

# **IMPLEMENTATION OF THE PROSPECTUS DIRECTIVE IN AUSTRIA**

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# Disclaimer

Please note that this presentation should give a general overview on the Prospectus Directive and its implementation in Austria only and does not replace legal advice.

# BOND MARKET IN AUSTRIA

# Bond Market in Austria

The Vienna Stock Exchange ("Wiener Börse") is the only securities exchange and listing authority in Austria

## Market segmentation:

- Equity market (stocks)
- Bond market (bonds)
- otob market (futures and options)
- Structured products (certificates and warrants)
- Other listings

Tradings are conducted through the fully electronically trading systems Xetra® (cash market) and OMex® (derivatives & warrants).

# Bond Market in Austria

		Trading days	Banking bonds	Government bonds	Corporate bonds	Performance linked bonds	TOTAL
Number of issuers at year-end	2002		100	9	36	36	156
	2003		107	8	56	44	188
	2004		108	8	60	50	195
Number of listed securities at year-end	2002		1.845	138	45	185	2.213
	2003		1.950	146	66	601	2.571
	2004		2.045	132	70	409	2.848
Annual trading volume in EUR (double count)	2002		338.662.697	169.813.447	41.370.622	125.829.870	675.676.637
	2003		694.110.706	152.299.870	61.635.493	106.731.504	1.014.777.573
	2004		404.953.799	105.546.855	47.787.844	161.253.873	719.542.372
Average daily trading volume in EUR	2002	248	1.365.575	684.732	166.817	507.379	2.724.503
	2003	247	2.810.165	616.599	249.536	432.111	4.108.411
	2004	250	1.619.815	422.187	191.151	645.015	2.878.169

www.wienerboerse.at, Jahresstatistik 2004, 3.

# PROSPECTUS DIRECTIVE (2003/71/EC)

## Prospectus Directive (2003/71/EC)

- Directive on the prospectus to be published when securities are offered to the public or admitted to trading ("Directive")
- In force since 31 December 2003
- Implementation deadline for Member States: 1 July 2005



## Prospectus Directive (2003/71/EC)

- Harmonisation of the requirement for the drawing up, approval and distribution of a prospectus
- "European Passport"
- Standard protection of investors
- Relief for cross border capital raising

## Scope of the Directive

- **"Offer to the public"**

"Communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities."

Applicable also to placing of securities through financial intermediaries

- Admission of securities to trading on a regulated market within a Member State
  - In Austria: Official Market and Semi-official Market

## Exemptions from prospectus requirements

Despite an offer to the public, no prospectus is required for:

- Securities included in an offer with a total consideration of less than EUR 2.5 million
- Offer solely to qualified investors
- Offer to fewer than 100 persons (per Member State)
- Total consideration of EUR 50,000 or more per investor
- Domination per unit amount to at least EUR 50,000
- Offers for specific types of securities (eg issued or guaranteed by a Member State)
- Admission of specific types of securities on regulated markets
- etc

## Drawing up of the Prospectus

### **The prospectus shall contain information which is**

- necessary to enable an investor
- to make an informed assessment
- of the assets and liabilities, financial position, profit and losses and future prospects
- of the issuer and any guarantor
- and of the rights attaching to the securities

## Drawing up of the Prospectus

### Use of languages (Art 19):

- Offer in the home Member State: language accepted by the competent authority;
- Offer in another Member State: either the language accepted in this Member State or in a language customary in the sphere of international finance;
- However, the competent authority of each host Member State may ask for the summary to be translated.

## Drawing up of the Prospectus

Either in **one document** or in **separate documents** consisting of

1. Registration documents
2. Securities note
3. Summary ("risk factors")
4. In certain cases additional modules

### **Commission Regulation No 809/2004/EC**

regarding information, format, incorporation by reference and publication

## Drawing up of the Prospectus – Non-equity securities

**Base prospectus** can be drawn up for

- non-equity securities issued under an offering programme
- non-equity securities issued in a continuous or repeated manner by credit institutions
  - where the sums deriving from the issue of the securities, are placed in assets providing sufficient coverage for the liability deriving from securities until their maturity date;
  - where in the event of insolvency the sums are intended as a priority to repay the capital and interest

## Drawing up of the Prospectus – Non-equity securities - Exemption

Non-equity securities issued in a continuous and repeated manner by credit institutions

- a) not subordinated, convertible and exchangeable;
- b) no right to subscribe to or acquire other types of securities and not linked to a derivative instrument
- c) materialise reception of repayable deposits
- d) not covered by a deposit guarantee scheme

With a total consideration of the offer of less than EUR 50 million, calculated over a period of 12 months, c) and d) do not apply.



# IMPLEMENTATION OF THE PROSPECTUS DIRECTIVE IN AUSTRIA

## Implementation in Austria

- Law implementing the Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003, changing the Capital Market Act, the Stock Exchange Act, the Investment Fund Act, the Financial Market Authority Act et alt.
- In force: expected to become effective on 10 August 2005
- Transitional interim-provisions until
  - 10 November 2005 for pending offers
  - 31 December 2008 for debt securities issued by credit institutions as permanent issues

## Implementation in Austria

- **"offer to the public"** (virtually identical to the wording of the Directive)

"Communication to persons in any form and by any means, presenting sufficient information on the terms of the offer of (or the invitation to subscribe for) securities and on the securities to be offered, so as to enable an investor to decide to purchase or subscribe to these securities. This definition also applies to the placement of securities through financial intermediaries."

# Implementation in Austria

- Format and content requirements taken from the Directive
- Criteria for inspection and approval
  - Completeness
  - Coherence
  - Comprehensibility  
(instead of correctness, integrity and non-misleading)
- NEW: Liability of Austrian prospectus controller (*Prospektkontrollor*) for incorrect or incomplete information due to **negligence** (instead of – previously - gross negligence)

# APPROVAL OF PROSPECTUS IN AUSTRIA

# Approval of Prospectus

## Competent Authority in Austria: Financial Market Authority (*Finanzmarktaufsicht*, "FMA")

- Institution under public Austrian law
- Single, independent, statutory supervisory board
- Supervision of banks, insurance companies and pension funds, securities, stock exchange

# Approval of Prospectus

- FMA is authorised to
  - demand additional information from issuer or auditors of the issuer
  - demand incorporation of additional details in the prospectus
  - suspend the public offering if well-founded suspicion of breach of the Capital Markets Act (*Kapitalmarktgesetz*) or the Austrian Stock Exchange Act (*Börsegesetz*) (§§ 74 et seq.); or ban in case of actual breach
  - suspend trading in case of breach of this law or the Austrian Stock Exchange Act (§§ 74 et seq.); or ban in case of actual breach
- FMA may
  - call in auditors or banks as prospectus controllers or experts (official liability!)
  - request a statement from the Vienna Stock Exchange

## Approval of Prospectus

- Transfer of approval by FMA to competent authority of other Member State possible
- Approval of prospectus: Decision within 10 days (7 if audited by prospect auditor) after submission of prospectus (20 days for first admission)  
CAVEAT: No automatic approval in case of delay by FMA!
- After admission of securities to the market: FMA may intervene for the protection of the interest(s) of investor(s) in case of market distortion by issuer



## Community Scope – Procedure in Austria

- Prospectus approved by competent authority in home Member State
- At the request of the issuer the competent authority of home Member State notifies FMA within 3 days
- If new factors, mistakes or inaccuracies appear after approval of prospectus by the home Member state, FMA may inform the competent foreign authority of a Member State
- → No approval or administrative procedure; prospectus is automatically approved

## Precautionary Measures

- Cooperation between FMA and competent authority of home Member State
- In case of irregularities: FMA refers findings to corresponding authority
- If no or inadequate measures by authority of home Member State → FMA takes necessary protective measures for investors and informs Commission and authority of home Member State

## Publication of Prospectus

- AFTER approval by FMA
- Austrian official gazette of the *Amtsblatt zur Wiener Zeitung* or
- Hand-out at Vienna Stock Exchange or
- Electronically on the Internet-Homepage of either the FMA or the issuer

## Supplements to the Prospectus

Necessary if significant **new factor**, **material mistake** or **inaccuracy** relating to the information included in the prospectus which is capable of affecting the assessment of the securities arise between approval and closing of the offer

- Supplement to be immediately published and deposited
- To be approved by FMA within 7 working days (5 days, if supplement is audited by prospect auditor)

## Right to withdraw acceptance

- Investors who have already agreed to purchase or subscribe for the securities before the supplement is published
- Within two days after publication
- One week in case of consumer transactions

## Duty to Inform

Issuers whose securities are admitted to trading on a regulated market (§75a Stock Exchange Act):

- provide a document that contains or refers to all information that they have published or made available to the public in one or more Member States and in third countries
- at least annually
- No ongoing duty to update

# **DORDA BRUGGER JORDIS**

## **Rechtsanwälte GmbH**

## DBJ

- Among Top Five in Austria
- Dynamic growth since 1976
- 24 Partners and 30 Associates
- Emphasis on banking and finance law and broad corporate law and transaction-related legal advise
- International orientation, strong network in Central and Eastern Europe



## Our Clients

- Austrian and international industrial and trade businesses
- Banks, financial institutions, investors and other financial service providers
- Governmental entities
- Private persons and trusts

## Track-record and expertise

- Members of our banking and finance team are leading experts in all areas of banking and finance law, equity and debt capital market transactions as well as all related transactions.
- We are regularly involved in major bond transactions in Austria.

## Contact Persons

Your team from

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