

Opinion of the European Economic and Social Committee on 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'

COM(2009) 491 final — 2009/0132 (COD)
(2010/C 347/12)

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On 14 October 2009 the Council decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, on 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

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On 3 November 2009 the Committee Bureau instructed the Section for Economic and Monetary Union and Economic and Social Cohesion to prepare the Committee's work on the subject.

At its 460th plenary session, held on 17-18 February (meeting of 18 February 2010), the European Economic and Social Committee adopted the following opinion by 156 votes to one with four abstentions.

1. Conclusions and recommendations

1.1 The proposal seeks to incorporate into current Community legislation two principles which the EESC essentially supports: a) quality of information is a key factor in genuine ability to support the investment choices of operators, particularly retail operators; b) more cost-effective information management can be achieved by eliminating duplication of information and thus the cost of producing it.

1.2 Practical implementation of these two principles raises real difficulties, given that measuring quality is difficult enough in itself, and even more difficult when it comes to quality of information. Moreover, it must be borne in mind that the mechanisms for disseminating information on the financial markets ('by osmosis', we could say) and the horizontal effects caused by these mechanisms among the various economic operators concerned by an investment ('signal effect') generate what can be considerable disparities between the costs of information production and the benefits (including financial benefits) thereof.

1.3 Resolving information quality and cost-effectiveness issues should therefore be a joint endeavour, given that the best incentive for securities issuers to produce high-quality information is being able to expect financial benefits which are at least equal to the costs entailed in producing the information. A cost-

effectiveness assessment of disclosure should be carried out, bearing in mind that if disclosure is transparent, the cost of raising capital will be lower; on the other hand, non-transparent disclosure will increase the cost of raising capital (the 'disclosure risk' premium). The EESC therefore calls for a solution to be found to information asymmetries, to reduce the cost of raising capital and the disclosure risk premium, thus increasing competitiveness among European businesses raising capital.

1.4 A considerable part (around 3/4) of the disclosure cost-benefit differential is dependent on the structural mechanisms used by market operators to disseminate information, while only a smaller part (around 1/4) is dependent on the information not disclosed by the issuer. The proposal sets out solutions to reduce the first of these two parts of the disclosure risk; as such, it is to be welcomed. The EESC would just stress the need for the considerable cost saving which should ensue not to be achieved to the detriment of the quality of the information disclosed – otherwise the initiative would be counterproductive.

1.5 Then the proposal raises an aspect of the issue which has yet to be resolved. The need to make the information available to non-expert investors clashes with the need to give them all the facts they need to choose investments, which inevitably means entering into technical details. A solution advocated by the EESC would be to create an 'information intermediaries' market, separate from the market of more conventional capital and risk intermediaries

markets (usually: banks, management companies, brokers specialising in derivatives, etc.). In the light of experience gained in other countries and situations, the EESC suggests laying down specific rules to introduce legal delegation structures (similar to proxy voting, including at the placement stage and in addition to the proposals made in the Commission document) and to recognise professional financial information figures (similar to family offices).

2. Regulatory background and importance of the issue.

2.1 The Commission attaches great importance to transparent disclosure in the financial markets – the continual drafting of new rules bears witness to this. Indeed, COM(2000) 0126 kicked off a decade of endeavours to provide clear, transparent EU rules as regards codifying the procedures for admission of securities to official stock exchange listings and the information to be published. With the proposal being discussed here, this process is now entering a new stage, intended to improve implementation of transparent disclosure rules by reducing and streamlining certain aspects of prospectus publication.

2.2 Over the course of the decade between 2000 and 2010, the focus of EU legislation has gradually changed.

2.2.1 Directive 2001/34 focused first and foremost on the amount of information that issuers of securities were required to disclose to investors, starting from the premise that the placement efficiency of the financial markets was directly related to this. The EESC essentially supported this approach in the Opinion adopted on 29 November 2000 (rapporteur: Mr Lehnhoff; 112 votes for, no votes against or abstentions), merely pointing out the need for the information provided to investors to be presented clearly and simply.

2.2.2 In the course of 2003, interest shifted to operators' use of information, with legislation intended to supplement the original text of Directive 2001/34. Directive 2003/6 regulated 'insider dealing', in particular that liable to lead to manipulation of the balance of the financial markets and, therefore, undermine consumer confidence. It should be pointed out, however, that the Directive refers to issuers and regulatory authorities, focusing less on the potential impact of the use of the information provided on investors' behaviour. In line with this approach, Directive 2003/71 laid down requirements for drawing up the prospectus to be published when securities are offered to the public or admitted to trading.

2.2.3 Directive 2004/109 amended Directive 2001/34, focusing on the technical arrangements for disclosure to investors by issuers of securities admitted to trading on a regulated market, with the aim of harmonising and integrating the European financial markets and the financial services operating thereon. The

EESC Opinion which preceded this Directive, adopted on 10 December 2003 (rapporteur: Mr Simon, 110 for, one abstention) welcomed the technical proposals made in the text, just pointing out the possibility of over-rigid schemes increasing the cost of producing the mandatory information disproportionately, generating a considerable financial deterrent from fully transparent disclosure, particularly for smaller issuers.

2.2.4 In 2005, however, additional legislation focused on 'information regulators' in the markets, establishing a new financial services committee organisational structure. The aim was to enable European legislators and regulators to respond more rapidly and effectively to developments in the financial markets (in particular those triggered by developments in technology). The EESC welcomed this Commission initiative on 31 March 2004 (rapporteur: Ms Fusco, 95 votes for, two abstentions).

2.3 The main aim of the new proposal is to improve implementation of Directives 2003/71 and 2004/109, simplifying the processes in a number of respects in order to make disclosure of financial information more compatible with the needs of 'retail investors' and make issuers established in the EU more efficient and competitive internationally. Thus, unlike previous measures, this Directive focuses on the quality of financial information disclosed.

2.4 The EESC feels that producing a large amount of information does not necessarily guarantee the quality of this information. This also creates problems as regards the cost-effectiveness of disclosure, assuming that the cost of providing financial information is related more to the number of prospectuses to be produced than the quality of their content. The proposal could lead to savings of over EUR 300 million per year, addressing a number of mechanisms which duplicate the various stages in the processes of disseminating information.

2.5 The need for markets which can supply the right balance between quantity and quality of information at affordable prices for investors is an issue which has attracted widespread interest. Recent empirical studies carried out by Ca' Foscari University in Venice have revealed that the risk of poor information ('disclosure risk') has contributed on average to 37 % of European share market volatility over the past 15 years, with no substantial difference between the various sectors. The same studies show how, surprisingly, over 3/4 of the disclosure risk is due to the mechanisms for disseminating available information among market operators, while only the remaining 1/4 is caused by distortion of the processes of disclosure by issuers. This fact is deeply rooted in the cost structure of disclosure of financial information, which is characterised by high production costs along with low transmission prices, a direct consequence of the absence of mutually exclusive rights regarding the way the information is used. This, in itself, helps to push down the quality of information and the mechanisms for disseminating it, while increasing the quantity of information, which is often duplicated.

2.6 The EESC therefore welcomes any attempts to regulate the economic processes related to information production and dissemination, provided that they genuinely help to increase the quality of information available on the financial markets, making it easier for investors to choose investments and thereby also reducing the cost of raising capital for issuers of securities for admission to trading.

3. The key points of the proposed Directive

3.1 The Proposal for a Directive consists of five articles, the first two of which modify the text of Directive 2003/71/EC (article 1 of the proposed Directive, more substantial changes) and Directive 2004/109/EC (article 2 of the proposed Directive, less substantial changes). The remaining three articles are supporting articles which deal with transposition (Article 3), entry into force (Article 4) and the addressees (Article 5).

3.2 *Analysis and comments on the content of Article 1 of the proposal under consideration, relating to Directive 2003/71/EC*

3.2.1 Proposed changes to Article 1(2)(h) and (j) and Article 3(2)(e). Addition of paragraph 4 to Article 1.

3.2.1.1 First and foremost, the new text stipulates that the ceilings set for application of the Directive refer to all placements made across the European Union as a whole. This clarification is useful above all to close a loophole involving dividing up what is a single transaction in economic terms into several transactions that are independent in legal terms and take place in different jurisdictions. The EESC would also like to point out that this clarification is also necessary in order to avoid possible distortions in the distribution of information across various territories and the increase in cost that could result from this, which would have a very significant impact on smaller transactions.

3.2.1.2 New application limits for the Directive are then specified, in accordance with the current situation in the financial markets. In order to avoid these limits becoming obsolete, it is proposed that the Commission be given the power to adjust them to the prevailing conditions as is necessary to ensure the dissemination of information to the financial markets. The EESC agrees with the need for limits that can more easily be adjusted to market conditions, but suggests that the changes made by the Commission be based on proposals put forward by the supervisory and regulatory authorities for financial markets and intermediaries, given that the activities of such authorities mean that they are best placed to continuously monitor the real requirements of the markets.

3.2.2 Proposed amendments to Article 2(1)(e) and (m)(ii).

3.2.2.1 The proposal calls for the definition of 'qualified investors' to be brought into line with that in the MiFID Directive. The EESC supports this proposal in that it helps to make the European Union's legislative framework more homogeneous.

3.2.2.2 The proposal sets the criteria for defining the geographical scope in the case of non-equity securities with a denomination per unit below EUR 1 000, restricting it to the 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. The EESC supports the Commission's aim of simplifying procedures so as to prevent cost increases resulting from the production of several prospectuses at the same time. On this subject, it is worth pointing out that the market value of securities is a very different thing from their denomination, which often has a purely legal function for the purpose of determining the proportional stake in an enterprise. Consequently, not all securities have a nominal value and some legal systems allow securities to be issued without a 'par value', in particular in the case of non-equity securities. The EESC therefore suggests that the proposal be improved by replacing any reference to 'denomination' with the 'market value' (or transaction value) of equity securities and the 'underlying value' in the case of non-equity securities.

3.2.3 Proposal to amend Article 3(2).

3.2.3.1 The proposal provides for intermediaries responsible for a placement being able to use the prospectus drawn up by the issuer, provided that it meets European standards, thus avoiding the costs of drawing up additional documents. The EESC broadly agrees with the proposal and the reasoning behind it, but suggests that there should be more clarity concerning the implementation of the new rules in cases where an intermediary is based in a third country and carries out a placement in a country other than that of the issuer.

3.2.3.2 The EESC also wonders whether the fact that the 'retail cascade' can benefit from the opportunities discussed in point 3.2.3.1 above might be incompatible with the rapid obsolescence of financial information. Consequently, it is proposed that, upon publication of a prospectus, the supervisory and regulatory authorities for the markets to which the issuer (or intermediary) refers set a time limit on the validity of the prospectus. Once that time limit has expired, it would be mandatory to update the prospectus if the specific transaction in respect of which the prospectus was published was still ongoing.

3.2.4 Proposal to amend Article 4(1)(e).

3.2.4.1 The proposal consists of extending the exemption provided for under the text currently in force to employee share plans of companies that do not have a listing on a regulated market (therefore including those with securities traded on non-EU markets). The intention behind this proposal is to eliminate the difference in treatment between different types of company (EU quoted versus non-quoted and non-EU quoted) and to limit the costs associated with placements reserved for individuals who are already aware of the investment risk because they are employees.

3.2.4.2 The EESC supports the aim of reducing costs, but points out that transactions involving shares issued to employees could in themselves constitute significant information for investors operating on the 'secondary market', particularly where multinational groups are taken into consideration. The EESC therefore calls for the extension of the exemption to be complemented by a revision of the rules concerning the transparency of markets. The EESC could propose changes to the transparency Directive in a separate own-initiative opinion.

3.2.5 Proposed changes to Article 5(2), Article 6(2) and Article 7.

3.2.5.1 The Proposal for a Directive suggests that greater importance be ascribed to the summary document, given the amount of attention paid to it, especially by 'retail investors'. Incorrectly drafted parts of the summary document could lead to the publisher being legally liable; however, the proposal states that the number of words in the document is not an effective indicator of the document's information value; instead, this can be gauged by the presence of 'key information'.

3.2.5.2 The EESC agrees that the number of words cannot be an adequate indicator of the information value of summary prospectuses, but considers that the proposed Directive should be clearer in setting criteria as to which information is most important. Given investors' need to assess an investment based on the relationship between expected risk and return, the key information must be that which has the greatest potential impact on the investment's risk profile, a concept that is difficult to identify in itself. We therefore propose that the key information be identified on the basis of the potential impact that it could have, to be measured through standard indicators already considered in other EU legislation such as 'value-at-risk'; an alternative, simpler technical solution that the EESC supports would be to make it compulsory to publish the VaR in the summary prospectus.

3.2.6 Proposal to amend Article 7(2).

This proposed amendment seeks to make the costs of producing the prospectus proportionate to the size of the issue, including in the case of rights issues. It is certainly true that the production

costs of prospectuses are not perfectly proportionate to the size of the financial transaction, which means that smaller transactions suffer a disproportionate impact. In the case of rights issues, the reduction in requirements is based on the assumption that 'existing shareholders have already made the initial decision to invest in the company and they should be familiar with it'.

The EESC agrees that there is a need to reduce the impact of the fixed costs of prospectuses on the size of the financial transaction, as this is an objectively measurable criterion. Conversely, it considers the justification given for reducing obligations on rights issues to be restrictive, given that such issues are often negotiated with individuals who, not being shareholders of the issuing company, could suffer inequalities in information. In both cases, as has been seen above, the introduction of mandatory publication of the investment's VaR would make it possible to limit the costs of producing the prospectus without having a significant impact on the information value of the summary version of the document.

3.2.7 Proposal to amend Article 8.

The proposed change to Article 8 suggests omitting information about state-backed guarantees in order to reduce the overall costs of the transaction. The EESC welcomes this proposal in principle but suggests that the prospectus should at least state the most recent rating of the guarantor, given that this varies between countries with the same denominating currency for the security and that the guarantee may derive from state entities that are financially autonomous or even from state-owned special purpose vehicles.

3.2.8 Proposal to amend Article 9 and 14(4).

The proposal consists of increasing to 24 months the validity period of the prospectus (from 12 months at present). The EESC repeats its arguments set out above that the nature of financial information does not allow the rigid codifying of the validity period of a piece of information; it therefore suggests that the current period of 12 months be maintained, but that financial market supervisory authorities should have the power to extend it for a further twelve months upon reasoned request from the issuer.

3.2.9 Proposal to amend Articles 10, 11(1), 12(2) and 14(4)

3.2.9.1 The EESC supports the proposal to repeal Article 10 of the Directive insofar as the current requirement to publish all information disclosed in the preceding 12 months constitutes an undue additional cost burden for the issuer that provides no benefit at all to the investor, who, thanks to modern information tools, can easily access previous prospectuses, especially in the light of the amendment to the subsequent Article 14, which proposes extending the requirement to publish on the web within the usual time limits.

3.2.9.2 The proposed changes to Articles 11 and 12 follow on from the deletion of Article 10 and are therefore uncontroversial as far as the EESC is concerned, without prejudice to the suggestion made in the previous point.

3.2.10 Proposal to amend Article 16.

3.2.10.1 The main aim of the proposal is to clarify the point at which the obligation to inform ceases, particularly with regard to any possible difference between the final closing of the offer to the public and the time when trading begins: the proposal suggests opting for whichever of these occurs earlier. The EESC considers that it would be useful to include in the proposal a requirement upon intermediaries responsible for placements to make public the volume of the securities in question traded in the period between the closing of the offer to the public and the start of trading. The data on the volume of securities traded during this period (a practice once described as the 'grey market') will have to be certified by a supervisory and regulatory authority and will need to report all the data on transactions between intermediaries taking part in the placement.

3.2.10.2 The proposal then stipulates a uniform period for the right of withdrawal of acceptance by investors, namely two days

after the publication of the information supplement. The EESC supports the proposal to harmonise the period for exercising the right of withdrawal, but suggests that a requirement be introduced to notify investors who have already accepted the supplementary prospectus via an e-mail address provided for that specific purpose.

3.2.11 Proposal to amend Article 18.

The proposed amendment to Article 18 of the Directive currently in force is extremely technical in nature and allows for more rapid notification of certificates of approval of prospectuses that have been drawn up. This enables a reduction in the costs and risks associated with technical errors in publishing prospectuses, particularly in countries where the 'passport' is not fully operational. The EESC approves the proposed amendment.

3.3 Analysis and comments on the content of Article 2 of the proposal under consideration, relating to Directive 2004/109/EC.

The purpose of the amendments proposed in Article 2 is to coordinate the content of the previous points with the text of the Directive in question. The EESC agrees with these amendments, without prejudice to the points made above.

Brussels, 18 February 2010

The President
of the European Economic and Social Committee
Mario SEPI
