNMV (see CNMV Circular 2/1999) and fulfil a series of minimum formal requirements. Correction of mistakes or relevant ex-post information must be included in a supplement. (Decree, Article 15-23). The public offer must take place within a month of

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<sup>1</sup> Annex II to the EFMLG Report on legal aspects of short-term securities concerning commercial paper, item 5 on investors and prospectuses, 2 September 2002. One Member State, Denmark, was not covered in Annex II to the EFMLG Report and is therefore not included.

registering the prospectus with the CNMV (Decree, Article 25). In the case of international offers (i.e., including non-Spanish residents) the prospectus must include all information provided to foreign investors, even if not required by Spanish legislation. All information must be translated into Spanish (Decree, Article 26). In the case of issuers not resident in Spain, the required audit must comply with the legislation of the place of residence of the issuer. If this is outside the EU, the CNMV may require additional clarification with regard to the applicable norms. As CP tends to have a short maturity, its issue would often be exempt from the requirement for prior registration of a prospectus with the CNMV (applicable to issues with a maturity of less than 12 months).

### France

The issuers of TCN benefit from the derogation to submit a prospectus, but need to fulfil certain disclosure obligations concerning their economic and financial situation and their issuing programme. Accordingly, there is no prospectus requirements for French CP. However, under Article L. 213-4 of the French Financial and Monetary Code, the issuers of TCN are under an obligation to give certain information about their economic and financial situation and their issuing programme. A Decree specifies the content of these obligations and the conditions of publicity. The COB is responsible for ensuring that these obligations are fulfilled (especially when issuers do not provide any rating and must apply for a visa of the COB). The information document to be presented by issuers is called "Dossier de présentation financière" (information memorandum). This information memorandum is communicated to the Banque de France, who is thus informed of any new entrant on the market and receives the information memorandum.

A typical TCN (negotiable debt security)<sup>2</sup> issue involves three documents: an Information Memorandum (*Dossier de présentation financière* or *DPF*); a *domiciliaire* agreement;<sup>3</sup> and a dealer (or subscription) agreement.<sup>4</sup>

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<sup>2</sup> Titres de créances négociables (TCN) –negotiable debt securities. As mentioned, this covers under French law, billets de trésorerie (commercial paper), certificates of deposit and Medium-Term Notes. Treasury bills are subject to a different set of rules.

<sup>3</sup> A written *domiciliaire* agreement must be put in place between the issuer and the *agent domiciliaire* and detail the issuing, paying and information reporting agency functions in relation to the TCNs that must be carried out by the *agent domiciliaire*. There may be more than one *agent domiciliaire*. As the *domiciliaire* agreement is a private agreement not submitted to the regulatory authorities or the investors, it need not necessarily be drafted in the French language.

<sup>4</sup> A dealer agreement is generally also put in place which records the basis on which the issuer will issue and the dealers will place or subscribe the relevant TCNs. Like the *domiciliaire* agreement, the dealer agreement is a private agreement not submitted to the regulatory authorities or the investors and therefore may be drafted in a foreign language.

According to Article L.213-4 of the Financial and Monetary Code, TCN issuers are requested to draw up an Information Memorandum, which must include the items detailed below. The same information must be provided in relation to the guarantor (if any).

The Information Memorandum must include information on the activity of the issuer, its financial situation and a general presentation of the issue programme. In particular, this document must contain:

- the maximum outstanding amount envisaged for the programme and, if appropriate, the currencies in which the issuer intends to issue;
- characteristics of the securities that the issuer intends to issue, detailing any minimum/maximum maturity and any proposed interest basis;
- in the event that an issuer has made public a rating or its issuance programme, a copy of the rating certificate(s) delivered by the rating agency(ies);
- the means of placement and names of initial dealers;
- the name of the *établissement domiciliaire*. Issuers of TCNs must domicile their securities under the conditions of the General Regulation of the CMF at an authorised credit institution or an investment firm managing custody accounts.

Generally, the principal dealer acts as *établissement domiciliaire*. However, each dealer increasingly acts as *établissement domiciliaire* for the TCNs that it has placed or subscribed. Finally, when the issuer is a French credit institution, it acts as its own *établissement domiciliaire*;

- where the issuer issues securities of the same type abroad, a brief summary of the terms and conditions of these programmes (ECP, EMTNs, US programs), indicating on which markets such securities are negotiated.<sup>5</sup>

Details of the statutory person responsible for the Information Memorandum must be given. This person must take responsibility for the contents of the Information Memorandum and its conformity to the applicable regulations. This person must, in addition, state that to its/his knowledge, and at the date of the Information Memorandum, the information contained in the Information Memorandum is true and accurate and that there is no information the omission of which would make such information misleading. As a result of this statement, issuers generally include a “recent development section” in the Information Memorandum.

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<sup>5</sup> The description of the information required to issue an Information Memorandum are detailed in the Guidance from Allen & Overy, Bulletin on French domestic negotiable debt securities, May 2002

The Information Memorandum must include (directly or by reference), in relation to each of the preceding two financial years, (i) the annual non-consolidated audited accounts of the issuer, (ii) the consolidated audited accounts of the issuer and its subsidiaries (if any), (iii) the report of the board of directors or of the managing board and of the supervisory board, and (iv) the report of the issuer's auditors.

Applicable regulations require that the accounts to be included in the Information Memorandum are drawn up in accordance with French accounting standards but allow the COB to adapt his requirement for foreign issuers. Information must also be given on (i) the issuer's share capital and its breakdown, indicating any shareholder owning at least five per cent of the capital, (ii) the composition of the issuer's Board of Directors and organisational chart of management, (iii) the location of the issuer's headquarters, (iv) the creation, purpose and registration of the issuer, (v) the activities and operations of the issuer (with specific provisions depending on whether the issuer is a commercial/industrial company or a bank), and (vi) the stock exchange on which dealings in the issuer's securities take place.

If the programme is not rated, the Information Memorandum must also include the issuer's latest quarterly short-term cash flow statement and, if the Information Memorandum is filed more than four months after the end of the first half-year, a half-yearly report on its activities and results.

Issuers with the status of credit institution or investment firm must prepare a half-yearly report on their activities and results and quarterly statements according to the models set out by the *Comité de la Réglementation Bancaire et Financière (CRBF)*. Other issuers must draw up a half-yearly report and quarterly short-term cash flow statement (which shall mention, in particular, assets and liabilities with maturity of no longer than one year).

TCN issuers must update their Information Memorandum every year within 45 days following the shareholders' annual general meeting being held in respect of the latest financial year. The annual update consists of preparing and distributing a new Information Memorandum.

Immediate update of the Information Memorandum is required following any change relating to the guarantee, the maximum amount of the outstanding TCNs, and the rating of the programme, as well as any fact "that may have a significant effect on the TCNs issued or on the conclusion of the issue programme".

The law on financial security finally adopted on 1<sup>st</sup> August 2003 (Law n°2003-706 published in the French OJ of 2 August 2003) . contains some provisions which amend the rules applicable to

TCN (negotiable debt securities) and which will be complemented in the next months of amendments to secondary legislation (Ministerial Orders and Decrees<sup>6</sup>).

As regards the rules on the organisation and supervision of the TCN market, the French authorities intend to clarify within the Code the respective roles and functions of the new market authority, i.e. the AMF (as a result of the merger of the COB and of the CMF) and of the Banque de France. For instance, Article L.213-4 of the Code, as amended, provides that the financial documentation is to be submitted prior to the first issuance of such securities to the Banque de France which is in charge of ensuring that issuers comply with the conditions of issuance provided for in Article L.213-3 of the Code.

Under the new provisions on negotiable debt securities envisaged by the French authorities, the AMF, as for the debt securities markets, is empowered in particular to ensure the surveillance of financial information continuously without having to deliver any visa, and the compliance of operators with business conduct rules. The AMF will only grant a visa for prospectus in the (limited) cases of "appel public à l'épargne" (public offerings) since the TCN market is essentially between professionals. Moreover, a protocol might be concluded between the AMF and the Banque de France regarding the respective powers of the two authorities in respect of the surveillance of the TCN market. The ECB indicated in its opinion on the draft law on financial security that it welcomes this clarification which should ultimately benefit TCN issuers, investors and other market participants.

Under the new law, the applicable provisions contained in the Code (and in particular Articles L.213-2 and L.213-4 of the Code) are amended to relax the applicable language regime (including in respect of accounting standards) and to provide the possibility for issuers, under certain circumstances, to submit financial documentation in a language customary in the sphere of finance other than French.

Moreover, the current obligation imposed on TCN issuers to prove two years of existence was repealed and all types of international organisations will be also authorised to issue TCN.

### Ireland

In Ireland, and taking a CP to be a negotiable instrument, it is a debt security subject to the general rules on the issuance of debt securities under Irish law. The prospectus requirements of the Companies Act, 1963, apply to notes offered and placed publicly. In the absence of clear statutory or common law guidance on the scope of the private placement exemption, market

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<sup>6</sup> For more details, see the EFMLG Report of September 2002. The amendments to secondary legislation regarding TCN are not yet known.

participants have taken steps to ensure that a prospectus is not needed when issuing CP. One approach has been for the issuer and the bank acting as the issuer's agent in offering the notes to agree on a maximum list of 20 potential purchasers. All invitations and offers are made orally, and only confirmed in writing after oral agreement. Additional safeguards would be that the agent would contact not more than five purchasers on any one day and/or would make an offer only to persons who expressed an interest in the notes and/or would not disclose the identity of the issuer to potential purchasers in the initial stages of the offering. The facility letter would also contain additional safeguards designed to avoid a secondary market in the issuer's notes. See Johnston, *Banking and Security Law in Ireland* pp. 219-21. Under the Central Bank of Ireland's Notice (BSD CP 1/98) exempting issuers of CP from the requirement to hold a licence to carry on a banking business, all CP issued under the exemption must carry the title 'Commercial Paper' and must identify the issuer by name. It must be stated explicitly on the face of the CP that it is issued in accordance with this exemption from holding a banking licence, that the investment does not have the status of a bank deposit, and is not outside the scope of the Central Bank of Ireland's deposit protection scheme; and that issuers are not regulated by the Central Bank of Ireland in matters arising from the issue of CP. Any issue of CP which is guaranteed must state this and identify the guarantor by name.

### Italy

In Italy, there is no obligation to issue a prospectus. The "Istruzioni di Vigilanza" of Banca d'Italia lays down the main features that are mandatory for cambiale finanziaria and polizza di credito commerciale. The issuance of certificates with features different from those laid down by the "Istruzioni" must first be notified to Banca d'Italia following the procedure in Article 129 of the Consolidated Banking Law.

### Luxembourg

In Luxembourg, a prospectus is only required if the instruments are offered to the public in Luxembourg or listed on the Luxembourg Stock Exchange. If the instruments are issued under a public programme and listed, then an annual update of the prospectus is required. An update is also required if major events occur that could affect the issuer's creditworthiness.

### The Netherlands

In The Netherlands, the Act on the Supervision of Securities Trade 1995 (and further rules and regulations) stipulates the requirements for the prospectus, which must be published unless securities are offered only to professionals, to a select group or only outside the Netherlands.

### Austria

In, Austria, Article 2 of the Austrian Capital Market Act requires a prospectus when securities are offered to the public. No prospectus is needed when securities are only offered to limited number of professional investors or in case of continuous issues by credit institutions.

### Portugal

In Portugal, under Article 7 of Decree-Law No. 181/92, a prospectus describing the main features of the issuing programme and about the financial situation of the issuer must be released.

### Finland

In Finland, all issuers of financial instruments, except shares in companies that fall within the scope of the Securities Markets Act, are subject to the information requirements in Chapter 2, Section 2 of the Act. Under this provision, anyone who issues securities (e.g. CP) to the public must provide enough information on any circumstances that may substantially affect the value of the securities.

### Sweden

In Sweden, the law does not distinguish between retail and professional investors as such for purposes of restricting sales. It states that debt instruments may only be offered to a non-closed group (in Swedish *öppen krets*) if a prospectus fulfilling Swedish requirements has been published, unless is at least SEK 300,000. On the grounds of this exception, no formal prospectuses are published for CP programmes, only brief sales material describing the securities.

### United Kingdom

The UK authorities (including in particular the Treasury and the Bank of England) have launched an important reform of the rules applicable to money market instruments. The purpose is mainly to modernise the settlement of these instruments mainly under the form of a dematerialisation process. This reform involves other changes, in particular in respect of the terms of issuance for these instruments as well as for the market documentation .

The reform does not only deal with Money Market Instruments (MMIs) (for instance commercial paper, certificates of deposit and bankers' acceptances) but also with other marketable negotiable

debt securities, of whatever maturity, including Medium Term Notes<sup>7</sup> and other securities with an original maturity of one year or more.

The collective term used for the non-material equivalent debt securities concerned is "Eligible Debt Securities" (EDSs<sup>8</sup>). It does not, however, encompass the issue of Treasury bills or local authority instruments.

In relation to this dematerialisation process, the Bank of England has issued in November 2002 and March 2003 a series of consultation documents regarding the future of money market instruments on pro forma terms of issuance for EDSs.<sup>9</sup>

Bank of England consulted in particular on whether one set of terms (under which any type of relevant units can be issued) would suffice or whether it would be preferable if separate terms were produced for different types of units (bankers' acceptances, CP, CD); the treatment of dematerialised MTNs; the use of a deed; the content of the draft pro forma terms (role of issuing and paying agents; early redemption, etc); and the notice of issue and minimum trading amount (e.g £ 100.000 and minimum trading multiples).

The deed, together with a notice of issue, constitutes the units of an eligible debt security. It is intended that the deed be issued in conjunction with some other documents as may be customary for a particular type of money market instrument, for example an Information Memorandum for commercial paper, an issuing and paying agency agreement, and a dealers' agreement. It is anticipated that existing standard programme documentation could be used, albeit with certain consequential amendments to reflect the issues of EDSs. It is also noted that MMIs/EDS are not generally listed or subject to prospectus requirements.<sup>10</sup>

The EDS terms are structured as a deed that is intended to be used in respect of the issue of units of a single eligible debt security or a programme of such securities which may include eligible

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<sup>7</sup> It was however agreed that this round of work on the pro forma terms should not attempt to cover MTNs.

<sup>8</sup> MMIs (Money Market Instruments) are generally defined by the Bank of England as "*financial instruments used to meet the short-term funding needs of financial and other institutions, as well as to assist banks and investment firms manage their liquidity by holding suitable short-term assets. Besides repo and derivative instruments, they principally comprise CDs (certificates of deposit issued only by banks and building societies), Treasury bills (issued by HM Treasury), commercial paper (issued by non-financial firms and banks) and banker's acceptances (bills of exchange, accepted by banks and financing non-financial firms and banks). They are all forms of debt security, and generally have an original maturity of under one year*" (see The Bank of England and the Sterling Money markets, January 2002). At present, they are generally paper, negotiable instruments. To help make a distinction between MMIs and their dematerialised equivalents, the present note will systematically refer to the notion of EDSs.

<sup>9</sup> See Bank of England, November 2002 and March 2003, "*The future of money market instruments*", First and second consultations on pro forma terms of issuance for eligible debt securities and.. It includes in its Annex the draft terms for EDS corresponding to CD/CP as well as the terms for EDS corresponding to banker's acceptances

<sup>10</sup> See The Bank of England and the Sterling Money markets, January 2002

debt securities corresponding to different types of money market instruments.<sup>11</sup> The purpose is to ensure that holders of securities issued under it acquire directly enforceable rights against the issuer.

The deed would need only be executed once and not every time new units of an EDS are issued (although in principle there could be a separate deed for each issue). The constituting of the units of a particular EDS would involve the completion and signing of a 'notice of issue' (a one page schedule to the deed containing the principal commercial terms of the EDS e.g. the rate of interest, maturity date, the identity of any guarantor etc.) and their issue would take place through the CREST system.

Work is now in progress to enable MMIs to be issued in non-material, that is electronic, form and to be settled in the CREST settlement system with title evidenced by names on an electronic register. According to the Bank of England, the aim is for EDSs to begin to be issued from mid-September 2003. Bank of England has published in June 2003 on its web-site the pro forma terms for the issuance of EDSs corresponding to CP/CD and bankers' acceptances as well as some explanatory notes. CRESTCo have also published a practical guide for all prospective issuers of EDSs.

It should be noted that in the UK, the Information Memorandum sets out basic details regarding the issuer and guarantor (if any). This is used as the marketing tool for the programme by the dealers and is distributed to potential investors ahead of the programme launch. It typically includes a brief summary of the programme terms and conditions, forms of note and selling restrictions. It is common practice for the Information Memorandum to incorporate by reference the annual report or other publicly available information, such as SEC filings. This avoids the need to include financial information in the Information Memorandum itself and extends the life of the memorandum. Market practice as to updating the Information Memorandum varies, with some issuers updating on an annual basis, some never. Any update should reflect the latest selling restrictions. Best practice would be to up-date annually or at least upon any material changes taking place.<sup>12 13</sup>

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<sup>11</sup> Where the deed is used for the issue of units under a programme of EDS, the issuer will not need to enter into a separate deed for each issue but simply complete a notice of issue on each occasion that it proposes to constitute EDSs under the programme.

<sup>12</sup> See London Market Guidelines on Commercial Paper, BBA, April 2000

<sup>13</sup> The draft Model Global Commercial Paper Dealer Agreement above mentioned defines the Information Memorandum as "*the most recent information memorandum, as the same may be amended or supplemented from time to time (...), containing information about the Issuer, and the Programme, the text of which has been prepared by or on behalf of the Issuer for use by the Dealers in connection with the transactions contemplated by this Agreement*".

The Bank of England and the BBA have issued guidance notices on CDs and the CD market in the interests of orderly and efficient market in the UK. Since progress has been made on the EDS reform, the BBA indicated its intention to update of the market guidelines on commercial paper<sup>14</sup> and CD s. These Guidelines are in the process of being reviewed and will be re-issued in updated form in Q4 2003.<sup>15</sup> This would take account of the new non-material instruments as well as changes in regulation, settlement and other developments in market practice. For instance, some references to regulation will need to be updated following the coming into force of the FSMA (Financial Services and Markets Act 2000) in December 2001.<sup>16</sup>In the meantime, in August 2003, the BBA has made public an interim guide and compendium of documents entitled "Preparing for the dematerialisation of Money Market Instruments" which supplements the two Guidelines<sup>17</sup>.It should be noted that this reform does not affect the issuance of (mostly non dematerialised) euro-denominated ECP.

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<sup>14</sup> See London Market Guidelines on Commercial Paper, British Bankers' Association (BBA), April 2000. They give guidance on aspects of commercial paper issuance and regulatory, accounting and tax issues. Some references to regulation will need to be updated following the coming into force of the FSMA in December 2001 and other more recent legislative developments.

<sup>15</sup> As of November 1996

<sup>16</sup> It is noted that the issuance of debt securities, other than bankers' acceptances, may entail accepting deposits (a form of regulated activity) as defined under FSMA legislation, although broadly the proceeds of such issuance would not be a deposit as defined if the minimum redemption value of the instrument is £100,000 or more (or the currency equivalent) and if they are sold to professionals; and most, but not all, MMIs have a minimum redemption value of £100,000 or more. Any person accepting deposits by way of business would generally have to be authorised for the purposes of the FSMA.

<sup>17</sup> The Compendium contains in particular the following documents: fact sheets for issuers, drawers and acceptors of EDSs, Migrating MMIs from CMO into Crest, explanatory notes on deeds relating to Eligible Debt, Terms for EDSs corresponding to Certificate of Deposit or Commercial Paper, Terms for EDSs corresponding to Banker' Acceptances, Frequently Asked Questions, Bank of England CD notice, Minimum Transfer Amounts and Units of Transfer, and Rematerialisation of CDs.