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COMMISSION OF THE EUROPEAN COMMUNITIES

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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

(Text with EEA relevance)

{SEC(2009)1222}
{SEC(2009)1223}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

In January 2007, the European Commission launched the Action Programme for reducing administrative burdens of existing regulation in the European Union underlining its commitment to Better Regulation as part of the "Growth and Jobs" strategy¹. The European Council agreed in March 2007 on a reduction target of 25 % to be achieved jointly by the EU and Member States by 2012 in order to enhance the competitiveness of companies in the Community. Moreover, Article 31 of the Prospectus Directive² required the Commission to assess the application of the Directive five years after its entry into force and to present, where appropriate, proposals for its review. After five years of its entry into force, the general assessment of the overall effect of the Directive has been positive.

However, despite this general success, the Directive has been identified as one area that contains a number of legal uncertainties and unjustified burdensome requirements that increase costs and create inefficiencies hampering the process of raising funds from the securities markets for companies and financial intermediaries in the EU. In addition, in order to further enhance investor protection and thus respond effectively to the current financial crisis, the summary of the prospectus should be improved in terms of simplicity and readability. This exercise will be consistent with the approach to be adopted following the Commission's Communication on Packaged Retail Investment Products, which aims for horizontal requirements on pre-contractual disclosures and selling practices for a wide range of retail investment product types³. The overarching goal of the current proposal is to simplify and improve the application of the Directive, increasing its efficiency and enhancing the EU's international competitiveness, bearing in mind the importance of enhancing the level of investor protection envisaged in the Directive and ensuring that the information provided is sufficient and adequate to cover the needs of retail investors, particularly in the context of the financial market turbulence that started in 2007. This exercise is linked to the European Economic Recovery Plan and the financial services reform announced in the Communication of 4 March for the Spring European Council "Driving European Recovery"⁴.

2. CONSULTATION OF INTERESTED PARTIES

The proposal is the result of an extensive and continuous dialogue and consultation with all major stakeholders, including securities regulators, market participants and consumers. It is built upon the observations and analysis contained in the reports published by the Committee

¹ http://ec.europa.eu/enterprise/regulation/better_regulation/docs/com_2007_23_en.pdf

² Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC. OJ L 345, 31.12.2003, p. 64.

³ The exercise of the review of the Prospectus Directive is not a duplication of the work to be undertaken under the Commission's Communication on Packaged Retail Investment Products because this will cover different types of retail investment products (such as unit-linked life insurance, investment funds, certain structured notes and certificates) which are outside the scope of the Prospectus Directive and do not benefit from the level of investor protection now granted by the Prospectus Directive.

⁴ COM (2009) 114 final of March 4, 2009.

of European Securities Regulators (CESR)⁵ and by the European Securities Markets Expert Group (ESME)⁶. It makes also use of the findings of a study completed by the Centre for Strategy & Evaluation Services (CSES)⁷. An open Internet consultation was conducted from 9 January to 10 March 2009⁸.

3. IMPACT ASSESSMENT

In line with its "Better Regulation" policy, the Commission conducted an impact assessment⁹ of policy alternatives. Policy options were considered for the following topics:

- Divergent definitions of qualified investors in Article 2.1(e) of Directive and professional clients in Section II of Annex II of MiFID¹⁰;
- Restriction of the choice of home Member State for the issuers of non-equity securities below EUR 1 000 in Article 2.1(m);
- Clarification of the requirements in Article 3.2 of the Directive in case of subsequent placements of securities through financial intermediaries (retail cascade);
- Regime for Employees Shares Schemes in Article 4.1(e) of the Directive;
- Functioning of the summary of the prospectus;
- Burdensome disclosure requirements in case of rights issues of listed companies, offers of non-equity securities issued by credit institutions above the threshold mentioned in Article 1.2(j) of the Directive, and offers of securities of issuers with reduced market capitalization;
- Lack of harmonized liability rules in Article 6 of the Directive;

⁵ CESR is an independent advisory group to the European Commission composed by the national supervisors of the EU securities markets. See the European Commission's Decision of 23 January 2009 establishing the Committee of European Securities Regulators 2009/77/CE. OJ L 25, 23.10.2009, p. 18). The role of CESR is to improve co-ordination among securities regulators, act as an advisory group to assist the EU Commission and to ensure more consistent and timely day-to-day implementation of community legislation in the Member States.

⁶ ESME is an advisory body to the Commission, composed of securities markets practitioners and experts. It was established by the Commission in April 2006 and operates on the basis of the Commission Decision 2006/288/EC of 30 March 2006 setting up a European Securities Markets Expert Group to provide legal and economic advice on the application of the EU securities Directives. OJ L 106, 19.4.2006, p. 14-17.

⁷ CSES is a private consultancy firm that carried out the study in response to a request for services in the context of the Framework Contract for Evaluation and Impact Assessment of Internal Market Directorate General activities.

⁸ The Commission received 121 contributions. With the exception of those declared confidential by the respondents, all responses are available under: http://ec.europa.eu/internal_market/consultations/2009/prospectus_en.htm

⁹ The impact assessment report is accessible on the following website: [AAA](#)

¹⁰ 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.

- Burdensome disclosure regime for government guarantee schemes;
- Duplication of disclosure requirements in Article 10 of the Directive;
- Requirements in Article 14 of the Directive relating to the printed form of the prospectus;
- Clarification of the obligation to supplement a prospectus and the exercise of the right of withdrawal in Article 16 of the Directive;
- Requirements in Article 18 of the Directive relating to the translation of the summary of the prospectus.

Each policy option was assessed against the following criteria: investor protection, consumer confidence, efficiency, clarity and legal certainty, and reduction of disproportionate and administrative burdens.

4. SIMPLIFICATION

This proposal is foreseen in the Simplification Rolling Programme for adoption by the Commission in 2009. Significant simplification benefits are being brought about whilst the level of investor protection under the Directive is maintained. Reducing the disclosure requirements for companies with reduced market capitalization can be expected to generate overall savings of €173 million every two years. Rules leading to double transparency obligations are removed, eliminating unnecessary costs of a total of €30 million to companies. Exemption of Employee Shares Schemes from the obligation to publish a prospectus will save over €18 million. Reduction of disclosure requirements for raising capital through rights issues will economize almost €80 million. Excluding detailed information on the financial situation of the guarantor in case of government guarantee schemes will save another €812 000. The total potential burden savings of all these measures is estimated to be up to €302million per year.

In its opinion of 18 September 2008 the High Level Group of Independent Stakeholders on Administrative Burdens chaired by Mr. Stoiber advised the European Commission to consider the suppression of (i) 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, and (ii) 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.

In relation to the obligation to deliver a paper copy of the prospectus, whilst the abolition of this obligation would be positive in terms of reducing the administrative burden for the person obliged to hand the prospectus to the investor (be it the offeror, the person asking for the admission to trading or the financial intermediaries placing or selling the securities), this would however reduce the level of investor protection because of the existing digital divide, namely in cases where the investor has no access to internet. The abolition of this obligation would have a negative impact in the confidence of the consumers because it would create discrimination between investors depending on whether they have internet access or not.

In relation to the obligation to translate the summary of the prospectus, whilst the abolition of this obligation would reduce the administrative burden for this type of offers, because the person responsible for drawing up the prospectus could save the cost of the translations, this would be seriously detrimental for investor protection. In accordance with Article 5.2 of the Prospectus Directive, the summary of the prospectus reflects the essential characteristics and risks associated with the issuer, any guarantor and the securities. In cases where the prospectus is "passported" to countries where the investors do not speak the language in which the prospectus is drawn up it is essential that investors receive at least the summary of the prospectus in a language that they can understand. The option of abolishing this obligation would undermine consumer confidence because it would be contrary to the main objective of the Prospectus Directive: to provide investors with information necessary to enable them to make an informed investment decision (Article 5 of the Prospectus Directive).

5. LEGAL ELEMENTS OF THE PROPOSAL

5.1. Legal basis

The proposal is based on Articles 44 and 95 of the EC Treaty.

5.2. Subsidiary and proportionality

A directive amending the current Directive is the most appropriate instrument. In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the EC Treaty, the objectives of the proposal cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. In particular, the proposal aims to increase legal certainty and efficiency in the prospectus regime, and to reduce disproportionate and administrative burdens for companies raising capital in the Community. Taking into account that offers of securities can have cross border dimension, this exercise can be better addressed by the Community: a consistent approach is essential in order to avoid regulatory arbitrage in the Member States and competition distortion in the various markets. The proposal respects the principle of proportionality because all solutions have been drafted bearing in mind cost-efficiency, and it does not go beyond what it is necessary to achieve the objectives pursued.

5.3. Detailed explanation of the proposal

5.3.1. Articles 1(2)(h) and (j), 1(4) and 3.2(e)

The way limits of maximum offering amounts are calculated in the Directive may lead to varying interpretations in the different Member States. Therefore, for reasons of certainty and efficiency, it should be clarified that the total consideration of the offers mentioned in Articles 1(2)(h) and (j) and 3(2)(e) of the Directive should be computed on a Community wide basis and not on a country-by-country basis. Moreover, as the limits set out in the Directive may eventually become outdated, in order to take account of the technical developments in the financial markets and to ensure uniform application of the Directive, the Commission shall be empowered to adopt implementing measures in relation to these limits. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

5.3.2. *Article 2(1)(e)*

The definition of qualified investors in Article 2.1(e)(i), (ii) and (iii) of the Directive is different from the definition of professional clients set out in Section II of Annex II of MiFID and investment firms cannot rely on their categorization for a private placement and thus benefit from the exemption in Article 3(2)(a) of the Directive. This creates complexity and costs for investment firms in case of private placements: a firm has to double check whether its professional clients are registered as qualified investors or it has to renounce to place securities within its professional clients. This situation restricts the issuers' ability to conduct private placements with some classes of experienced individual investors. As there is no justification in terms of investor protection for having divergent definitions for sophisticated investors in both directives, for the purposes of private placements of securities, investment firms and credit institutions shall be entitled to treat as qualified investors those natural or legal persons that the firms consider to be professional clients or eligible counterparties in accordance with Section II of Annex II of MiFID.

5.3.3. *Articles 2(1)(m)(ii)*

Article 2(1)(m)(ii) imposes a restriction on the choice of the home Member State (among those Member States where the issuer has its registered office or where the debt is going to be admitted to trading on a regulated market or where the debt is offered to the public) for issues of non-equity securities with a denomination per unit below EUR 1 000. If the denomination per unit is below EUR 1 000, the Directive provides that the home Member State is the one where the issuer has its registered office. The threshold is causing practical problems to issuers of non-equity securities who may need to draw up several prospectuses for a single issue, i.e. one to cover a debt issuance program within the threshold and another for the remaining debt issuance activities which might exceed that threshold. Moreover, the threshold cannot apply to certain structured products which are not denominated. In order to increase the efficiency and flexibility of the issuance of debt in the Community, the limitation on the determination of the home Member State for issues of non-equity securities with a denomination below EUR 1.000 should be removed.

Such a change would not create concrete risks in terms of investor protection because the characteristics of and the risks associated with debt securities do not depend on the denomination of the securities offered or traded in a regulated market. As a consequence of this proposal, as issuers will be allowed to choose the home Member State for all non-equity security independently of the denomination, such a possibility currently granted by the Directive for "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," will not be further necessary. Moreover, the mechanism for the determination of the home and the host Member States in Article 2(1)(i)(i) of Directive 2004/109/EC should be amended accordingly.

5.3.4. *Article 3(2)*

Article 3(1) and (3) requires the publication of a prospectus when securities are offered to the public and when they are admitted to trading on a regulated market. Article 3(2) sets out a number of circumstances in which an offer of securities to the public is exempt from the requirement to publish a prospectus. However the lack of clarity in Article 3(2) seems to be causing problems for issuers in some markets where securities are distributed by "retail

cascade". A retail cascade typically occurs when securities are sold to investors (other than qualified investors) by intermediaries and not directly by the issuer. In particular, it is unclear how the requirement to produce and update a prospectus, and the provisions on responsibility and liability, should apply when securities are placed by the issuer with financial intermediaries and are subsequently, over a period that may run to many months, sold on to retail investors, possibly through one or more additional tiers of intermediaries. A valid prospectus, drawn up by the issuer or the offeror and available to the public in the final placement of securities through financial intermediaries or in any subsequent resale of securities, shall provide sufficient information for investors to make informed investment decisions. Therefore, financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer or the offeror as long as this is valid and duly supplemented in accordance with Article 9 and the issuer or the offeror responsible for drawing up such prospectus consents to its use. In this case no other prospectus should be required. However, in case the issuer or the offeror responsible for drawing up such initial prospectus does not consent to its use, the financial intermediary should be required to publish a new prospectus. The financial intermediary could use the initial prospectus by incorporating the relevant parts by reference into its new prospectus.

5.3.5. Article 4(1)(e)

Article 4(1)(e) grants an exemption specifically for offers of securities to employees, provided that two conditions are met: (i) the issuer must have securities admitted to trading on a regulated market; and (ii) a document must be available containing information on the number and nature of the securities and the reason for and the details of the offer. This exemption does not apply equally to all employees, but creates a less advantageous situation for the employees of two categories of companies, namely 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. The exemption is not available to third country issuers that do not have a listing on a regulated market because the concept of regulated market is by definition limited to the EU, as provided for in Article 4(1)(14) of MiFID, and it is equally impossible for EU non-listed companies or EU companies that have securities traded on EU exchange-regulated markets to satisfy this condition because once again they are not listed on a regulated market in line with the applicable MiFID definition. The requirement to produce a full prospectus for this type of offers is not an effective means of informing employees about the risks and benefits of this very particular kind of offer, and imposes excessive costs on employers that are not justified in terms of investor protection. Therefore, the exemption in Article 4(1)(e) relating to employee shares schemes should be widened in order to cover the employee shares schemes of companies that are not listed on a regulated market.

5.3.6. Articles 5(2), 6(2) and 7

The summary of the prospectus is in practice a key source of information for retail investors in their investment decisions. Therefore, it should be short, simple and comprehensible to the targeted investors. It should focus on the key information and it should not be restricted to any predetermined number of words. Moreover, the content of the summary should be determined in a way that ensures comparability with other investment products that are comparable to the investment proposal described in the prospectus. A more substantial summary document will strike a better balance between the need for investor protection and the need for comprehensibility for retail investors and it will help targeted retail investors to make informed investment decisions. A logical consequence of having a more substantial summary

document is to attach civil liability on the basis of the summary not only if it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, but also if it does not provide key information enabling investors to take informed investment decisions and to compare the securities with other investment products.

The cost of producing a full prospectus might not be justified in the case of rights issues because existing shareholders have already made the initial decision to invest in the company and they should be familiar with it. Moreover, according to some industry stakeholders, the disclosure requirements of the Directive might be overly burdensome and costly also for companies with smaller market capitalization in the case of offers of or above EUR 2 500 000, and for small credit institutions in the case of offers of non-equity securities referred to in Article 1(2)(j) of or above EUR 50 000 000. These stakeholders stress that, in practice, these thresholds would be too low and would create difficulties for these issuers raising funds in the EU. However, consumer experts have emphasised that the creation of a "mini" prospectus, which might correspond better to the needs and size of small firms, should first guarantee the same level of investor protection regardless of the size of the issuer. Therefore, in order to improve the efficiency of cross border right issues and to adapt the information to the size of issuers, notably credit institutions issuing the securities mentioned in Article 1(2)(j) within or above the threshold therein and companies with reduced market capitalization, a proportionate disclosure regime should be introduced in the Directive for such offers, while maintaining a high level of investor protection.

5.3.7. *Article 8*

According to Article 1(2)(d) of the Directive, the Directive does not apply to securities unconditionally and irrevocably guaranteed by a Member State. However, according to Article 1(3) of the Directive, an issuer whose securities are guaranteed by a Member State shall be entitled to opt in drawing up a prospectus and thus benefiting from the passport mechanism in order to make a cross-border offer in the Community. In this case, Article 5.1 of the Directive provides that the prospectus has to include information about the issuer, the securities and the guarantor of the offer. In accordance with the Annex VI of the Prospectus Regulation¹¹, when an offer of securities is guaranteed by a third party, the issuer has to disclose in the prospectus information about the nature and scope of the guarantee and about the guarantor. In particular, the "guarantor must disclose information about itself as if it were the issuer of that same type of security that is the subject of the guarantee". Therefore, in the case of securities guaranteed by a Member State, in order to benefit of the passport regime, the issuer shall disclose information about the guarantor according to Annexes VI and XVI of the Prospectus Regulation. However, as Member States publish abundant information on their financial situation and this is in general available to the public, there is no added value for investors in requiring the issuer to disclose in the prospectus information about Member States, as guarantors, according to Annexes VI and XVI of the Prospectus Regulation. Therefore, issuers of securities guaranteed by a Member State, when drawing up a prospectus according to Article 1(3) of the Directive, shall be entitled to omit information about such guarantors.

¹¹ Commission Regulation (EC) No 809/2004 of 29 April 2004 implementing Directive 2003/71/EC of the European Parliament and of the Council as regards information contained in prospectuses as well as the format, incorporation by reference and publication of such prospectuses and dissemination of advertisements. OJ L 149, 30.4.2004, p.1.

5.3.8. *Article 9 and 14(4)*

According to Article 9 of the Directive, a prospectus, a base prospectus and a registration document shall be valid for a period up to 12 months. As these documents can currently be supplemented according to Article 16 of the Directive or currently updated according to Article 12 of the Directive, there is no risk that they become outdated. Therefore, given the time and costs of drafting and approving a prospectus, the validity period of 12 months of a prospectus, a base prospectus and a registration document should be extended to 24 months provided they are properly supplemented. Article 14(4) should be modified accordingly.

5.3.9. *Articles 10, 11(1) and 12(2)*

As a consequence of the entry into force of 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/EC¹², the obligation for the issuer in Article 10 of the Directive to provide annually a document containing or referring to all information published in the 12 months preceding the issuance of the prospectus has become a mere duplication and therefore should be repealed. Article 11(1) of the Directive and Article 2(1)(i)(i) of Directive 2004/109/EC should be amended accordingly inasmuch they make reference to Article 10. Moreover, the registration document, which can currently be updated according to Articles 10(1) and 12(2), should only be supplemented in accordance with the normal procedure to supplement a prospectus in Article 16 of the Directive. Indeed, the registration document contains information on the issuer. Therefore, it should no longer be updated according to Article 12(2) i.e. by securities note, which instead contains information on the securities.

5.3.10. *Article 16*

The current wording of Article 16(1) of the Directive creates a considerable degree of uncertainty as to when the requirement to publish a prospectus ends in cases where the securities are to be admitted to trading on a regulated market. The relationship between the "final closing of the offer to the public" and "the time when trading on regulated market begins" should be clarified as to whether the requirement to publish a prospectus ends with the start of trading of the securities on a regulated market irrespective of whether the offering period has finally closed. Indeed, the subscription period generally expires prior to the admission of securities to trading, and investors should not be entitled to a right of withdrawal pursuant to Article 16(2) of the Directive if the offer has already closed. Therefore, in order to clarify whether the requirement to publish a prospectus ends with the start of trading of the securities on a regulated market irrespective of whether the offer to the public has finally closed, the obligation to supplement a prospectus should be terminated at the final closing of the offering period or the time when trading of such securities on a regulated market begins, whichever occurs earlier.

In addition, every time a prospectus is supplemented in the course of an offer, Article 16(2) of the Directive grants investors a right of withdrawal of their previous acceptances. Such right can be exercised during a period no shorter than two days following the publication of the supplement. As the time frame for the exercise of such right is not harmonised, Member

¹² OJ L 390, 31.12.2004, p. 38.

States have set different periods through national implementing legislation and, in the case of a cross-border offer, it is unclear whether the time frame set out in the national legislation of the home Member State of the issuer should apply or those stemming from the legislation of each of the Member States where the offer or admission to trading takes place. This lack of common time frame increases the costs of legal advice. Therefore, when a prospectus is supplemented, the harmonization at Community level of the time frame for the exercise by investors of the right of withdrawal of their previous acceptances would provide certainty to issuers making cross border offers of securities. To provide flexibility to issuers from countries with traditionally a longer time frame, the issuer, the offeror or the person asking for the admission to trading on a regulated market should be able to extend voluntarily the term for the exercise of this right.

5.3.11. Article 18

According to Article 18 of the Directive, the competent authority of the home Member State shall notify the host competent authorities the certificate of approval attesting that the prospectus has been drawn up in accordance with the Prospectus Directive. However, in practice, uncertainty has arisen for the issuers as to whether and when a notification has actually been effected. Therefore the notification procedure of Article 18 of the Directive should be amended so that the competent authority of the home Member State shall at the same time notify also the issuer or the person responsible for drawing up the prospectus of the certificate of approval in addition to the competent authority of the host Member State. This will reduce costs and risks for the issuer or the person responsible for drawing up the prospectus who will have certainty that it has not inadvertently contravened the law by offering securities to the public in a Member State where the passport is not yet effective due to an oversight or error on the part of competent authority of the home Member State.

6. BUDGETARY IMPLICATION

The proposal has no implication for the Community budget.

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 44 and 95 thereof,

Having regard to the proposal from the Commission¹³,

Having regard to the opinion of the European Economic and Social Committee¹⁴,

Having regard to the opinion of the European Central Bank¹⁵,

Acting in accordance with the procedure laid down in Article 251 of the Treaty¹⁶,

Whereas:

- (1) The European Council agreed, at its meeting on 8 and 9 March 2007, that administrative burdens on companies should be reduced by 25% by the year 2012 in order to enhance the competitiveness of companies in the Community.
- (2) Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC¹⁷ has been identified by the Commission as one piece of legislation that contains a number obligations for companies, some of which seem burdensome.
- (3) Those obligations need to be reviewed in order to reduce the burdens weighing on companies within the Community to the necessary minimum without compromising the protection of investors and the proper functioning of the securities markets in the Community.

¹³ OJ C , , p. .

¹⁴ OJ C , , p. .

¹⁵ OJ C , , p. .

¹⁶ OJ C , , p. .

¹⁷ OJ L 345, 31.12.2003, p. 64.

- (4) Directive 2003/71/EC requires the Commission to make an assessment of the application of that Directive five years after the date of entry into force and to present, where appropriate, proposals for its review. That assessment has revealed that certain elements of Directive 2003/71/EC should be modified in order to simplify and improve its application, increase its efficiency and enhance the international competitiveness of the Community, contributing to the reduction of administrative burdens.
- (5) The way limits of maximum offering amounts are calculated in the Directive 2003/71/EC should be clarified for reasons of certainty and efficiency. The total consideration for certain offers referred to in that Directive should be computed on a Community wide basis.
- (6) For the purposes of private placements of securities, investment firms and credit institutions should be entitled to treat as qualified investors those natural or legal persons that are considered to be or that they treat as professional clients, or that are recognized eligible counterparties in accordance with 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/EEC¹⁸. An alignment of the relevant provisions of Directives 2003/71/EC and 2004/39/EC in this sense would reduce complexity and costs for investment firms in the event of private placements because the firms would be able to define the persons to whom the placement is to be addressed relying on their own list of professional clients and eligible counterparties. Therefore, the definition of qualified investors in Directive 2003/71/EC should be widened to include those persons.
- (7) In order to increase the efficiency and flexibility of the issuance of debt in the Community, the limitation on the determination of the home Member State for issues of non-equity securities with a denomination below EUR 1.000 should be removed. The mechanism for the determination of the home and the host Member States in Directive 2004/109/EC should also be amended accordingly.
- (8) A valid prospectus, drawn up by the issuer or the offeror and available to the public at the time of the final placement of securities through financial intermediaries or in any subsequent resale of securities, provides sufficient information for investors to make informed investment decisions. Therefore, financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer or the offeror as long as this is valid and duly supplemented in accordance with Article 9 and Article 16 of Directive 2003/71/EC and the issuer or the offeror responsible for drawing up such prospectus consents to its use. In this case no other prospectus should be required. However, in case the issuer or the offeror responsible for drawing up such initial prospectus does not consent to its use, the financial intermediary should be required to publish a new prospectus.
- (9) The requirement to produce a prospectus for offers made in the context of an employee share scheme is not an effective means of informing employees about the

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OJ L 145, 30.4.2004, p. 1.

risks and benefits of that very particular kind of offer, and imposes excessive costs on employers that are not justified in terms of investor protection. Non-listed companies and companies listed in markets other than regulated markets in the Community should therefore be exempted from the obligation to produce a prospectus under those circumstances.

- (10) The summary of the prospectus is a key source of information for retail investors. It should be short, simple and easy for targeted investors to understand. It should focus on the key information that investors need in order to be able to make informed investment decisions. Its content should not be restricted to any predetermined number of words. The format and content of the summary should be determined in a way that ensures comparability with other investment products that are similar to the investment proposal described in the prospectus. Therefore, Member States should attach civil liability on the basis of the summary not only if it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, but also if it does not provide key information enabling investors to take informed investment decisions and to compare the securities with other investment products.
- (11) In order to improve the efficiency of cross border right issues and to adequately take into account the size of issuers, notably credit institutions issuing the securities mentioned in Article 1(2)(j) of Directive 2003/71/EC at or above the limit laid down in that Article and companies with reduced market capitalization, a proportionate disclosure regime should be introduced for rights issues and for offers of shares of issuers with reduced market capitalization and offers of non-equity securities referred to in Article 1(2)(j) of Directive 2003/71/EC issued by credit institutions at or above the limit laid down in that Article.
- (12) Member States publish abundant information on their financial situation which is in general available in the public domain. Therefore, in case a Member State in the Community guarantees an offer of securities, the issuer should not be obliged to provide in the prospectus information about that Member State acting as guarantor.
- (13) As the prospectus can be updated by way of supplements according to Directive 2003/71/EC, there is no risk that it may become outdated. Therefore, given the time and costs of drafting and approving a prospectus, the validity period of 12 months of the prospectus, base prospectus and registration document should be extended to 24 months provided they are properly supplemented.
- (14) As a consequence of the entry into force of 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/EC¹⁹, the obligation in Directive 2003/71/EC for the issuer to provide annually a document containing or referring to all information published in the twelve months preceding the issuance of the prospectus has become a dual obligation and should therefore be abolished. As a consequence, a registration document, instead of being updated in accordance with Article 10, should be supplemented in accordance with the normal procedure to supplement prospectuses.

¹⁹ OJ L 390, 31.12.2004, p. 38.

- (15) In order to clarify whether the requirement to publish a supplement to the prospectus ends with the start of trading of the securities on a regulated market irrespective of whether the offering period has closed, the obligation to supplement a prospectus should be terminated at the final closing of the offering period or the time when trading of such securities on a regulated market begins, whichever occurs earlier.
- (16) When the prospectus is supplemented, harmonization at Community level of the time frame for the exercise by investors of the right of withdrawal of their previous acceptances would provide certainty to issuers making cross border offers of securities. To provide flexibility to issuers from Member States with traditionally longer time frame in this regard, the issuer, the offeror or the person asking for the admission to trading on a regulated market should be able to extend voluntarily the term for the exercise of that right.
- (17) The authority responsible for the approval of the prospectus should also notify the issuer or the person responsible for drawing up the prospectus of the certificate of approval of the prospectus that is addressed to the authorities of host Member States in accordance with Directive 2003/71/EC in order to provide the issuer or the person responsible for drawing up the prospectus with certainty as to whether and when a notification has actually been effected.
- (18) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission²⁰.
- (19) In particular, in order to take account of the technical developments in the financial markets and to ensure uniform application of Directive 2003/71/EC, the Commission should be empowered to adopt implementing measures to update the limits established in that Directive. Since those measures are of general scope and are designed to amend non-essential elements of Directive 2003/71/EC by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (20) Since the objectives of this Directive, namely reducing administrative burdens relating to the publication of a prospectus in the case of offers of securities to the public and admission to trading in regulated markets within the Community, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (21) Directive 2003/71/EC and Directive 2004/109 should therefore be amended accordingly,

²⁰ OJ L 184, 17.7.1999, p. 23.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2003/71/EC

Directive 2003/71/EC is amended as follows:

1. Article 1 is amended as follows:

(a) Paragraph 2 is amended as follows:

(i) Point (h) is replaced by the following:

"(h) securities included in an offer where the total consideration of the offer in the Community is less than EUR 2 500 000, which limit shall be calculated over a period of 12 months;"

(ii) Point (j) is replaced by the following:

"(j) non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer in the Community is less than EUR 50 000 000, which limit shall be calculated over a period of 12 months, provided that these securities:

(i) are not subordinated, convertible or exchangeable;

(ii) do not give a right to subscribe to or acquire other types of securities and that they are not linked to a derivative instrument."

(b) The following paragraph 4 is added:

"4. In order to take account of technical developments on financial markets and to ensure uniform application of this Directive, the Commission shall adopt implementing measures concerning the adjustment of the limits referred to in points (h) and (j) of Article 1(2). Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC."

2. Article 2(1) is amended as follows:

(a) Point (e) is amended as follows:

(i) Point (i) is replaced by the following:

"(i) Persons or entities that are considered to be or treated on request as professional clients in accordance with Annex II to Directive 2004/39/EC, or recognised as eligible counterparties in accordance with Article 24 of Directive 2004/39/EC."

(ii) Points (ii) and (iii) are deleted.

- (b) In Point (m), point (ii) is replaced by the following:
- "(ii) for any issues of non-equity securities , 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 ;"
3. Article 3 is amended as follows:
- (a) In the first subparagraph of paragraph 2, point (e) is replaced by the following:
- "(e) an offer of securities with a total consideration in the Community of less than EUR 100 000, which limit shall be calculated over a period of 12 months."
- (b) In paragraph 2, the following subparagraph is added:
- "Member States shall not require another prospectus in any such subsequent resale of securities or final placement of securities through financial intermediaries as long as a valid prospectus is available in accordance with Article 9 and the issuer or the person responsible for drawing up such prospectus consents to its use."
4. In Article 4(1), point (e) is replaced by the following:
- "(e) securities offered, allotted or to be allotted to existing or former directors or employees by their employer or by an affiliated undertaking, provided that a document is made available containing information on the number and nature of the securities and the reasons for and details of the offer."
5. In Article 5(2), the first subparagraph is replaced by the following:
- "The prospectus shall contain information concerning the issuer and the securities to be offered to the public or to be admitted to trading on a regulated market. It shall also include a summary. The summary shall, in a brief manner and in non-technical language, convey the essential characteristics and risks associated with the issuer, any guarantor and the securities, in the language in which the prospectus was originally drawn up. The format and content of the summary of the prospectus shall provide key information in order to enable investors to take informed investment decisions and to compare the securities with other investment products. The summary shall also contain a warning that:"
6. In Article 6(2), the second subparagraph is replaced by the following:
- "However, Member States shall ensure that no civil liability shall attach to any person solely on the basis of the summary, including any translation thereof, unless it is misleading, inaccurate or inconsistent, when read together with the other parts of the prospectus, and it does not provide key information enabling investors to take informed investment decisions and to compare the securities with other investment products."
7. Article 7(2) is amended as follows:
- (a) Point (e) is replaced by the following:

"(e) the various activities and size of the issuer, in particular credit institutions issuing non-equity-securities referred to in Article 1(2)(j) at or above the limit laid down in that Article, companies with reduced market capitalization and SMEs. For such companies the information shall be adapted to their size and, where appropriate, to their shorter track record;"

- (b) Point (g) is inserted:

"(g) a proportionate disclosure regime shall apply to rights issues of companies whose shares are admitted to trading on a regulated market."

8. In Article 8, the following paragraph 3a is inserted after paragraph 3:

"3a. If securities are guaranteed by a Member State, an issuer, an offeror or a person asking for the admission to trading on a regulated market, when drawing up a prospectus in accordance with Article 1.3, shall be entitled to omit information about such guarantors."

9. Article 9 is amended as follows:

- (a) Paragraphs 1 and 2 are replaced by the following:

"1. A prospectus shall be valid for 24 months after its publication for offers to the public or admissions to trading on a regulated market, provided that the prospectus is completed by any supplements required pursuant to Article 16.

2. In the case of an offering programme, the base prospectus, previously filed, shall be valid for a period of up to 24 months."

- (b) Paragraph 4 is replaced by the following:

"4. A registration document, as referred to in Article 5(3), previously filed and approved, shall be valid for a period of up to 24 months provided that it has been supplemented in accordance with Article 16. The registration document, supplemented if necessary in accordance with Article 16, accompanied by the securities note and the summary note shall be considered to constitute a valid prospectus."

10. Article 10 is deleted.

11. Article 11(1) is replaced by the following:

"1. Member States shall allow information to be incorporated in the prospectus by reference to one or more previously or simultaneously published documents that have been approved by the competent authority of the home Member State or filed with it in accordance with this Directive or Directive 2004/109/EC. This information shall be the latest available to the issuer. The summary shall not incorporate information by reference."

12. Article 12(2) is replaced by the following:

"2. In this case, the registration document shall be supplemented in accordance with Article 16. The securities and summary notes shall be subject to a separate approval."

13. Article 14(4) is replaced by the following:

"4. The competent authority of the home Member State shall publish on its website over a period of 24 months, at its choice, all the prospectuses approved, or at least the list of prospectuses approved in accordance with Article 13, including, if applicable, a hyperlink to the prospectus published on the website of the issuer, or on the website of the regulated market."

14. Article 16 is replaced by the following:

"Article 16

Supplements to the prospectus

1. Every 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 and which arises or is noted between the time when the prospectus is approved and the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, whichever occurs earlier, shall be mentioned in a supplement to the prospectus. Such a supplement shall be approved in the same way in a maximum of seven working days and published in accordance with at least the same arrangements as were applied when the original prospectus was published. The summary, and any translations thereof, shall also be supplemented, if necessary to take into account the new information included in the supplement.
 2. Investors who have already agreed to purchase or subscribe for the securities before the supplement is published shall have the right, exercisable within two working days after the publication of the supplement, to withdraw their acceptances. This period may be extended by the issuer, the offeror or the person asking for the admission to trading on a regulated market."
15. Article 18(1) is replaced by the following:

"1. The competent authority of the home Member State shall, at the request of the issuer or the person responsible for drawing up the prospectus and within three working days following that request or, if the request is submitted together with the draft prospectus, within one working day after the approval of the prospectus notify the competent authority of the host Member State with a certificate of approval attesting that the prospectus has been drawn up in accordance with this Directive and with a copy of the said prospectus. If applicable, this notification shall be accompanied by a translation of the summary produced under the responsibility of the issuer or person responsible for drawing up the prospectus. The same procedure shall be followed for any supplement to the prospectus. The issuer or the person responsible for drawing up the prospectus shall also be notified of the certificate of approval at the same time as the competent authority of the host Member State."

Article 2

Amendment of Directive 2004/109/EC

In Article 2(1)(i) of Directive 2004/109/EC, point (i) is replaced by the following:

"(i) in the case of an issuer of shares:

— where the issuer is incorporated in the Community, the Member State in which it has its registered office;

— where the issuer is incorporated in a third country, the Member State referred to in point (iii) of Article 2(1)(m) of Directive 2003/71/EC."

Article 3

Transposition

- 1 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*twelve months after the entry into force of this Directive*] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

- 2 Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 4

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 5

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President