

The Prospectus Directive and the Transparency Directive

More on Non-EEA Financial Statements

The new year has brought some greater clarity in relation to non-EEA companies and whether they will be able to rely on their national accounting standards for the purposes of the Prospectus Directive and Transparency Directive. Two new regulations from the European Commission have the effect that for the purposes of the Prospectus Directive and Transparency Directive (1) from 1 January 2012 Chinese, Canadian and Korean GAAP will be considered equivalent to International Financial Reporting Standards, as adopted by the European Union (EU IFRS) and (2) the transitional relief previously granted to Indian GAAP for financial years starting before 1 January 2012 is extended to cover financial years starting before 1 January 2015.

IFRS and Equivalence – the Background

For any prospectus that is required to comply with the Prospectus Directive¹ regime the basic position regarding financial disclosure is that historical financial information included in the prospectus must be prepared in accordance with EU IFRS, subject to limited exceptions. Exceptions are available for (1) issuers and guarantors that are states, their regional or local authorities and public international bodies, (2) EEA issuers and guarantors that are not required by the law of their state of incorporation to prepare their financial statements in accordance with EU IFRS, (3) prospectuses relating to securities that have a minimum denomination of at least Euro 50,000² (or equivalent in another currency) and (4) issuers and guarantors incorporated in countries outside the EEA (known in the jargon as "third countries") where the third country's national accounting standards are deemed to be equivalent to EU IFRS.

Similarly, the basic position under the Transparency Directive³ is that historical financial information which is required to be included in the annual and semi annual reports to be published under the Transparency Directive regime must be prepared

Key issues

- Chinese, Canadian, Korean, Japanese and US GAAP considered equivalent to EU IFRS
- Indian GAAP acceptable until 2015

¹ Directive 2003/71/EC

² In the process of being increased to EUR 100,000 by virtue of Directive 2010/73/EU.

³ Directive 2004/109/EC

in accordance with EU IFRS, subject to limited exceptions. Exceptions are available for (1) issuers that are states, their regional or local authorities and public international bodies (the Transparency Directive is not expressed to apply to guarantors), (2) issuers whose only securities admitted to trading on a regulated market are debt securities with a minimum denomination of Euro 50,000⁴ (or equivalent in another currency) and (3) third country issuers where the third country's national accounting standards are deemed equivalent to EU IFRS.

Current Position on Equivalence

As a result of the two new regulations from the European Commission, the current position regarding the equivalence for the purposes of the Prospectus Directive and Transparency Directive of historical financial information prepared according to accounting standards other than EU IFRS can be summarised as follows:

China, Canada, Korea, Japan and the United States

Chinese, Canadian, Korean, Japanese and US GAAP are considered equivalent to EU IFRS⁵.

Australia, Hong Kong, Israel, Singapore, South Africa and New Zealand

A Commission report published in April 2008⁶ concluded that as Australia, Hong Kong, Singapore, South Africa and New Zealand have fully adopted IFRS no decision on equivalence is necessary regarding the accounting standards from those countries. In addition the Commission report recognised that Israel has made IFRS mandatory for all listed companies except for banks and dual listed companies as of 1 January 2008. As a result financial statements prepared in accordance with the national GAAP of those countries should be able to include a statement of compliance with IAS 1 (Presentation of Financial Statements) in the notes to such financial statements, which will make them acceptable for the purposes of the Prospectus Directive and Transparency Directive⁷.

India

For financial information in respect of any financial year starting before 1 January 2015, Indian GAAP is acceptable for the purposes of the Prospectus Directive and Transparency Directive⁸.

Argentina, Brazil, Mexico, Russia and Taiwan

Although these countries were not mentioned in the latest legislation, the latest European Commission staff working paper published in July 2011 presented recent developments in Argentina, Brazil, Mexico, Russia, and Taiwan, each of which have made progress towards the adoption of IFRS.⁹ The European Commission has committed to continue to monitor the situation and assesses the ongoing efforts by third countries converging to IFRS or intending to adopt IFRS, with the technical assistance of the European Securities and Markets Authority (ESMA).

⁴ In the process of being increased to EUR 100,000 by virtue of Directive 2010/73/EU.

⁵ See: Commission Decision of 12 December 2008 in relation to the Transparency Directive; Commission Regulation (EC) No 1289/2008 in relation to the Prospectus Directive; and Commission delegated Regulation of 21 December 2011 amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC.

⁶ DG Internal Market and Services Working Document dated 22 April 2008 entitled "Report on convergence between International Financial Reporting Standards (IFRS) and third country Generally Accepted Accounting Principles (GAAPs) and on the progress towards the elimination or reconciliation requirements that apply to Community issuers under the rules of these third countries".

⁷ See Commission Regulation (EC) No 1289/2008 and Commission Decision 2008/961/EC.

⁸ Commission delegated Regulation of 21 December 2011 amending Regulation (EC) No 809/2004 implementing Directive 2003/71/EC and Commission delegated Regulation of 21 December 2011 amending Regulation (EC) No 1569/2007 establishing a mechanism for the determination of equivalence of accounting standards applied by third country issuers of securities.

⁹ Commission Staff Working Paper on the state of play on convergence between International Financial Reporting Standards (IFRS) and third country national Generally Accepted Accounting Principles (GAAP); SEC(2011) 991 final, 28.07.2011.

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