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accompanying the

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

SUMMARY OF THE IMPACT ASSESSMENT

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1. PROBLEM DEFINITION

There is evidence about some burdens and legal uncertainties that increase cost and create ineffectiveness hampering the process of fundraising for companies and financial intermediaries in the EU. These problems could be divided in two groups:

1.1. Ineffectiveness derived from the lack of legal clarity

1.1.1. Obligations in case of placement of securities through financial intermediaries (retail cascade): the lack of clarity in Article 3.2 of the Prospectus Directive seems to be causing problems for issuers in some markets where securities are distributed by "retail cascade".

1.1.2. Divergent definitions for qualified investors and professional clients: the prospectus regime for qualified investors is different from the regime for professional clients set out in MiFID¹.

1.1.3. Legal uncertainty in relation to the obligation of supplementing a prospectus and the exercise of the right of withdrawal: Article 16 of the Prospectus Directive leaves room for divergent application in the Member States because the time frame for the exercise of the right of withdrawal is not harmonised and Member States have set different periods through national implementing legislation.

1.1.4. Lack of harmonised rules on liability: article 6.2 of the Prospectus Directive does not provide for a harmonised liability regime under the Prospectus Directive.

1.1.5. Functioning of the summary of the prospectus: the primary aim of the Prospectus Directive to inform investors may actually be hampered by the limitation imposed by recital 21. Moreover, there are significant inconsistencies in the form and the content of the summary disclosures for broadly comparable products.

1.2. Situations of burdensome requirements imposed on companies raising capital in securities markets and to the intermediaries involved

1.2.1. Divergent regime for Employee Shares Schemes: the exemption in Article 4.1(e) creates a less advantageous situation for employees of third country companies that do not have a listing on a regulated market within the EU, and EU non-listed companies or EU companies that have securities traded on EU "exchange-regulated" markets.

1.2.2. Overlap of transparency obligations: in its opinion of 18 September 2008 the High Level Group of Independent Stakeholders on Administrative Burdens advised the European Commission to consider the suppression of Article 10 of the Prospectus

¹ Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC. OJ L 145, 30.4.2004, p. 1-44.

Directive because the Transparency Directive² has made the disclosure requirement for issuer with listed securities redundant, generating a duplication of the same requirement for issuers.

1.2.3. *Restriction for the choice of home Member State for the issuers of debt:* article 2.1(m)(ii) imposes a restriction on the choice of the home Member State for issues of non-equity securities.

1.2.4. *Burdensome disclosure requirements in some cases*

1.2.4.1. Rights issues: stakeholders have expressed concerns in relation to the obligation to publish a full prospectus for rights issues, notably because the cost for producing a full prospectus might not be justified.

1.2.4.2. Small quoted companies: concerns have been expressed by some industry stakeholders that the disclosure requirements linked to the issuance of a prospectus could be overly burdensome and costly for companies with smaller market capitalization. This is mostly related to the exemption for offers with a total consideration below €2.5 million set in Article 1.2(h) of the Prospectus Directive.

1.2.4.3. Small credit institutions: the exemption in Article 1.2(j) was designed for the funding of small credit institutions. However, representatives of small credit institutions consider that in practice the limit of €50 million is too low for the annual issuing volume and, as a consequence, small banks cannot fully benefit from this exemption.

1.2.5. *Burdensome disclosures for government guarantee schemes:* in the context of the current financial crisis Member States have decided to guarantee the issuance of debt by banks. Due to the novelty of this scheme, uncertainties have been reported on the legal regime applicable to this type of offers concerning the information to be provided in the prospectus in relation to the State guarantor.

1.2.6. *Printed form (paper form) of the prospectus:* in its opinion of 18 September 2008 the High Level Group of Independent Stakeholders on Administrative Burdens advised the European Commission to consider the suppression of the obligation in Article 14.2 for the person asking for the admission to trading or the financial intermediaries placing or selling the securities to deliver a paper copy of the prospectus free of charge, upon request of the investor to the offeror, because according to a group of industry stakeholders the obligation would have no added value and the electronic provision of information would be sufficient for effective supervision.

² Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC. OJ L 390 of 31.12.2004, p.38. The Transparency Directive entered into force on 20 January 2005, and was due to be transposed by all Member States by 20 January 2007.

- 1.2.7. *Translation of the summary of the prospectus:* in the same opinion the High Level Group advised to consider the suppression of the obligation to provide the translation of the summary in case of cross-border offers according to Article 19.3 because a group of stakeholders considers that this requirement is unnecessary and advocates for the harmonisation of the language regime for the whole internal market.

2. THE BASELINE SCENARIO, SUBSIDIARITY AND PROPORTIONALITY

If no action is taken at EU level the problems defined in section 1 will remain without a response. The European Commission considers that the solutions proposed respect the principle of subsidiarity and proportionality. On the one hand, taking into account that offers of securities could have cross border dimension in the EU this exercise will be better addressed in an EU legal text. On the other hand, all solutions brought forward aim at ensuring effective product disclosure and investor protection.

3. OBJECTIVES

The review of the Prospectus Directive aims at (i) increasing effectiveness in the prospectus regime; and (ii) reducing the burdens for EU companies when raising capital in the European securities markets.

4. POLICY OPTIONS

With the intention to meet the objectives set out in the previous section, the Commission services have analysed different policy options:

4.1. Policy options for the increase of legal clarity and effectiveness in the prospectus regime

- 4.1.1. *Policy options in case of subsequent placements of securities through financial intermediaries (retail cascade):* (i) no action at EU level; (ii) clarify that the further resale of the securities to retail investors through financial intermediaries following the initial issue does not qualify as a public offering of the initial issuer; (iii) amend Article 3.2 of the Prospectus Directive to clarify that whenever an intermediary offers securities to the public the intermediary should put at the disposal of the public a valid prospectus.
- 4.1.2. *Policy options in relation to the divergent definitions for qualified investors and professional clients:* (i) no action at EU level; (ii) amend the Directive and align the definitions of qualified investors in Article 2.1(e) (i) and (ii) of the Prospectus Directive and of professional clients and eligible counterparties in MiFID; (iii) in addition to the alignment proposed in option 2, remove the system of central registers from the Prospectus Directive.
- 4.1.3. *Policy options in relation to the obligation of supplementing a prospectus and the exercise of the right of withdrawal (Article 16 of the Prospectus Directive):* (i) no action at EU level; (ii) harmonize the different periods of time for the exercise of the right of withdrawal; (iii) harmonize the different periods of time with possibility for

issuer to grant longer time; (iv) harmonize the different periods of time at the settlement of the securities.

4.1.4. *Policy options in relation to the lack of harmonised rules on liability:* (i) no action at EU level; (ii) harmonize the liability standards applicable to the prospectus.

4.1.5. *Policy options in relation to the summary of the prospectus:* (i) no action at EU level; (ii) provide retail investors with appropriate information in an easily analyzable and comprehensible form in order to make investment decisions in full knowledge of facts.

4.2. Situations of disproportionate or burdensome requirements imposed to companies raising capital in securities markets and to the intermediaries involved

4.2.1. *Policy options for bringing forward a level playing field for Employee Shares Schemes:* (i) no action at EU level; (ii) amend the Directive and extend the exemption in Article 4.1(e) to the employee share schemes launched by companies that are listed in a non-regulated market (third country and EU issuers); (iii) amend the Directive and extend the exemption in Article 4.1.(e) to companies that are listed in a non-regulated market and to companies that are not listed.

4.2.2. *Policy options in relation to the overlapping of transparency obligations (Article 10 of the Prospectus Directive):* (i) no action at EU level; (ii) eliminate the obligation established in Article 10 of the Directive.

4.2.3. *Policy options in relation to the restriction for the choice of home Member State for the issuers of debt:* (i) no action at EU level; (ii) provide for the choice of the home Member State for issues of non-equity securities below the €1000 threshold.

4.2.4. *Policy options for facilitating the raise of capital through the issuance of rights:* (i) no action at EU level and let CESR members agree on a short-form disclosure regime for rights issues; (ii) exempt rights issues from the prospectus requirement; (iii) introduce a "proportionate" prospectus" for right issues.

4.2.5. *Policy options for providing proportionate disclosure requirements for small quoted companies:* (i) no action at EU level; (ii) exempt small quoted companies from the obligation to publish a prospectus by raising the threshold in Article 1(2)(h) of the Directive; (iii) introduce a "proportionate" prospectus for small quoted companies.

4.2.6. *Policy options for providing proportionate disclosure requirements for small credit institutions:* (i) no action at EU level; (ii) exempt small credit institutions from the obligation to publish a prospectus by raising the threshold in Article 1(2)(j) of the Directive; (iii) introduce a "proportionate" prospectus for small credit institutions.

4.2.7. *Policy options in relation to the prospectus disclosures in case of government guarantee schemes should be rationalised:* (i) no action at EU level; (ii) exempt issuers of securities guaranteed by the government of a Member State from the obligation to provide information about the guarantor in the prospectus; (iii) exempt issuers of securities guaranteed by the government of a Member State from the obligation to provide information about the guarantor and also about the guarantee in the prospectus.

- 4.2.8. *Policy options in relation to the printed form (paper copy) of the prospectus:* (i) no action at EU level; (ii) abolish the obligation to deliver a printed form (paper copy) of the prospectus.
- 4.2.9. *Policy options in relation to the translation of the summary of the prospectus:* (i) no action at EU level; (ii) abolish the obligation to translate the summary of the prospectus.

5. ASSESSMENT AND COMPARISON OF THE OPTIONS

The different policy options are tested against the criteria of investor protection, consumer confidence, effectiveness, clarity and reduction of administrative burden. In view of the conclusions reached in the impact assessment, the European Commission considers appropriate to present a proposal amending the Prospectus Directive in order to address the following issues:

- *Retail cascade:* for reasons of investor protection, consumer confidence, reduction of administrative burden, certainty and effectiveness the preferred option is to amend Article 3.2 of the Prospectus Directive to clarify that intermediaries should not be obliged to produce a new prospectus for each subsequent offer as long as they have the possibility to use the initial prospectus of the issuer (with the condition that such a prospectus is valid in accordance with Article 9).
- *Definition of qualified investor/professional client:* for reasons of reduction of administrative burden, certainty and effectiveness, the definition of qualified investor in Article 2.1(e) should be modified to encompass the persons that are considered professional clients under MiFID.
- *Exercise of the right of withdrawal:* for reasons of investor protection, consumer confidence, reduction of administrative burden, certainty and effectiveness, the time frame for the exercise of the right of withdrawal in Article 16.2 of the Prospectus Directive should be harmonised in all EU Member States; nevertheless issuers should have the possibility to expand the time frame voluntarily.
- *Lack of harmonised rules on liability:* the harmonisation of the liability standards is a goal that exceeds the Prospectus Directive. The preferred option is to keep the *status quo*.
- *Summary of the prospectus:* for reasons of investor protection, consumer confidence, certainty and effectiveness, the content of the summary of the prospectus should be standardised following the approach adopted by the European Commission in its Communication on Packaged Retail Investment Products.
- *Employee shares schemes:* for reasons of effectiveness, certainty and reduction of administrative burdens, the exemption for employee shares schemes in Article 4.1(e) of the Prospectus Directive should be extended to employees of companies listed in markets other than EU regulated markets and non-listed companies.
- *Duplication of transparency obligations:* for reasons of investor protection, consumer confidence, reduction of administrative burden and effectiveness, the

disclosure requirements of Article 10 of the Prospectus Directive should be abolished.

- *Choice of home Member State for the issuers of non-equity securities*: for reasons of reduction of administrative burden and effectiveness, issuers of non-equity should be entitled to choose a home Member State regardless of the denomination per unit of the offer. The threshold of €1.000 should be deleted from Article 2.1(m) of the Prospectus Directive.
- *Rights issues*: for reasons of consumer confidence, reduction of administrative burden, certainty and effectiveness, the preferred option is to introduce the principle of a reduced disclosure regime for prospectuses for rights issues in the Directive; this regime should be supplemented through implementing measures, i.e. a modification in the implementing regulation.
- *Small quoted companies and small credit institutions*: for reasons of consumer confidence, reduction of administrative burden, certainty and effectiveness, the raise of capital of small quoted companies and small credit institutions should be subject to "proportionate" disclosure requirements. Article 5 of the Prospectus Directive should reflect this principle and the European Commission should be empowered to put in place implementing legislation specifying the disclosure requirements in this regard.
- *Government Guarantee Schemes*: for reasons of reduction of administrative burden, certainty and effectiveness, Article 1.3 of the Prospectus Directive should clarify that issuers of securities guaranteed by a Member State are not obliged to include in the prospectus information about the State guarantor (though it should contain information about the guarantee).

6. IMPACTS OF THE PREFERRED OPTIONS

The impact assessment shows that the preferred options will have positive impacts for investors, companies raising capital, financial intermediaries, employees and small and medium size enterprises. The identifiable reduction of administrative burdens from the preferred options amounts to approximately **€302 million** on an annual basis.

Obligation	Wage costs reduction per occurrence	Overhead by occurrence (25% of wage costs)	Frequency	Administrative burden by occurrence	Number of companies affected by the changes	TOTAL admin burden
Deletion of Article 10 of the Prospectus Directive, to avoid duplication of transparency requirement	€2,000	€500	1	€2,500	12,000	€30,000,000
Exemption of all kinds of Employee Shares Schemes	€392,000	€98,000	1	€490,000	37	€18,130,000

launched in the EU from the obligation to publish a prospectus						
Reduction of disclosure requirements for rights offers	€186,400	€46,600	1	€233,000	343	€79,919,000
Reduction of disclosure requirements for small quoted companies	€39,200	€9,800	0.5	€24,500	7056	€172,872,000
Exclude information on guarantor in case of government guarantee schemes	€23,200	€5,800	1	€29,000	28	€812,000
Total €						€301,733,000

7. MONITORING AND EVALUATION

The Commission is the guardian of the Treaty and therefore will monitor how Member States have implemented the changes of the Prospectus Directive. The evaluation of the consequences of the application of the legislative measure could take place three years after the entry into force of the legislative measure in the form of a Commission report to the Council and the European Parliament.