COMMISSION OF THE EUROPEAN COMMUNITIES

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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

IMPACT ASSESSMENT

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1. INTRODUCTION

In January 2007, the European Commission launched the Action Programme for reducing administrative burdens in the European Union to measure administrative costs arising from legislation in the EU and reduce administrative burdens by 25% by 2012[1]. The Prospectus Directive[2] has been identified as one area that contains a number of burdensome obligations for companies, some of which could possibly be alleviated[3]. In addition, Article 31 of the Prospectus Directive requires the European Commission to assess the application of the Directive five years after its entry into force[4] and to present, where appropriate, proposals for its review.

The financial crisis has provided a stark reminder of the importance of transparency and risk management in the financial markets. In the context of the current financial crisis, the Prospectus Directive has provided a sound framework in terms of investor protection and disclosure obligations for the financial instruments it covers. As stressed out in the ECOFIN Roadmap for financial stability, the absence of accurate and timely information on exposures of banks to credit risk has been the key factor for the generalized loss of confidence in financial markets[5].

Assessing the application of the Prospectus Directive, the European Commission has concluded that the framework created by the Prospectus Directive has eased the possibility to offer securities in different Member States. This has boosted competition among issuers and has generated a wider variety of products that are now available to investors, ensuring at the same time investor protection through a harmonized set of rules. The majority of market participants believe that the prospectus has had an important role to play as a legal document for investors in the single European market of securities and that the Prospectus Directive has had a significant positive impact on the quality and appropriateness of information

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1 See http://ec.europa.eu/enterprise/admin-burdens-reduction/home_en.htm

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 For details see Annex VI.

4 The Prospectus Directive entered into force on 31 December 2003.

5 Questions about the adequacy of transparency have been raised with respect to Special Purpose Vehicles (SPVs), banks' disclosure of securitization operations and exposures to Special Investment Vehicles (SIVs), the complexity in the structuring, risk measurement and valuation of structured finance products. These issues need to be tackled through the new rules on Credit Rating Agencies (CRAs), a sound and consistent implementation of the securitization related Capital Requirement Directive (CRD) disclosure requirements and a reliable valuation and auditing of illiquid assets. In particular, in the banking sector, there is the need for clearer rules on: (i) large exposures, (ii) banks' trading book exposures, (iii) enhanced cooperation between supervisors, (iv) improvement of risk management standards by non-bank investors and (v) banks' liquidity requirements. The Regulation on CRAs has been approved by the European Parliament and the Council on 23 April 2009. P6_TA-PROV(2009)0279. Moreover, the European Commission will table a proposal on CRD to further strengthen capital requirements for banks and investment firms in June. COM(2008) 602 final. On standards to be used for the valuation of financial instruments, ECOFIN Council reiterated on 9 June 2009 a call for IASB to work urgently to achieve clarity and consistency in the application of standards used for the valuation of assets in distressed and inactive markets.

available to investors[6]. Therefore the Prospectus Directive has met its objectives of market efficiency and investor protection.

However, despite these achievements, there is still progress to be made. In particular, in order to further enhance investor protection and thus respond effectively to the current financial crisis, the summary of the prospectus should be improved only in terms of simplicity and actual 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[7]. Moreover, in order to simplify and improve the application of the Directive, increase its effectiveness and enhance the EU's international competitiveness, the Commission has put forward suggestions for its review with the objective of reducing administrative burdens for companies raising capital in the securities markets. This is consistent with the objective of maintaining and, when necessary, 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.

This document is the impact assessment accompanying the initiative for the review of the Prospectus Directive; it does not pre-judge the final form of any decision to be taken by the European Commission.

2. PROCEDURE

The review of the Prospectus Directive and its impact assessment have been prepared in accordance with the Commission's approach to applying the better regulation principles. The initiative is the result of an extensive and continuous dialogue and consultation with all major stakeholders, including securities regulators, market participants (issuers, intermediaries and investors), and consumers. It is built upon the observations and analysis contained in the reports published by the Committee of European Securities Regulators (CESR)[8] and by the European Securities Markets Expert Group (ESME)[9]. The initiative and the impact assessment make also use of

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6 See CSES study, p.52. 58% of the respondents to the survey think that the Prospectus Directive has had a positive impact in terms of investor protection and quality of information for investors. This has been confirmed in the context of the current financial crisis by the contributions received from stakeholders participating in the public consultation launched from 9 January to 10 March 2009.

7 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.

8 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 L25, 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.

9 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

the findings of a study completed by the Centre for Strategy & Evaluation Services (CSES)[10], and of the comments received from stakeholders participating in the public consultation launched from 9 January to 10 March 2009.

2.1. CESR report

The CESR report on the supervisory functioning of the Prospectus Directive[11] was adopted and published in June 2007. The report is based on evidence gathered from market participants by means of a call for evidence opened in November 2006, including an open hearing in January 2007, as well as on statistical data provided by regulators. The report contains a detailed summary and analysis of the 38 responses received. It aims at assessing whether, after almost two years in operation, the prospectus regime is achieving its objectives of investor protection, reduction in the cost of capital, and development of the single market for securities[12].

2.2. ESME report

The ESME report on the Prospectus Directive[13] was published in September 2007 and reflects the views and practical experience of ESME members. It assesses the effectiveness of the Prospectus Directive in achieving its primary objectives of investor protection and market efficiency; identifies significant areas where the Directive may not have achieved its intended effect, or where lack of clarity or flawed provisions are causing problems for market participants; and sets out detailed comments and suggestions on specific articles[14].

2.3. CSES study

The "Study on the Impact of the Prospectus Regime on EU Financial Markets"[15] was completed in June 2008 by the CSES. The study gives an overview of the impact of certain aspects of the Prospectus Directive on EU financial markets and supplements the evidence provided in the CESR and ESME reports. It also addresses some additional issues by providing qualitative and quantitative evidence. [16]

Group to provide legal and economic advice on the application of the EU securities Directives (OJ L 106, 19.4.2006, p. 14–17).

10 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.

11 Ref. CESR/07-225, available at www.cesr-eu.org.

12 See Annex I for a short summary of the CESR Report.

13 The report is available at http://ec.europa.eu/internal_market/securities/esme/index_en.htm.

14 See Annex I for a short summary of the ESME Report.

15 The study is available at http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm. The opinions expressed in the Study by CSES do not necessarily reflect the position of the European Commission. CSES is a private firm that was contracted by the European Commission to undertake a fact finding exercise in relation to the review of the Prospectus Directive. The statements and opinions expressed in the study are the responsibility of the firm. The European Commission does not endorse the CSES report, but uses it as a source of information for the review of the Prospectus Directive.

16 See Annex I for a short summary of the CSES Study.

2.4. Public consultation

On 9 January 2009, the European Commission launched a two months public consultation on the review of the Prospectus Directive. For the occasion the Commission services made available to the public a consultation document with detailed suggestions for changes in the Directive, together with a background document explaining the reasoning for those changes as well as addressing some further issues where no concrete legislative suggestions were made. The Commission services received 121 contributions. The non-confidential contributions can be consulted in the Commission website[17].

2.5. Targeted discussion with 30 EU associations

On 12 March 2009, the Commission services invited 30 EU associations to express their views on the review of the Prospectus Directive[18]. The discussion focused on the impact of the suggestions on the objectives of investor protection, market efficiency, reduction in cost of capital, and development of the single market for securities. These views have been taken into account in this impact assessment.

2.6. Steering Group

The Steering Group for this Impact Assessment was formed by representatives of a number of services of the European Commission, namely the Directorate General Internal Market and Services, the Directorate General Competition, the Directorate General Economic and Financial Affairs, the Directorate General Enterprise, the Directorate General for Health and Consumers, the Legal Service and the Secretariat General. This Group met three times, on 7 November 2008 and on 6 and 24 March 2009. The contributions of the members of the Steering Group have been taken into account in the content and shape of this impact assessment. The Directorate General Justice, Freedom and Security and the Directorate General Employment, Social Affairs and Equal Opportunities were invited to join the last meeting[19].

2.7. Impact Assessment Board

DG MARKT services met the Impact Assessment Board on 27 May 2009. The Board analysed this Impact Assessment and delivered its opinion on 29 May 2009. During this meeting the members of the Board provided DG Markt services with comments to improve the content of the Impact Assessment that led to some modifications of this final draft. These are the most relevant ones:

– The analysis in the report should be placed in a broader context, notably with regard to the reflections following the financial crisis and the parallel work on product disclosure for packaged retail products;

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17 See http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm. See Annex II for a short summary of the consultation results.

18 See Annex III for the outline of the discussion and the list of participants.

19 In accordance with the rules for the elaboration of impact assessments the minutes of the last meeting of the steering group have been submitted to the Impact Assessment Board together with this impact assessment.

– The case for additional EU legislative action should be better substantiated by analysing possible improvements in the implementation of the current framework and clarifying the roles currently played by Member States and by the Committee of European Securities Regulators;

– The analysis of the problems affecting small quoted companies and credit entities and the solutions proposed in the report should be strengthened.

– The DG MARKT services incorporated in this final draft of the Impact Assessment Report the recommendations in the opinion of the Impact Assessment Board and the technical comments.

3. PROBLEM DEFINITION

After five years of its entry into force, the general assessment of the overall effect of the Prospectus Directive is positive. A general assessment of the Prospectus Directive with information on the cost of producing a prospectus can be found in Annex IV. Despite the general success of the Prospectus Directive, there is evidence about some burdens and legal uncertainties that increase cost and create inefficiencies hampering the process of fundraising for companies and financial intermediaries in the EU. These problems could be divided in two groups: (i) ineffectiveness derived from the lack of legal clarity, and (ii) situations of unjustified burdensome requirements imposed to companies raising funds from securities markets and to the intermediaries involved. These two groups of problems have been tackled in this impact assessment 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 current international financial crisis.

3.1. Ineffectiveness derived from the lack of legal clarity

There are situations of ineffectiveness derived from the lack of legal clarity or inconsistencies in the legal framework. The lack of legal certainty makes issuers and intermediaries liable for unexpected risks. This may increase the cost of legal advice and – in order to be protected against any contingency – issuers and intermediaries include non-mandatory disclosure in the prospectus. The prospectus therefore becomes longer and obscure for retail investors.

3.1.1. Obligations in case of placement of securities through financial intermediaries (retail cascade)

Article 3 requires the publication of a prospectus when securities are offered to the public (paragraph 1) and when they are admitted to trading on a regulated market (paragraph 3). Paragraph 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. 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 debt securities are sold to investors (other than qualified investors) by intermediaries and not directly by the issuer itself. Respondents to the various consultations have raised two points of uncertainty:

- 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; and

- where a prospectus is produced, it is unclear how the disclosure requirements in Annex V of the Prospectus Regulation apply to the multiple sales by intermediaries that make up the retail cascade[20].

The problem is only experienced by issuers in a limited number of EU markets. This may reflect established differences in distribution patterns (i.e. selling by retail cascade may be common in some markets but not in others); or it may arise from differences in national implementation and application of the final indent of Article 3(2) and in the way a prospectus is used by persons other than those responsible for drawing it up. However, in those markets where it is experienced, it may cause some issuers to limit or suspend their retail debt programmes[21]. The cost incurred in the event of a retail cascade is highly dependent on the obligation imposed on financial intermediaries. It is not possible to arrive to any reliable estimate about the precise magnitude of this problem due to the diversity and the very nature of the markets. However, the cost of producing a non-equity prospectus is estimated to an average of € 63,000 in the CSES study.[22]

3.1.2. 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 MiFID[23]. Article 2(1)(e) of the Prospectus Directive defines qualified investors and Article 3(2)(a) exempts offers of securities to qualified investors from the requirement of a prospectus. The Directive allows certain natural persons and small and medium-sized enterprises to ask to be treated as qualified investors, and under Article 2(2) it requires them to register in a national register available to all issuers.

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20 Particularly those under the heading "terms and conditions of the offer". See point 5 of Annex V of the Prospectus Regulation (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)

21 "For instance, the German competent authority considers that a Prospectus Directive compliant Prospectus needs to be prepared the first time a public offer is made (i.e. the first time a product is sold that does not qualify for one of the exemptions within the Prospectus Directive) and that this prospectus is valid for all subsequent stages. The legal liability for the product sold at retail level would then lie with the issuer of the Prospectus Directive compliant prospectus. In the UK, on the other hand, the competent authority has so far considered that a Prospectus Directive compliant prospectus is required every time an offer to the public is made. Clearly, this interpretation of the Prospectus requirements is much more costly for issuers and this may, in some cases, affect the development of the retail bond market." (CSES Report, p 62-63)

22 See Figure 8 in Annex IV.

23 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.

Annex II of MiFID defines natural and legal persons that can request investment firms to provide them investment services under the special treatment reserved to professional clients. The definition of professional clients and eligible counterparties in MiFID is wider than the definition of qualified investors in the Prospectus Directive. Investment firms cannot rely on their categorization for a private placement and thus benefit from the exemption in Article 3(2)(a) of the Prospectus 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. Alternatively, the firm could opt 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. There is no justification in terms of investor protection for having divergent definitions for sophisticated investors in both Directives. The consultation contributions have confirmed that investment firms are subject to stringent rules on the criteria and procedure for categorising a client as professional[24].

According to information provided by 27 national supervisors in the EEA, there is a limited use of the national registers (mainly in the form of a database). In 16 Member States, the registers have either not been set up or have 2 or less qualified investors registered[25]. In the remaining 11 Member States, the number of qualified investors registered in the national registers ranges from 11 to 526, with an average of approximately 120. This indicates that the use of the register may be significant, at least in some countries. Moreover, national registers play an important role for private placements facilitating offerings directly carried out by the issuer without the intervention of an intermediary. Issuers can use the register to offer directly their securities to registered qualified investors. This ensures additional transparency in the European securities markets offering an alternative to the broad use of private placements through financial intermediaries.

Data provided by competent authorities indicate that in Member States with relatively active registers it is free for qualified investors to register. Similarly a query in the register is free or comes at a modest cost[26]. Indirect costs may also fall upon investors and investment firms in providing information to the register and accessing the register. However, it is likely that the most significant cost in relation to the divergent definition of qualified investors and professional clients is linked to the inability of investment firms to offer securities to investors that are considered professional under MIFID, but are not part of the register. The effect of an alignment of the definitions would depend on the increase of securities sold to investors on this basis and hence the monetary gain of the investors and the issuers due to the more efficient exchange of capital. This effect is very difficult to quantify.

In addition, many stakeholders suggested in their contributions to the public consultation that in case the two definitions are aligned, the concept of large undertaking defined by opposition to small and medium size enterprise in Article

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24 See Section II in Annex II of the MiFID.

25 See Figure 1 in Annex V.

26 In the UK the fee to view the register is £25 + VAT for a one-off copy or £150 + VAT a year to receive monthly copy. In Finland a submission in electronic form, is free of charge. A submission on paper is free of charge for the first 30 pages, while additional pages cost 0.16€ per page.

2.1.(e)(iii) of the Prospectus Directive should be aligned with the same concept set in Annex II, point I(2) in MiFID.

3.1.3. 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)

Article 16 regulates the publication of the supplement to the prospectus. Every time there is a significant new factor, material mistake or inaccuracy relating to the information included in the prospectus, the prospectus has to be supplemented. Investors who have already agreed to purchase or subscribe for the securities have the right to withdraw their acceptances. The wording of this Article leaves room for divergent application in the Member States. This has generated an intense debate among stakeholders. Some issues require clarification in order to ensure legal certainty, such as, for instance, the meaning of "significant new factor"[27] and the question whether — in a situation where there is both an offer and an admission to trading — the obligation to supplement the prospectus ceases once the trading begins, even if the public offer is still open.

Concerns have been raised with respect to cross-border offers in relation to the period for the exercise of the right of withdrawal. Every time a prospectus is supplemented in the course of an offer, the Directive grants investors the exercise of the right of withdrawal of their previous acceptances. Such a right can be exercised during a period no shorter than two days following the publication of the supplement. The time frame for the exercise of such a right is not harmonised and Member States have set different periods through national implementing legislation. The period for withdrawal is two days in the vast majority of Member States, three days in three Member States and it exceeds three days in three other Member States (see Figure 2 in Annex V)[28]. Therefore, 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. The lack of common time frame increases therefore the cost of legal advice.

3.1.4. Lack of harmonised rules on liability

Article 6(1) of the Prospectus Directive requires Member States to ensure that responsibility for the information given in a prospectus attaches to a clearly identified person (normally the issuer). Article 6(2) furthermore requires Member States to ensure that their laws on civil liability apply to the person responsible for the prospectus. Article 6(2) does not, however, provide for a harmonised liability regime under the Prospectus Directive. It is often argued that the same information is subject to different liability regimes, depending on the home Member State where the prospectus is approved, and possibly also on the Member State where it is being used, in case, under the relevant conflict of law rules, the host Member State's regime for civil liability applies[29]. There is divergent intensity in the various liability

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27 In this regard, ESME noted that there should be an element of proportionality in the application of this rule, and the withdrawal right should not be available, for instance, for positive news.

28 See Figure 2 in Annex V.

29 See, for instance, section 3.6 of the ESME report.

regimes. Issuers may be liable to unexpected risks. This may create a barrier to the effective use of the passport.

3.1.5. Functioning of the summary of the prospectus

Article 5.2 requires the prospectus to include a summary that *"in a brief manner and in non-technical language, convey the essential characteristics and risks associated with the issuer, any guarantor and the securities"*.

Due to the length and complexity of prospectuses, the summary is in practice a key element for retail investors in their investment decisions.

However, the primary aim of the Prospectus Directive of informing investors may actually be hampered by the limitation imposed by recital 21 on the length of the summary to 2.500 words. In fact, this limitation may prevent issuers from including relevant information in a more comprehensible way. Therefore many respondents to the public consultation highlighted that the summary should not be restricted to a prescribed length, but should enable issuers to provide meaningful information.

On the other hand, it is questionable whether all items in the indicative Annexes I and IV of the Prospectus Directive are relevant to retail investors and are appropriate to enable them to make an investment decision (for example, information on research and development, patents and licences).

Finally, there are significant inconsistencies in the form and the content of the summary disclosures for broadly comparable products. This is the case for the structured securities in the Prospectus Directive, the simplified prospectus of the investment funds regulated by the UCITS Directive, the disclosure requirements of the Insurance Mediation Directive for unit-linked life insurance policies[30]. There are even other products that lack disclosure rules in Community Law (like structured term deposits). These inconsistencies impede the comparability of products which have different legal forms but which may compete for the same retail savings.[31]

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

3.2.1. Divergent regime for Employee Shares Schemes

Article 4 of the Prospectus Directive contains a series of exemptions which remove the need to publish a prospectus that would otherwise apply where securities are offered to the public (paragraph 1) or admitted to trading on a regulated market (paragraph 2). The exemptions cover a wide range of different situations, varying from securities offered free of charge, to securities offered in connection with a merger or a takeover. Particularly relevant is the exemption dealing with securities offered to employees.

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30 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation. OJ L 9, 15.1.2003, p. 3–10

31 COM (2009) 204 of April 30, 2009.

Offers of transferable securities to employees are considered to be offers of securities to the public in line with the definition in Article 2(1)(d) of the Prospectus Directive. A prospectus is therefore required unless an exemption applies. 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. In addition, it is equally impossible for EU non-listed companies or EU companies that have securities traded on EU exchange-regulated markets (i.e. AIM in London) to satisfy this condition, because once again they are not listed on a regulated market in line with the applicable MiFID definition.

Employee share schemes run by all such companies are exempted from the obligation to publish a prospectus if there are less than one hundred scheme participants in a particular Member State[32]. This may generate the perverse effect that executive share incentive plans are generally exempted, while "all employees" schemes require a (relatively costly) prospectus. The Directive could therefore be criticised as preserving the interests of directors while penalising ordinary employees.

Views have been expressed that, with its current structure, the exemption fails to address the concern expressed by the Commission in its 2002 Communication on a framework for the promotion of employee financial participation[33]. EU employees working for non-EU companies or companies listed in a non-regulated EU market or EU non-listed companies should not be penalised in comparison to EU employees of companies listed on an EU regulated market. This could lead to unequal employment conditions for staff in Europe as compared to outside Europe and have a negative effect on competitiveness of firms in the EU and wealth creation and accumulation by employees.

A 2006 survey for Linklaters on employee share schemes referred to the CSES study[34] highlighted the following findings:

– Some 20% of respondents to the survey were considering changing or withdrawing their employee share schemes;

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32 If there are less than 100 scheme participants by Member State the issuer will not be obliged to produce a prospectus in accordance with Article 3.2(b) of the Prospectus Directive.

33 COM(2002) 364.

34 CSES study, pages 41 and 42.

– One third reported “serious inconsistencies” among states in application of the Prospectus Directive to employee share schemes. Some of them have withdrawn schemes in those member states that present significant legal problems, resulting in a non-harmonised EU employment environment for their staff;

– 90% considered that the EU should accept non-EU listing document as a base for offering employee share schemes.

An updated survey by Linklaters in June 2008[35] shows that some global employers have removed or reduced their employee share schemes and others are in the process of doing so.

Six Member States have approved prospectuses for the purpose of ESS in the period 2006 to 2008, as specified in Figure 3 in Annex V[36]. Accordingly, the recorded number of prospectuses approved that could have had benefit from an exemption in that period was at least 114. The vast majority (at least 102) fall in the category Non-EU listed companies. Based on the estimated cost of producing a prospectus ranging from € 480,000 to € 720,000 (excluding insurance of comfort letter) a conservative estimate of the annual cost savings on European level is € 18 million. In addition, stakeholders often mention that the costs associated with producing a prospectus is an important and sometimes decisive factor when assessing the feasibility of offering ESS.

A survey conducted by Baker & McKenzie LLP offers information on the operation of ESS within 75 companies. Most of the companies are non-EU listed and many have chosen to rely on the exemptions provided for offers addressed to less than 100 natural or legal persons and for offers with a total consideration of less than € 2.5 million within a period of 12 months. This verifies that ESS may be artificially held within thresholds specified in the Prospectus Directive to avoid the obligation of producing a prospectus.

3.2.2. Overlap of transparency obligations (Article 10 of the Prospectus Directive)

Article 10 of the Prospectus Directive requires issuers with listed securities to provide annually a document containing or referring to all information published in the twelve months preceding the issuance of the prospectus[37].

The requirement imposed by Article 10 of the Prospectus Directive has been superseded by the Transparency Directive[38]. This directive provides for a

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35 *How the EU’s Prospectus Directive is Adversely Affecting Employee Share Plans.* Senior executives from 65 global firms were interviewed.

36 See Figure 3 in Annex V.

37 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 Directive. The deletion of Articles 10, 14.7 (see section 3.2.6) and 18 (see section 3.2.7) were suggested to the "Stoiber group" by the Dutch Ministry of Finance, in association with the representatives of the Dutch financial sector (Dutch Banking Association, Association of Dutch Insurers, Dutch Fund and Asset Management Association, Dutch Association of Investment Firms) and the national financial supervisors (De Dutch Central Bank and the Financial Markets Authority). See: http://ec.europa.eu/enterprise/admin-burdens-reduction/docs/OpinionOfflineSuggestions080918_Final.pdf

comprehensive regime for the disclosure of information about issuers with listed securities, comprising the periodic financial information (annual and half-yearly financial reports, interim management statement) and the ongoing information (market abuse disclosures – i.e. inside information, information about major holdings, etc). This information has to be stored in the officially appointed mechanism set in Article 21.2 of the Transparency Directive and is publicly available. The provisions of the Transparency Directive have made the requirement of Article 10 redundant, generating a duplication of the same requirement for issuers. There is no added value in terms of investor protection in the obligation of Article 10 of the Prospectus Directive.

The cost for the issuer of fulfilling this obligation could amount from 2,500 to a maximum of 5,000 € per year[39]. At least 12,000 companies are listed on a regulated market in Europe[40] and are consequently subject to this obligation. A conservative estimate of the annual costs saved by removing the obligation would be € 30 million per year.

3.2.3. 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. The choice is available only for debt securities with a denomination above €1.000 (issuers could choose supervisor 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). Below this threshold the home Member State mandated by the Directive is the one where the issuer has its registered office. It is argued that this restriction is causing practical problems for issuers, either because it obliges them to maintain additional debt issuance programmes[41] or because the threshold does not accommodate certain structured products which are not denominated (i.e. certificates)[42].

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38 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.

39 The document required by Article 10 of the Prospectus Directive is more or less a collection and compilation of already published information. The number of employees assigned to the preparation of this document is medium. However, given the possible legal consequences in case of non-compliance, a senior officer is in charge of the control. Overall, the preparation time for a company should not exceed two days and the cost varies from about €2,500 to €5,000. Dr. Wolfgang Gerhardt, member of ESME, provided this cost estimation for Germany in his reply to a questionnaire sent by the Commission services for the elaboration of this impact assessment. According to Dr. Gerhardt, this cost estimation is can be considered a reasonable approximation of the average cost across all EEA member countries.

40 This figure is calculated based on the number of companies with listed shares (12,299), as provided by FESE monthly statistics, February 2009, and the estimated annual cost of meeting the obligation (€2,500). Some companies may not have shares traded on a regulated market but only other securities, such as bonds. These companies should also be taken into account. However, the number of companies with listed shares is the most reliable figure available.

41 The threshold is causing practical problems to issuers of non-equity securities who may need to draw up several prospectuses, 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 (see the ESME report, p.13).

42 Only issuers of securities that are denominated can opt to benefit from a choice reserved to offers denominated above 1.000€. See ESME report, section 3.2 and Annex. See also CSES study, section 4.6.

3.2.4. Burdensome disclosure requirements in some cases

3.2.4.1. Rights issues[43]

Stakeholders have expressed concerns in relation to the obligation to publish a full prospectus for rights issues[44] or "open offers"[45], notably because of the fact that the cost for producing a full prospectus for this type of offer might not be justified. Indeed, these are share offerings to existing shareholders; stakeholders claim that these investors do not need the special protection provided for by a full prospectus as they are familiar with and confident in the company in which they have invested in the past. The cost of producing a prospectus for rights issues is comparable with the general estimate provided for the production of a prospectus. This implies a cost in the range of € 480,000 to € 720,000, excluding insurance of comfort letter[46].

3.2.4.2. Small quoted companies[47]

Companies with reduced market capitalization have expressed their concerns about the low level of the threshold relating to the exemption for offers with a total consideration below €2.5 million set in Article 1(2)(h) of the Prospectus Directive. Indeed they claim that the threshold is too low relatively to their financial needs and that it creates difficulties when raising capital on the financial markets because from a cost-benefit perspective there is no incentive to raise capital below it, whereas above it they incur the costs of producing a full prospectus, which may be relatively costly given their size and the amount they raise. This forces companies with small market capitalization to raise funds mainly through private placements. Therefore, given the size of companies with small market capitalization and the amount they generally raise on the financial markets, it seems that the costs of producing a full prospectus are always prohibitive and that the disclosure requirements for such kind of issuers might be alleviated where excessive. Small credit institutions

In accordance with Article 1.2(j) of the Prospectus Directive, certain offers of non-equity securities issued by credit institutions are excluded from the scope of the Directive[48]. The total consideration of the offer should amount to less than €50 million calculated over a period of 12 months. Offers included in the scope of the Prospectus Directive require the publication of a prospectus. Though the wording of this Article only refers to the size of the offers, the exemption in Article 1.2(j) is

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43 For the number of rights issues in the EU see Figure 4 in Annex V.

44 A rights issue is a pre-emptive issue like an open offer, but it allows the existing shareholder to sell the right to subscribe for shares.

45 In the UK, the expression "open offer" encompasses placings with clawback where shares are conditionally placed and then offered to existing shareholders via a clawback. Existing shareholders are offered shares in proportion to their existing holdings (the pre-emptive right). Those shares not taken up by shareholders are usually taken by placees.

46 See the cost breakdown of producing a prospectus in Annex IV.

47 There is no legal or academic definition of "small quoted company. It could be conventionally considered that a "small cap" is a company with less than 500 Million € of market capitalization.

48 The article refers to non-equity securities issued in a continuous or repeated manner by credit institutions where the total consideration of the offer 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.

designed for small credit institutions[49]. 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. The case is similar as the one of the small quoted companies mentioned in the previous section. Below the limit of €50 million they claim that the threshold is too low relatively to their financial needs and that it creates difficulties when raising capital on the financial markets because from a cost-benefit perspective it is not worth to raise capital below it, whereas above it they incur the costs of producing a full prospectus, which may be prohibitively costly given their size and the amount they raise. This forces small credit institutions to raise funds mainly through private placements. Therefore, given the size of small credit institutions and the amount they generally raise on the financial markets, it seems that the costs of producing a full prospectus are always prohibitive and that the disclosure requirements for such kind of issuers might be alleviated where excessive.

3.2.5. 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.

Article 5.1 of the Prospectus Directive sets out 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 Regulation, when an offer of securities is guaranteed by a third party, the issuer has to give in the prospectus information about the nature and scope of the guarantee and about the guarantor. In particular, the guarantor of the offer "must disclose information about itself as if it were the issuer of that same type of security that is the subject of the guarantee". In case the guarantor is a State, the information to be provided in the prospectus is contained in Annex XVI of the Prospectus Regulation.

In accordance with Article 1(2)(d), the Prospectus Directive does not apply to securities unconditionally and irrevocably guaranteed by a Member State. However, in accordance with Article 1(3) of the Directive, the issuers benefiting from the guarantee of a State could opt to produce a prospectus in order to benefit from the passport mechanism and make a multinational offer in the EU. In this case the prospectus must comply with the disclosure requirements mentioned above. The reason for the exemption foreseen in Article 1(2)(d) of the Prospectus Directive is that the public has constant access to sufficient information on the solvency and economic status of the States[50]. Information on public finances of Member States are already public, thus there is no added value for investors in requiring the issuer to include in the prospectus information about the State required by Annex XVI of the Prospectus Regulation.

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[49] The size of offering programs used by the big credit institutions for funding purposes is usually €10 – 15 billion.

[50] Among other sources, Eurostat provides information about the solvency and economic status of the States. See: http://epp.eurostat.ec.europa.eu/portal/page?_pageid=2373,47631312,2373_58674332&_dad=portal&_schema=PORTAL

3.2.6. Printed form (paper form) of the prospectus

Article 14 of the Prospectus Directive lays down the rules concerning the publication of the prospectus. Paragraph 2 of Article 14 permits the publication of the prospectus either in printed or electronic form. In case the prospectus is published in electronic form, paragraph 7 of this article grants the right of the investor to receive a paper copy of the prospectus. Upon the request of the investor to the offeror, the person asking for the admission to trading or the financial intermediaries placing or selling the securities have to deliver a paper copy of the prospectus free of charge.

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 this obligation. A group of industry stakeholders suggested that this obligation would have no added value and advocated for the deletion of obligations to provide documents and information on paper. It was considered that the electronic provision of information would be sufficient for effective supervision.

3.2.7. Translation of the summary of the prospectus

The rules for the functioning of the passport of the prospectus for cross border offers and admission to trading are laid down in Articles 17 and 18 of the Prospectus Directive. In accordance with Article 17 a prospectus approved by the authority of one Member State (home competent authority) is valid for the rest of the Members States included in the scope of a cross border offer or admission to trading (host competent authorities).

The only condition for the acceptance of the prospectus is stipulated in Article 18.1: the home competent authority has to certify to the host competent authorities that the prospectus has been drawn up in accordance with the Prospectus Directive. This notification has to be accompanied by a translation of the summary of the prospectus into the language accepted by the host Member States. The translations of the summary have to be produced under the responsibility of the issuer or the person responsible for drawing up 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 to provide the translation of the summary. A group of stakeholders considered that this requirement was unnecessary and advocated for the harmonisation of the language regime for the whole internal market.

4. THE BASELINE SCENARIO, SUBSIDIARITY AND PROPORTIONALITY

The problems detected in section 3 stem from EU legislation and can only be addressed through changes in EU legislation. If no action is taken through the modification of the Prospectus Directive, the problems deriving from the EU legislation may continue to generate legal uncertainty which might find only temporary and partial clarification through clarification, coordination and convergent

application by CESR[51]. CESR is indeed an independent advisory group to the European Commission composed by the national supervisors of the EU securities markets. At the same time, its role 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[52]. However, despite the fact that such an "improved policy implementation" through CESR and the national supervisors of the Member States is analysed, when appropriate, among the possible policy options of this report, this is not the most effective solution to the problems identified because the legal uncertainty derives from the existing EU legislation and it may lead to inconsistent or conflicting implementation by national competent authorities. Thus it can only be addressed at this same level. In addition, the review of the Prospectus Directive aims at increasing effectiveness and reducing the administrative burdens for companies raising capital in the EU. 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. A consistent approach is essential in order to avoid regulatory arbitrage in the Member States and competition distortion in the various markets. The amendment of the Prospectus Directive proposed by the European Commission respects therefore the principle of subsidiarity.

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51 In its conclusions in March 2000, the Lisbon European Council emphasised that in order to accelerate completion of the internal market for financial services, steps should be taken to set a tight timetable so that the Financial Services Action Plan (FSAP) is implemented by 2005. In this context, the Committee of Wise Men (chaired by A. Lamfalussy) in February 2001 proposed a new legislative approach, which was endorsed in a Resolution of the Stockholm European Council in March 2001 and by the European Parliament in a Resolution adopted on 5 February 2002. The core of this process centres around a new 4 level legislative approach: **Level 1**: Level 1 is traditional EU decision making, i.e. Directives or Regulations proposed by the Commission containing framework principles, reflecting key political choices to be co-decided by the EP and the Council, with implementing powers being delegated to a second level. **Level 2**: Technical implementing measures to render the level 1 principles operational, can be adopted, adapted and updated through comitology: they are adopted by the Commission after having been submitted to the European Securities Committee (ESC) and the European Parliament for their opinion. The ESC is a comitology committee; however, a part from its legislative capacity, the ESC is also responsible for assisting the Commission with respect to policy issues in the field of securities. Upon request in the form of mandates, the Committee of European Securities Regulators (CESR), an independent advisory group, can advise the Commission on the technical implementing details to be included in level 2 legislation. Both the ESC and CESR are high level Committees. **Level 3**: In order to facilitate coherent implementation and uniform application of EU legislation by the Member States CESR may adopt non-binding guidelines (level 3). CESR can also adopt common standards regarding matters not covered by EU legislation (but these standards have to be compatible with level 1 and 2 legislation). **Level 4**: Enforcement: This refers to monitoring correctness of implementation of EU legislation into national legislation by the Commission and, in case of non-conformity, launching of infringement proceedings. In order to ensure coherence in the field of financial services, this approach was extended in 2004 to include UCITS (Undertakings for Collective Instruments in Transferable Securities) within the CESR/ESC process and set up similar Lamfalussy structures for banking and insurance. With respect to UCITS, extension of the scope of the activities of both the ESC and CESR has been provided to also cover these products, whereas in the field of banking and insurance four new level 2 and 3 committees have been created: At level 2 the new organisations are the European Banking Committee (EBC) and the European Insurance and Occupational Pensions Committee (EIOPC); at level 3 the Committee of European Banking Supervisors (CEBS) and the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).

52 An "improved policy implementation" would certainly be more effective under the European financial supervision regime of the Communication of 27 May 2009 if an enforced coordination role is attributed to CESR. COM (2009) 252 of May 27, 2009.

The European Commission considers that the solutions proposed respect the principle of proportionality: all solutions have been drafted bearing in mind cost-efficiency; the calculations and estimates that are brought forward in section 8.3 and Annex VI advocate that the objectives in terms of effective product disclosure and investor protection are fully respected while important cost savings and reduction of administrative burden are possible. The analysis of the impact of the solutions on stakeholders presented in sections 8.1 and 8.2 shows that the changes proposed by the European Commission are likely to have positive impact on investors, companies issuing securities, intermediaries, shareholders and small and medium size enterprises. Concerning this last category of stakeholders, the European Commission proposes the introduction of a new "proportionate" prospectus in order to avoid excessive burden and costs (see sections 7.2.4, 7.2.5 and 7.2.6)

5. OBJECTIVES

The review of the Prospectus Directive aims at (i) increasing legal clarity and effectiveness in the prospectus regime; and (ii) reducing the burdens for EU companies when raising capital in the European securities markets. These two objectives are consistent with the overall objective of maintaining and, when necessary, 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 current international financial crisis.

5.1. Increase legal clarity and effectiveness in the prospectus regime

Within the first objective, the suggestions of the Commission seek to achieve the following sub-objectives:

– Clarify the obligations in case of placement of securities through financial intermediaries (retail cascade);

– Align the definitions for qualified investors and professional clients;

– Provide legal certainty in relation to the exercise of the right of withdrawal (Article 16 of the Prospectus Directive);

– Clarify the rules on liability;

– Improve the functioning of the Prospectus.

5.2. Eliminate the disproportionate requirements for EU companies when raising capital in the European securities markets and to the intermediaries involved.

Within the second objective, the suggestions of the Commission seek to achieve the following sub-objectives:

– Provide a level paying field for Employee Shares Schemes in the EU;

– Avoid the overlapping disclosure obligation of Article 10 of the Prospectus;

– Provide the choice of the home Member State for issuers of debt;

– Provide proportionate disclosure requirements for right issues, small quoted companies and small credit institutions;

– Provide proportionate disclosures for Government Guarantee Schemes.

6. POLICY OPTIONS

With the intention to meet the objectives set out in the previous section, the Commission services have analysed different policy options[53]. The first section reflects the most relevant policy options that have been considered in relation to the increase of effectiveness in the prospectus regime. The second section contains the list of policy options that have been analysed in relation to the situations of unjustified burdensome requirements imposed to companies raising funding in securities markets and to the intermediaries involved.

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

6.1.1. Policy options in case of subsequent placements of securities through financial intermediaries (retail cascade).

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – 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[54].**

(3) **Option 3 – Amend Article 3(2) of the Prospectus Directive to clarify that whenever an intermediary offers securities to the public (i.e., makes a non-exempted offer) the intermediary should put at the disposal of the public a valid prospectus.**

6.1.2. Policy option in relation to the divergent definitions for qualified investors and professional clients

(1) **Option 1 – No action at EU level.**

(4) **Option 2 – 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.**

(5) **Option 3 – In addition to the alignment proposed in option 2, the system of central registers could be removed from the Prospectus Directive.**

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53 For a full description of the policy options see Annex VII.

54 This option was suggested by ESME. See ESME report on the Prospectus Directive, September 2007, p. 15.

6.1.3. 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)

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Harmonize the different periods of time for the exercise of the right of withdrawal.**

(6) **Option 3 – Harmonize the different periods of time with possibility for issuer to grant longer time.**

(7) **Option 4 - Harmonize the different periods of time at the settlement of the securities[55].**

6.1.4. Policy options in relation to the lack of harmonised rules on liability

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Harmonize the liability standards applicable to the prospectus.**

6.1.5. Policy options in relation to the summary of the prospectus

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Provide retail investors with appropriate information in an easily analyzable and comprehensible form in order to make investment decisions in full knowledge of facts.**

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

6.2.1. Policy options for bringing forward a level playing field for Employee Shares Schemes

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – 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).**

(3) **Option 3 – Amend the Directive and extend the exemption in Article 4.1.(e) including not only the employee share schemes of companies that are listed in a non-regulated market ("exchange-regulated" market or**

[55] The settlement of securities is the process whereby securities or interests in securities are delivered, usually against payment, to fulfil contractual obligations, such as those arising under securities trades. This involves the delivery of securities to perform contractual delivery obligations. It usually also involves the corresponding payment of a purchase price. Usually settlement is preceded by trading, which involves entering into contracts of sale and purchase.

third country securities markets) as proposed in option 2, but also encompass companies that are not listed.

6.2.2. Policy options in relation to the overlapping of transparency obligations (Article 10 of the Prospectus Directive)

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Eliminate the obligation established in Article 10 of the Directive.**

6.2.3. Policy options in relation to the restriction for the choice of home Member State for the issuers of debt

(1) **Option 1 – No action at EU level.**

(8) **Option 2 – Provide for the choice of the home Member State for issues of non-equity securities below the €1000 threshold.**

6.2.4. Policy options for facilitating the raise of capital through the issuance of rights

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Share offerings to existing shareholders by the way of a rights issue could be exempted from the prospectus requirement**.

(3) **Option 3 – The principle of a "proportionate" prospectus for right issues could be introduced.**

6.2.5. Policy options for providing proportionate disclosure requirements for small quoted companies

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Small quoted companies could be exempted from the obligation to publish a prospectus by raising the threshold in Article 1(2)(h) of the Prospectus Directive.**

(3) **Option 3 – The principle of a "proportionate" prospectus for small quoted companies could be introduced.**

6.2.6. Policy options for providing proportionate disclosure requirements for small credit institutions

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Small credit institutions could be exempted from the obligation to publish a prospectus by raising the threshold in Article 1(2)(j) of the Prospectus Directive.**

(3) **Option 3 – The principle of a "proportionate" prospectus for small credit institutions could be introduced.**

6.2.7. Policy options in relation to the prospectus disclosures in case of government guarantee schemes should be rationalised

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Issuers of securities guaranteed by the government of a Member State could be exempted from the obligation to provide information about the guarantor in the prospectus.**

(3) **Option 3 – The same policy option could be extended to cover the information not only about the guarantor, but also about the guarantee.**

6.2.8. Policy options in relation to the printed form (paper copy) of the prospectus

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Abolish the obligation to deliver a paper copy of the prospectus.**

6.2.9. Policy options in relation to the translation of the summary of the prospectus

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Abolish the obligation to translate the summary of the prospectus.**

7. COMPARING THE OPTIONS

This section discusses the advantages and disadvantages of the different policy options against the following criteria:

1. Investor protection[56]: the option proposed should maintain and, when necessary, enhance the level of investor protection achieved by the Prospectus Directive.

2. Consumer confidence[57]: the option proposed should maintain consumers' confidence in the securities markets.

3. Reduction of disproportionate burdens/administrative burden: the option proposed should reduce the administrative burden for companies in the EU.

4. Clarity and legal certainty: the option proposed should provide the highest possible confidence to stakeholders as of the rules to comply with.

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[56] "Investor protection" defines the entity of efforts and activities to observe, safeguard and enforce the rights and claims of a person in his role as an investor. This includes advice and legal action. The assumption of a need of protection is based on the experience that financial investors are usually structurally disadvantaged compared to providers of financial services and products due to lack of professional knowledge, information and/or experience.

[57] "Consumer confidence" is the degree of optimism and confidence that consumers feel about the overall state of the financial markets. Therefore it serves as one of the key indicators of their purchase activity. In essence, if consumer confidence is higher, consumers are making more purchases, boosting the financial markets.

5. Effectiveness: the extent to which the option achieves the problem specific objectives and facilitates the operation of EU securities markets.

The options are measured against the above-mentioned pre-defined criteria in the tables below. Each scenario is rated between "---" (very negative), 0 (neutral) and "+++" (very positive). In some cases not all criteria are applicable to the issues under analysis. The assessment highlights the policy option which is best placed to reach the objectives outlined in section 5 and therefore the preferred one.

7.1. Analysis of the options related to situations of lack of clarity or inconsistencies in the securities market legal framework

7.1.1. Policy options in case of subsequent placements of securities through financial intermediaries (retail cascade)

Option 1. No action at the EU level: If the EU legislator took no action (the **"baseline scenario"**), the market would be expected to develop in the following way. The uncertainties surrounding the retail cascade issue could be partially and temporarily solved by applying the common interpretation agreed by the members of CESR[58] **(**the **"improved policy implementation option"**). In accordance with this interpretation any subsequent resale of securities shall be regarded as a separate offer and therefore each level of a retail cascade is to be separately considered as to whether or not an exemption from the obligation to publish a prospectus is available to such public offer. A valid prospectus should be required at each level of the offering mechanism. If the issuer has published a prospectus, all financial intermediaries may use such prospectus for their resale of the securities to retail investors if they act in association with the issuer and thereby ensure that the issuer's prospectus is still valid. No further prospectus shall be required for a public offer as long as a valid prospectus is available[59]. If the issuer has not published a prospectus because a retail cascade was not foreseen, or if the issuer has published a prospectus but the intermediary is not acting in association with the issuer but selling the securities on its account, then a separate prospectus would be required. In these circumstances, it is up to the offeror to use the issuer's prospectus by incorporating the relevant parts by reference into its own prospectus in accordance with Article 11 of the Prospectus Directive ("incorporation by reference") subject to the provisions of Article 28 of the Prospectus Regulation ("arrangements for incorporation by reference").

A number of respondents to the public consultation have pointed out that for the sake of certainty and effectiveness the solution to the retail cascade problem should be clarified in the text of the Directive.

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58 This interpretation is applied by the EU competent authorities and is inspired in CESR's common interpretation (see question number 56 "Retail cascade offers" of the frequently asked questions regarding prospectuses). The concept of 'acting in association' between the issuer and the financial intermediary is the key element of this interpretation. See www.cesr.eu

59 According to Article 9 (1) of the Prospectus Directive a prospectus is only valid on condition that it is completed by any supplements required pursuant to Article 16 of the Prospectus Directive and only the issuer can update its prospectus by publishing supplements thereto.

Option 2. 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: as a number of contributors have signalled, the option of deleting the last sentence of the Article 3.2 of the Prospectus Directive could not solve the problem either but create more uncertainty. The last sentence of Article 3.2 was meant to be an anti-avoidance provision: to avoid the circumvention of the obligation to publish a prospectus by breaking a public offer into different private placements through financial intermediaries. Therefore this option could harm consumers' confidence in the proper functioning of the securities markets legal framework and should be negatively assessed in terms of investor protection. Such an option would permit intermediaries to circumvent the obligation to publish a prospectus.

Option 3. Amend Article 3(2) of the Prospectus Directive to clarify that whenever an intermediary offers securities to the public (i.e., makes a non-exempted offer) the intermediary should put at the disposal of the public an updated and valid prospectus: the option of amending the Prospectus Directive to clarify that 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,has benefits in terms of investor protection, reduction of administrative burden, consumer confidence and effectiveness: investors will be better protected because there will be a valid prospectus available for these type of offers; the cost of the offer will be reduced as the intermediary acting with the consent of the issuer will be able to use the initial prospectus produced by the issuer as long as it is valid and will not have to produce a new prospectus; consumer confidence will increase as a consequence of a more rational legal framework; finally, there will be more certainty for stakeholders if the legal framework for this type of offers is clarified in the Directive.

This option requires some cooperation between the issuer and the intermediary: the issuer should supplement its prospectus for the subsequent offers at the request of the intermediary. In case there is no such cooperation, the intermediary should produce a new prospectus. In this case it could incorporate by reference the information already disclosed by the issuer in the initial prospectus or in other pieces of regulated information in accordance with Article 11 of the Prospectus Directive. In any event the intermediary should be responsible for the accuracy of the information included in such prospectus and should keep it up-to-date.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Delete last sentence in 3.2 PD	-	--	0	-	0
Clarify that intermediaries can use the valid prospectus of the issuer if	++	++	++	++	+

updated					

For reasons of investor protection, consumer confidence, reduction of administrative burden, certainty and effectiveness, the preferred option is to amend the Prospectus Directive in order to clarify that 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.

7.1.2. Policy options in relation to the divergent definitions for qualified investors and professional clients

Option 1. No action at EU level: this would imply that two different definitions would be maintained in the MiFID and the Prospectus Directive (the "**baseline scenario**"). As explained under section 3.1.2, it is not effective to have different systems in the Prospectus Directive and in MiFID for determining what persons can be treated as sophisticated investors. Very often investors that could qualify under the Prospectus Directive are already categorised by investment firms as professional clients in accordance with the MiFID requirements. However the firm cannot benefit from the exemption of Article 3.2(a) of the Prospectus Directive since these investors are not registered in the national register of qualified investors.

Option 2. 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: the alignment of both definitions will have clear benefits for intermediaries and investors in terms of efficiency: firms will be able to invite their professional clients to participate in a private placement of securities without the need of visiting and relying only on the limited information contained in the national register of qualified investors. As a consequence, professional investors will have access to new investment opportunities without having to be listed in national registers.

The fact that firms will not need to double check whether their professional clients are or not also listed in the national registers will provide certainty to these companies and will help them to reduce the time spent organising a private placement and to reduce the administrative burden of the operation. In some countries, there is a fee charged for the consultation of the register.

UK charges £25 (approx. €27) for a one-off copy, while a monthly copy costs £150 (approx. €163) per year. Finland charges €0.16 per page exceeding 30 pages resulting from a request to the competent authority. Other Member states apply a fee for the registration. Austria and Slovenia apply a fee of €200 and €80, respectively. In Poland a stamp duty of 10 PLN (approx. €2.17) is required. Romania charges a fee of 100 lei and 1000 lei (approx. € 23 and 234) respectively to natural and legal persons authorised under the competent authority: for entities not authorised by the competent authority the fee is 5,000 lei (approx. € 1,172).

The alignment of the definitions would not have impact in terms of investor protection or consumer confidence, as the underlying philosophy for both institutions is the same: both qualified investors and professional clients do not require the same

treatment as retail investors for the provision of investment services and the private placement of securities.

The safeguards envisaged in MiFID for the client categorisation are adequate in terms of investor protection. In accordance to the rules laid down in the Section II of Annex II of the MiFID an investment firm could treat a client as professional only if an adequate assessment of the expertise, experience and knowledge of the client, undertaken by the investment firm, gives reasonable assurance, in light of the nature of the transactions or services envisaged, that the client is capable of making his own investment decisions and understanding the risks involved[60]. The firm has to comply with strict procedures to categorise the client as sophisticated[61].

Option 3. In addition to the alignment proposed above, the system of central registers could be removed from the Prospectus Directive: in the contributions to the public consultation some stakeholders wonder whether the national register of qualified investors should be removed from article 2.3 of the Prospectus Directive . In this regard, in accordance with the evidence provided by CESR members, the national registers of qualified investors envisaged in article 2.3 of the Prospectus Directive are not working effectively in all EU countries.

As indicated in Figure 1 in Annex V[62], only 11 out of 27 Member States have established a register that currently has more than 2 names. Among these 11 Member States, two declare that the register has never been accessed for the purpose of private placements. One Member State declares that it has not been accessed in the last two years, while another declares that it is not accessed very often. The remaining Member States cannot provide information in this regard, either because the registry is publicly available or because no statistics are produced. These include France, Germany and UK with 975 registered qualified investors. The three Member States account for 74 percent of all registered qualified investors in Europe; therefore in these Member States the registry may play an important role.

Moreover, the data on the national register are often not representative because sophisticated investors are reluctant to appear in a public register for privacy reasons. If the register is removed, the competent authorities could save the administrative costs of its maintenance and, if applicable, investors would save the cost of the registration fees and intermediaries would save the cost of consultation fees.

On the other hand, if the register is removed there will be no room for private placements directly carried out by the issuer without the intervention of an intermediary. Issuers could use the register to offer directly their securities to qualified investors (nonetheless, in accordance with the data provided by the CESR members, there is no evidence of such practice). The register of qualified investors ensures more transparency, and therefore it is advisable to maintain it.

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60 Third paragraph of Section II.1 in Annex II of the MiFID.

61 First, the client must state in writing to the investment firm that he or she wishes to be treated as a professional; second, the investment firm must give him or her a clear written warning of the protections and investor compensation rights he or she may lose; and third, the client must state in writing, in a separate document from the contract, that he or she is aware of the consequences of being treated as professional. See Section II.2 in Annex II of the MiFID.

62 See Annex V.

For reasons of reduction of administrative burden, certainty and effectiveness, the

Criteria Options	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Align both definitions and keep the register	0	0	+	+	+
Align both definitions and remove the register	0	0	+	+	+

preferred option is to align the definitions of qualified investors set in Article 2.3 of the Prospectus Directive. Moreover, national registers should be kept because they play an important role for private placements facilitating offerings directly carried out by the issuer without the intervention of an intermediary. Issuers can use the register to offer directly their securities to registered qualified investors. This ensures additional transparency in the European securities markets offering an alternative to the broad use of private placements through financial intermediaries.

7.1.3. 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)

Option 1. No action at the EU level: this signifies that the uncertainty in relation to the time frame for the exercise of the right of withdrawal would remain, as explained in section 3.1.3 (the "**baseline scenario**").

Option 2. Harmonize the different periods of time for the exercise of the right of withdrawal: the maximum harmonisation of the time frame for the right of withdrawal will provide certainty to the issuers making cross border offers of securities, as there will not be different time frames depending on the national legislation of the countries involved in the offer. However, if this harmonisation were made at the lowest level, investors of countries where longer deadlines are currently applied would be less protected because the time to withdraw their acceptances will be reduced compared to the current regime and thus their confidence may decrease. The majority of responses to the consultation agreed on the need for a common time frame for the exercise of this right. Within this majority, a minority considered that, on the basis of a common time frame, it should be up to the issuer to extend voluntarily its duration.

Though this is very difficult to estimate in concrete figures, it could be sensibly argued that a common time frame would reduce the cost of legal advices in case of cross-border offers, as there will not be any need to analyse in this regard the particularities of the national legislation of the countries involved in the offer.

Option 3. Harmonize the different periods of time with possibility for issuer to grant longer time: a common fixed time frame with the possibility for the issuer to extend the time frame for each particular offer would provide a flexible solution to issuers from countries with traditionally longer time frames. This approach would merge effectiveness and efficiency with more investor protection and consumer confidence.

Option 4. Harmonize the different periods of time at the settlement of the securities: some stakeholders insisted on the possibility to limit the exercise of the right of withdrawal at the settlement of the securities. Such an option would be very efficient for the issuer, but would reduce investor protection: investors might not be aware of the date of the settlement. Taking into account that such a date might differ from one system of settlement to another, this might not be the best option for increasing consumer confidence. Finally, the benefits of this option in terms of reduction of administrative burden are not entirely clear.

Moreover, some respondents pointed out that this is a good opportunity at least to clarify in the text of the Prospectus Directive that the registration document could be independently supplemented and that the time frame for the exercise of the right of withdrawal envisaged in Article 16.2 of the Prospectus Directive should finish at the close of the offer and when the admission to trading begins.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep status quo	0	0	0	0	0
Maximum harmonization of the time frame	-	-	+	++	++
Harmonize time frame and allow extension by the issuer	+	++	+	++	+++
Harmonize time frame to the settlement of the securities	--	--	0	--	++

For reasons of investor protection, consumer confidence, reduction of administrative burden, certainty and effectiveness, the preferred option is to harmonize the time frame for the exercise of the right of withdrawal and the issuer would be entitled to extend the period voluntarily.

7.1.4. Policy options in relation to the lack of harmonised rules on liability

Option 1. No action at EU level: Rome I Regulation[63] on the law applicable to contractual obligations is not applicable to the terms and conditions of an offer to the public. National systems of civil liability are not harmonised in the EU. National rules of civil liability are deeply embedded in the civil law of Member States. The harmonisation of the liability standards is a goal that exceeds the Prospectus Directive; it is not pertinent to ask for a limited harmonization of the civil liability

63 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). OJ L 177, 4.7.2008, p.6. See recital 28 and Article 6.4(d).

standards applicable just to prospectuses. Such a proposal could even create more disruptions and uncertainties when interacting with other provisions of the national legal frameworks for liability. Such an initiative should embrace a larger spectrum of legislation, notably financial services law.

Option 2. Harmonize the liability standards applicable to the prospectus: the harmonization of the rules on liability would certainly reduce the costs of producing a prospectus (at least those related to the legal advice) and enhance certainty in the securities market. Investor protection and consumer confidence could certainly be strengthened by the harmonization of the liability standards of the Prospectus Directive: more certainty would be added to the current requirements of article 6 of the Prospectus Directive which already requires that someone is responsible for the information given in the prospectus and that such a person or persons is clearly identified in the prospectus. Both obligations are already included in Article 6 of the Prospectus Directive.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo of the liability standards in the PD	0	0	0	0	0
Harmonize the liability standards	+	+	++	+	+

The harmonisation of the liability standards is a goal that exceeds the Prospectus Directive. Therefore the preferred option is to keep the *status quo*.

7.1.5. Analysis of the policy options in relation to the summary of the prospectus

Option 1. No action at EU level: this would imply that the situation of the summary of the prospectus will remain unchanged as defined in section 3.1.5 (the "**baseline scenario**"). The current limitation of 2,500 words and Annex I and IV of the Prospectus should not be read prescriptively but as an indication for an optimum length for prospectuses. However, depending on the specific circumstances surrounding each issue, a meaningful summary could exceed such limit and/or contain fewer items than those in the Annexes.

Option 2. Provide retail investors with appropriate information in an easily analyzable and comprehensible form in order to make investment decisions in full knowledge of facts: the standardisation of the content of the summary will increase investor protection, consumer confidence and certainty: first, investors will receive a more useful piece of information to form their investment decision and, second, a summary inspired by the UCITS Key Investor Information[64] could allow the investor to compare the security with other investment products. For reasons of

[64] For more information on the UCITS Key Investor Information concept, see http://ec.europa.eu/internal_market/investment/investor_information_en.htm.

effectiveness, issuers should not be constrained by the limit of 2.500 words for the summary. The size of the summary should not be determined *a priori*, because the limitation prevents issuers from including relevant information in a more comprehensible way. The summary should be as short as possible but as long as necessary to enable issuers to convey meaningful information to the investor. A logical consequence of having a more substantial summary document would be 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.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Standardise the content of the summary	++	++	0	+	++

For reasons of investor protection, consumer confidence, certainty and effectiveness, the preferred option is the standardisation of the summary of the prospectus following the approach adopted by the European Commission in its Communication on Packaged Retail Investment Products[65].

7.2. Analysis of the options related to situations of burdensome requirements imposed on companies raising funding in securities markets and to the intermediaries involved

7.2.1. Policy options for bringing forward a level playing field for Employee Shares Schemes

Option 1. No action at EU level: in this situation (the **"baseline scenario"**) the competent authorities of the Member States could use the possibilities provided for in the Directive and the implementing Regulation (the **"improved policy implementation option"**): in accordance with Article 23.4 of the Prospectus Regulation, in those cases where one of the information items required by the Regulation is not pertinent to the issuer, to the offer or to the securities to which the prospectus relates, that information may be omitted. Third country issuers or EU non listed issuers that have decided to launch employee shares schemes do not need to elaborate a fully fledged prospectus. The prospectus for these types of offers could contain less amount of information. The reasoning is twofold: first, if the issuer is already admitted to trading in the securities market of a third country, there is already public information about the company in the public domain; second, employees of a company are not comparable to the common investor in terms of their information needs. In these cases the issuer will find easier (and cheaper) to produce a prospectus that is just focused on aspects that are essential for the employees (like information

[65] COM (2009) 204 of April 30, 2009.

on the number and nature of the securities and the reasons for and the details of the offer – see Articles 4.1(e) and 4.2(f) of the Prospectus Directive).[66]

However, the common interpretation agreed by the CESR members in January 2009[67] on the short-form disclosure regime for offers to the employees in those cases where a prospectus is required has partially alleviated the situation of the European employees of companies listed in third countries. But, the solution is not fully satisfactory for various reasons: first, this interpretation was meant to be a temporal arrangement, pending the amendment of the Prospectus Directive that would provide a better solution in terms of the legal certainty; second, the CESR interpretation still requires the companies that benefit from the interpretation to publish a prospectus, which is still costly, and in case of employee share schemes a prospectus has not added value in terms of investor protection or consumer confidence: employees are better protected than investors because they could receive adequate information through the employee information document of article 4.1(e) and article 4.2(f) of the Directive (see CESR guidance on the contents of the employee information document[68]); finally, the CESR interpretation covers only part of the companies (just non-EU listed companies) and does not cover the European employees of non-listed companies and of companies listed in multilateral trading facilities (these companies have to publish a full prospectus).

Option 2. 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): introducing an exemption in the Prospectus Directive for employee share schemes launched by companies that are listed in a non-regulated market (third country and EU issuers) would help to overcome the limitations described in the previous paragraph. However, employees from non-listed companies would be excluded from this regime.

Option 3. Amend the Directive and extend the exemption in Article 4.1.(e) including not only the employee share schemes of companies that are listed in a

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66 This policy option is inspired by CESR's common interpretation set up in question number 71 of the frequently asked questions regarding prospectuses ("Employee Share Scheme Prospectuses: Short-form disclosure regime for offers to the employees in those cases where a prospectus is required"). CESR members agreed on a list of information items that are not pertinent for an offer addressed to employees of third country listed issuers and issuers listed in a non-regulated market (the employer has to have securities already admitted to trading on a market or by an affiliated undertaking).

67 Frequently asked questions regarding Prospectuses: Common positions agreed by CESR Members 8th Updated Version - February 2009 (Ref. CESR/09-103). Question number 71.

68 The CESR's recommendations for the consistent implementation of the European Commission's Regulation on Prospectuses nº 809/2004 (ref. CESR/05-054b), paragraphs 173 to 176. The CESR would expect the document referred to in articles 4.1.d and 4.2.e and 4.1.e and 4.2.f to include: a) the identification of the issuer and a indication of where additional information on the issuer can be found; b) an explanation of the reasons of the offer or admission to trading together with an indication of the specific provision of the Directive under which the exemption applies; c) details of the offer (key terms and conditions of the offer or admission to trading, which is likely to include information on the addressees of the offer, time frame of the offer, minimum and maximum amount of orders, information on where details of the price can be found, if not yet determined), including the nature of the offer (offer to issue or to sale securities), conditions upon which the securities will be issued or admitted to trading, price of the securities, if any. In relation to the number and nature of the securities involved in the offer or admission to trading, the CESR would expect this to include a summarised description of the rights attaching to the securities.

non-regulated market ("exchange-regulated" market or third country securities markets) as proposed in option above, but also encompass companies that are not listed: the introduction in the Prospectus Directive of a wide exemption by which the employees are not discriminated on whether their company is listed or not could be considered an improvement in terms of efficiency (no only companies in third countries will benefit from the new regime but also EU non listed companies), certainty (the legal basis for the exemption will be included in a Directive, and no longer in a non-binding interpretation from CESR) and reduction of administrative burdens (companies launching employee share schemes will save the cost of producing a prospectus). This option is also positive in terms of investor protection because employees will receive tailored information about the financial participation scheme in accordance with Article 4.1(e) of the Prospectus Directive. In fact, employee share schemes are exempted from the obligation to publish a prospectus "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"[69].

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Exempt ESS for third country listed issuers	0	0	+	+	+
Exempt all kind of ESS	0	0	+++	+	++++

For reasons of certainty and reduction of administrative burdens and effectiveness, the preferred option is to amend the Prospectus Directive in a way that exempts from the obligation to publish a prospectus employee share schemes launched in the EU by any type of company.

69 The outline of the information that the issuer has to include in such a document is suggested in the CESR recommendation for the consistent implementation of the Prospectus Regulation (n° 809/2004). The CESR would expect the document referred to in articles 4.1.d and 4.2.e and 4.1.e and 4.2.f to include: a) the identification of the issuer and a indication of where additional information on the issuer can be found; b) an explanation of the reasons of the offer or admission to trading together with an indication of the specific provision of the Directive under which the exemption applies; c) details of the offer (key terms and conditions of the offer or admission to trading, which is likely to include information on the addressees of the offer, time frame of the offer, minimum and maximum amount of orders, information on where details of the price can be found, if not yet determined), including the nature of the offer (offer to issue or to sale securities), conditions upon which the securities will be issued or admitted to trading, price of the securities, if any. In relation to the number and nature of the securities involved in the offer or admission to trading, the CESR would expect this to include a summarised description of the rights attaching to the securities. See www.cesr.eu (ref. CESR/05-054b, paragraphs 173-176).

7.2.2. Policy options in relation to the duplication of transparency obligations (Article 10 of the Prospectus Directive)

Option 1. No action at EU level: this will keep in place the obligation stipulated in Article 10 of the Prospectus Directive with the consequences explained in section 3.2.2: issuers will keep on publishing annually a document with no added value in terms of transparency (the **"baseline scenario"**).

Option 2. Eliminate the obligation established in Article 10 of the Directive: taking into account that the provisions of the Transparency Directive have made the requirement of Article 10 redundant, the deletion of article 10 of the Prospectus Directive will not have any negative impact in terms of investor protection or consumer confidence. On the contrary, as ESME suggests, such a change would be even more effective and would help to increase consumer confidence as it would serve to remove from the public domain outdated and therefore misleading information[70].

The deletion of article 10 would imply a reduction of administrative burden for issuers. In accordance with the estimations provided by ESME members, the cost saved by EU issuers could amount to € 30 million[71].

Stakeholders participating in the public consultation have unanimously agreed on the benefits from the deletion of Article 10 of the Prospectus Directive. A number of the contributions have pointed out that the deletion of article 10 would require adjustments in Articles 9.4 and 11.1 of the Prospectus Directive and 2.1.i (i) of the Transparency Directive, where there is a cross-reference to Article 10.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo of art. 10 of PD	0	0	0	0	0
Delete art. 10 of PD	+	+	+++	0	++

70 *"The Annual Document does not contain current information, but a collection of historical information only. Therefore, the issuers only accept liability for correctly having collected the required data, not for the correctness of the information at the time of publication of the document. This is reflected by the statement of the issuer normally contained in the Annual Document: Examples are "Information included or referenced in this annual document may be out of date." and "The information referred to below is not necessarily up to date as at the date of this annual information and the Company does not undertake any obligation to up-date any such information in the future."* ESME paper *"Position on Article 10 of the Prospectus Directive in relation to the Transparency Directive"*, 4 June 2008. See http://ec.europa.eu/internal_market/securities/docs/esme

71 This figure is calculated based on the number of companies with listed shares (12,299), as provided by FESE monthly statistics, February 2009, and the estimated annual cost of meeting the obligation (€2,500). See section 3.2.2. Some companies may not have shares traded on a regulated market but only other securities, such as bonds. These companies should also be taken into account. However, the number of companies with listed shares is the most reliable figure available.

For reasons of investor protection, consumer confidence, reduction of administrative burden and effectiveness, the preferred option is to delete article 10 from the Prospectus Directive.

7.2.3. Policy options in relation to the restriction for the choice of home Member State for the issuers of non-equity securities

Option 1. No action at EU level: this willkeep the threshold of 1.000 € for the determination of the home Member State for the issuers of non-equity securities (the **"baseline scenario").** This situation has the consequences described in section 3.2.3: issuers of non-equity securities below €1.000 and securities without denomination are excluded from the possibility of choosing a home Member State, with the implications, notably for debt issuance, explained in this section.

Since the Prospectus Directive entered into force, issuers of securities mentioned in article 2.1(m)(ii) have been entitled to appoint – among those of the countries where the offer or the admission to trading is taking place – the competent authority in charge of the approval of the prospectus. This possibility has proven to be an efficient tool for issuers of debt denominated above € 1.000 per unit.

Option 2. Provide for the choice of the home Member State for issues of non-equity securities below the €1000 threshold: the elimination of the €1.000 threshold in article 2.1(m)(ii) will extend this possibility to issuers of non-equity securities regardless of the denomination of the offer . Such a change would have a positive impact in terms of efficiency in cross border offers for two reasons: first, the issuer will not have to depend on the denomination of the offer to choose the home Member State that better suits an offer in terms of commercial strategy; second, issuers of securities that are not denominated (like structured securities) will be able to benefit from this possibility.

The abolition of the threshold has no impact in terms of investor protection: the choice of home Member State does not mean less control or relaxed supervision. The prospectus will be in any event approved by the competent authority of an EU Member State. This competent authority will be responsible for the application of the European standards of investor protection stemming from the Prospectus Directive.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Delete the 1000 € threshold	0	0	+	0	++

For reasons of reduction of administrative burden and effectiveness, the preferred option is to extend the possibility to choose home Member State to all the issuers of non-equity securities.

7.2.4. Policy options for facilitating the raise of capital through the issuance of rights

Option 1. No action at EU level: the option of keeping the *status quo* **(**the **"baseline scenario")** would imply that the competent authorities should apply individually Articles 8.2 of the Prospectus Directive and 23.4 of the Prospectus Regulation on a case by case basis (the **"improved policy implementation option"**). In this case the competent authorities could permit issuers to reduce the amount of the information in the prospectus for right issues. This option is positive in terms of reducing administrative burden as the cost of producing a lighter prospectus would decrease (the cost of performing the due diligence would be less than in a case of a full prospectus). However, it would not favour certainty as the decisions of the individual competent authorities would not be necessarily consistent in the 27 Member States. The lack of a harmonised approach in this regard could hamper consumer confidence.

Option 2. Share offerings to existing shareholders by the way of a rights issue could be exempted from the prospectus requirement: the issuer would save the cost of producing a prospectus if there was a total exemption from the obligation to publish a prospectus in the case of rights issues. Stakeholders are already familiar with the company issuing the rights (they have already taken in the past the decision to invest in this company). Taking into account the cost of producing a fully fledged prospectus, this might not be the most appropriate way to inform shareholders about a right issue. Shareholders do not need the special protection provided for by a prospectus as they should be familiar with and confident in the company in which they have already invested. First, companies are required by company law to report to their shareholders[72]; second, a traded company discloses information to the market on a continuing basis, so that the public and shareholders know the essential and fundamental information regarding the new shares. Issuers would find it easier to launch this type of offers. However, taking into account that in some countries rights issues are not limited to existing shareholders (and therefore new investors could participate in the offer), such exemption would significantly reduce information that the investors that are not shareholders would receive. Investor protection and consumer confidence would therefore be diminished by such an option.

Option 3. The principle of a "proportionate" prospectus for right issues could be introduced: the option of providing a reduced disclosure regime for rights issues seems to provide more certainty to this type of offers (as it would be a harmonised solution). Such a solution would improve the efficiency of cross border rights issues and would help to build consumer confidence, as the content of the prospectus would be better tailored for this type of the offer. A reduction of the amount of information to be included in the prospectus would help to reduce significantly the cost of publishing a prospectus by decreasing due diligence costs.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status	0	0	0	0	0

[72] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. OJ L 184 , 14/07/2007 P. 0017 - 0024

quo					
Total exemption	--	--	+++	-	+
Reduced disclosure requirements	0	+	++	+	+

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.

7.2.5. Policy options for providing proportionate disclosure requirements for small quoted companies[73]

Option 1. No action at EU level: by keeping the *status quo* the problems identified for companies with small market capitalization raising capital on financial markets will not be solved. According to Article 8.2 of the Prospectus Directive and 23.4 of the Prospectus Regulation, national competent authorities have the power to omit certain information from prospectuses. However they can use it in a discretionary manner affecting the final aim of the Prospetus Directive to create a level playing field for all issuers in the single market. It could be argued that such option could be positive in terms of reducing administrative burden (the cost of producing a lighter prospectus would be more affordable than producing a fully fledged prospectus). However, such option does not ensure sufficient certainty given the possible different interpretations by the competent authorities in each single case.

Option 2. Small quoted companies could be exempted from the obligation to publish a prospectus by raising the threshold in Article 1(2)(h) of the Prospectus Directive: an exemption from the obligation to publish a prospectus by raising the threshold of €2,5 million in Article 1.2(h) of the Prospectus Directive would reduce significantly the cost of raising capital for small quoted companies and therefore would provide these companies with a more effective way to raise capital. However, the impact of such a measure would be detrimental in terms of investor protection (investors would be deprived from the basic information that is needed for making an informed investment decision) and consumer confidence (some respondents of the public consultation argued that investing in small quoted companies is often more risky than investing in the big well-known issuers).

73 Figure 5 in Annex V shows that a specific treatment would be justified for small quoted companies in terms of disclosure requirements. It provides details on market capitalisation for companies listed in Cyprus, Finland, France, Germany, Greece, Italy and UK. The figures illustrate that 80 percent of the smallest firms only account for 4 percent of the market capitalisation. Specifically, the 4,559 listed companies with a market capitalisation of less than € 500 million have total market capitalisation of €421 bn. This is contrasted by the total of 5,721 listed companies with a market capitalisation of €10,166bn. The obligations that companies have to meet are very similar irrespective of the size of the companies. Assuming that the capital typically raised through an offer is proportional to the current market capitalisation it is clear that cost related to the production of the prospectus attributes to a significantly larger increase in the funding costs for smaller companies than for larger companies.

Option 3. The principle of a "proportionate" prospectus for small quoted companies could be introduced: the option of providing a reduced disclosure regime to small quoted companies combines the positive effects of reducing the administrative burden of these companies with a more effective system for raising capital. Investor protection will not be harmed because investors would be able to base their investment decisions on tailored information about these companies. Such a proportionate solution could also favour the general consumer confidence, as the market would approve a disclosure regime that better reflects the reality of these companies.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Exemption by raising the threshold	--	--	++	0	+
Reduced disclosure requirements	0	+	+	+	+

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 of companies with reduced market capitalization in the Directive; this regime should be supplemented through implementing measures, i.e. a modification in the implementing regulation.

7.2.6. Policy options for providing proportionate disclosure requirements for small credit institutions

The analysis in the previous point applies also to the policy options related to the credit entities and the offer of the securities mentioned in Article 1.2(j) of the Prospectus Directive[74].

Option 1. No action at EU level: t baseline scenario would imply that the situation would remain unchanged as described in section 3.2.4.3: Competent authorities could be expected to use the powers referred to in Articles 8.2 of the Prospectus Directive and 23.4 of the Prospectus Regulation. Like in the previous case, on one hand, such option could imply a reduction of the administrative burden; on the other hand, it would not be effective in terms of consumer confidence given the uncertainty deriving from the different interpretations by the competent authorities of each single case.

Option 2. Small credit institutions could be exempted from the obligation to publish a prospectus by raising the threshold in Article 1(2)(j) of the Prospectus Directive: a total exemption from the obligation to publish a prospectus could be

[74] The comparison in Figure 6 in Annex V between an offer of €50 and an offer of €500 million might help to illustrate the problem: the impact of the additional costs for the prospectus in the offer of €50 million (0.3%) is considerably higher than in the offer of €500 million (0.03%).

implemented by raising the threshold of €50 million in Article 1.2(j) of the Prospectus Directive. On the one hand, such a change would reduce the cost of raising funds for these entities (because they would not have to produce a prospectus). On the other hand, the impact of such a measure would be detrimental in terms of investor protection and consumer confidence.

Option 3. The principle of a "proportionate" prospectus for small credit institutions could be introduced: the option of providing a reduced disclosure regime to small credit institutions for the type of offers mentioned in Article 1.2(j) of the Prospectus Directive, at or above the threshold therein, has the positive effect of reducing the administrative burden of these companies and provides for a more efficient system for raising funds. Investor protection will not be harmed because investors would be able to base their investment decisions on tailored information about the offers of securities described in Article 1.2(j) of the Prospectus Directive.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Exemption by raising the threshold	--	--	++	0	+
Reduced disclosure requirements	0	+	+	+	+

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 only for offers of securities described in Article 1.2(j) of the Prospectus Directive at or above the threshold therein. Below this threshold, offers of securities described in Article 1.2(j) of the Prospectus Directive remain outside the scope of the Directive. This regime should be supplemented through implementing measures, i.e. a modification in the implementing regulation.

7.2.7. Policy options in relation to the prospectus disclosures in case of government guarantee schemes

Option 1. No action at EU level: the option of keeping the *status quo* **(**the **"baseline scenario")** in relation to information that has to be included in a prospectus in case of an offer of securities guaranteed by a Member State has similar implications in terms of certainty and consumer confidence as in the previous two points.

Option 2. Issuers of securities guaranteed by the government of a Member State could be exempted from the obligation to provide information about the guarantor in the prospectus: sources like Eurostat provide to the public sufficient data on government revenue, government expenditure, government deficit, transactions in assets, transactions in liabilities, other economic flows, and balance

sheets[75]. Therefore the option of waiving issuers from the obligation of including information about the State guarantor would reduce the administrative burden for these issuers (at least it should have a positive impact in relation to the cost of performing the due diligence).

Option 3. The same policy option could be extended to cover the information not only about the guarantor, but also about the guarantee: , information on the guarantee (scope, conditions, etc.) is a key element of an investment decision. Availability of this type of information will improve certainty in the securities markets. Therefore, while the issuer could omit the information on the State as guarantor, information on the guarantee should be at least included in the prospectus for reasons of certainty in the securities markets.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Exclude information only on guarantor	0	0	+	+	+
Exclude information on guarantor and guarantee	--	--	++	+	+

For reasons of reduction of administrative burden, certainty and effectiveness, the preferred option is to amend the Prospectus Directive and clarify that in case an offer of securities is guaranteed by a Member State, there is no need to include in the prospectus the information on the guarantor State (though it should contain information about the guarantee).

7.2.8. Policy options in relation to the printed form (paper copy) of the prospectus

Option 1. No action at EU level: the option of keeping the status quo would imply that, in the situations where the prospectus has been published in electronic form, the persons obliged to deliver the prospectus would have to provide a paper copy if requested to do so by the investor (the **"baseline scenario"**).

Option 2. Abolish the obligation to deliver a paper copy of the prospectus: the option of abolishing this obligation would be positive in terms of reducing the administrative burden for the person obliged to handle 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). However, it will reduce notably 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

[75] See http://ec.europa.eu/eurostat/

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.

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Abolish the paper copy obligation	--	--	++	0	0

For reasons of investor protection and consumer confidence the preferred option is to maintain the obligation of providing a copy paper of the prospectus in the case described in Article 14.7 of the Prospectus Directive.

7.2.9. Policy options in relation to the translation of the summary of the prospectus

Option 1. No action at EU level: the option of keeping the status quo would imply that the issuer or the person responsible for drawing up the prospectus would have to provide the translations of the summary of the prospectus into the languages of the Member States included in the scope of the cross-border offer or admission to trading (the **"baseline scenario"**).

Option 2. Abolish the obligation to translate the summary of the prospectus: the option of abolishing 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. However, this solution 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).

	Investor protection	Consumer confidence	Reduction of administrative burden	Certainty	Effectiveness
Keep the status quo	0	0	0	0	0
Abolish the translation of the summary	--	--	++	0	0

For reasons of investor protection and consumer confidence the preferred option is to maintain the obligation of translating the summary of the prospectus as required by Article 18.1 of the Prospectus Directive.

8. ANALYSIS OF IMPACTS

8.1. Impact on stakeholders

The following table shows the impact of the changes comprising the preferred policy options in relation to the main stakeholders.

Impact on stakeholders / Scenario	Investors	Companies raising capital	Financial intermediaries	Supervisors	Other stakeholders
Clarification of the retail cascade regime	Investors to benefit from the fact that a prospectus will be required in case of subsequent offers of securities through financial intermediaries (in case the offer is not exempted in accordance with the PD).	No impact	Intermediaries acting in association with the issuer will benefit from the fact that they will not have to draw up a new prospectus for the subsequent offers as they could rely on the existing prospectus of the issuer, if updated.	Supervisors will have a common and clear legal framework for dealing with retail cascade issues.	
Alignment of qualified investors and professional clients	Investors that are considered professional clients under MiFID will benefit from the treatment of qualified investors under the Prospectus Directive. They will have more investment opportunities as they will have easier access to private placements.	Companies raising capital through private placements will benefit from a wider spectrum of potential investors.	Financial intermediaries will be able to prepare private placements in a more effective manner as they will be entitled to use their list of professional clients for the purposes of private placements.	A reduction of the use of the registers of qualified investors is expected. Supervisors may devote less resources to the maintenance of such registers	

Impact on stakeholders / Scenario	Investors	Companies raising capital	Financial intermediaries	Supervisors	Other stakeholders
Harmonisation of the time frame for the right of withdrawal	Investors will benefit from the clarity of having a common time frame in the EU for the exercise of the right of withdrawal governing a cross border offer. Investors from countries where currently longer deadlines are applied would be less protected and their confidence could decrease. However, this risk is mitigated by the fact that the issuer or offeror will be entitled to extend the deadline in accordance with national consumer protection traditions	Issuers will be able to set the period. Therefore they will have certainty at every moment on when the right of withdrawal could be exercised, regardless the Member State where the investors are based.	Financial intermediaries acting as offeror will have the same benefits as the issuers.	Supervisors will find easier to supervise whether the right of withdrawal ahs been respected, as there will be only one period governing each offer.	
Exemption for employee shares schemes	Employees will be protected by receiving tailored information for the type of offer according to the document provided in article 4.1 (e).	Companies will save the cost of producing a prospectus when offering a financial participation to their employees	No impact	Supervisors will not have to devote resources to approve prospectusses for this type of offers.	**EU employees** As a consequence of the exemption, some companies are likely to be encouraged to offer financial participation to their employees. These schemes are notably addressed to non-executives employees. Therefore many EU workers will benefit from these type of schemes.
Standardized summary	A standardized summary will enhance investor protection and consumer confidence. Moreover, investors will be will be able to compare with other products and make more efficient investment decisions.	No impact	No impact	No impact	

Impact on stakeholders / Scenario	Investors	Companies raising capital	Financial intermediaries	Supervisors	Other stakeholders
Deletion of Article 10	No impact. Investors have already access to the regulated information in accordance to the Transparency Directive	Companies will save the cost of producing the annual document referred in Article 10	No impact	Supervisors will not need to devote resources to oversight the fulfilment by the issuers of the requirement in Article 10	
Permit the choice of home Member State to all non-equity offers	No impact. Investors will be protected because all the EU competent authorities apply the same standards of investor protection when approving prospectuses.	Issuers will be able to arrange cross-border offers according to the strategy that better suits their needs. Issuers of securities that are not denominated (like structured securities) will benefit from the possibility to choose the competent authority.	No impact	No impact	
Proportionate prospectus for rights issues	Investors will benefit from the fact that the prospectus will be tailored for rights issues. The fact that the cost for such a prospectus decreases will permit more public offers of rights.	Companies will find more attractive and easier to raise capital via rights issues as a consequence of the reduction of the cost of producing a rights prospectus.	No impact	No impact	**Shareholders** The fact that the cost for such a prospectus decreases will permit more public offers of rights. Issuers may be less inclined to circumvent the costs of making a public offer of rights by using the exemptions of the Directive to carry out private placements (where shareholders are as a consequence excluded from the increase of capital and their share of capital diluted)

Impact on stakeholders / Scenario	Investors	Companies raising capital	Financial intermediaries	Supervisors	Other stakeholders
Proportionate prospectus for small quoted companies/credit institutions.	Small quoted companies will be encouraged to raise capital in the securities markets. Investors will benefit from the wider range of investment opportunities. Investors would also receive a tailored prospectus in case they want to invest in small quoted companies	Small quoted companies can be expected to have better access to finance. The cost of producing a prospectus will be balanced with the benefits of going public.	No impact	No impact	**SMEs** The special treatment for small quoted companies can be expected to facilitate SME the fundraising in the securities markets
Proportionate prospectus for offers of securities mentioned in Art. 1.2(j) (small credit institutions)	Small credit institutions will be encouraged to raise capital in the securities markets. Investors will benefit from the wider range of investment opportunities. Investors would also receive a tailored prospectus in case they want to invest in these securities	Small credit institutions can be expected to have better access to finance. The cost of producing a prospectus will be balanced with the benefits of going public.	No impact	No impact	
No need to include information about the State guarantor	No impact. There is already sufficient information about the States available to the public.	The cost of producing the prospectus will be reduced and therefore it will be less costly to raise capital for this type of offers.	No impact	Supervisors will no need to examine that part of the prospectus.	

8.2. Other impacts

8.2.1. Impacts on the environment, employment and third countries

It is not expected that the changes in the Prospectus Directive are going to have any direct impact on the natural environment or on the gender policy of the EU or on third countries. Environmental benefits may increase by repealing the obligation to provide on investors' request printed version of the prospectus. However this will be detrimental to investors' protection.

The extension of the employee share scheme exemption is likely to have a positive impact in terms the social and employment policy of the EU. As explained in section 3.2.1, under the existing regime companies are penalised if they offer financial participation schemes to common employees, because they have to produce a costly prospectus; this is not the case for offers addressed to employees with executive level

and directors, because in this case the company can use the exemption of Article 3.2(b) of the Prospectus Directive[76]. The change proposed by the European Commission will eliminate this discrimination for the ordinary employees and it is expected that many EU workers will benefit from this type of schemes in the future. The benefits of financial participation are highlighted in the Communication from the Commission on a framework for the promotion of employee financial participation[77].

The flexibility provided by the extension of the home Member State choice for all offers of non-equity securities (deletion of €1.000 threshold in Article 2.1.m (ii) of the Prospectus Directive) will make EU markets more attractive for third country issuers offering non-denominated non-equity securities or non-equity securities with a denomination per unit below €1.000 threshold. Under the current regime, the determination of the home Member State for the issuers offering such securities is governed by a rigid system set out in Article 2.1.(m) (iii)[78]. Apart from that, no major impact on third countries is expected from the changes proposed by the European Commission.

8.2.2. Impacts on small and medium size enterprises

The short form disclosure regime described in section 7.2.5 could have a positive impact for those small and medium size enterprises (SMEs) searching to finance their business in the securities markets. The cost of producing a prospectus will be reduced for these SMEs. In a similar way, the short form disclosure regime described in section 7.2.6 will facilitate the raise of capital for small credit institutions. Easier access to funding will enhance the development of the small entities and will promote the emergence of new local and regional actors competing in the financial markets.

Non-quoted SMEs willing to launch financial participation schemes with their employees will also benefit from the extension of the employee share schemes exemption described in section 7.2.1. The estimation of reduction in administrative burden of both measures is detailed in the next section.

The rest of the changes suggested by the European Commission are not likely to have any direct impact on SME.

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76 Offers of securities addressed to less than 100 natural or legal persons per Member State are exempted from the obligation to publish a prospectus.

77 'The main reasons for enterprises to introduce financial participation are to encourage employees to take a greater interest in the success of the company, to create a feeling of belonging to the company and sharing common goals, and to encourage a greater alignment of employees' interests with those of the shareholders. Financial participation is also an important instrument for recruiting and retaining staff. In addition, it improves the motivation of employees, enhances their loyalty and long-term commitment, increases productivity, and improves competitiveness and profitability. Finally, financial participation can also be an important instrument for raising capital, in particular in the case of start-up firms'. Communication from the Commission on a framework for the promotion of employee financial participation. COM(2002) 364, page 6.

78 The home Member State for third country issuers offering equity securities and non-equity securities with a denomination below €1.000 is the one where the securities are offered for the first time after the entry into force of the Prospectus Directive.

8.3. Estimation of reduction in administrative burden

This table shows the identifiable reductions of administrative burdens on an annual basis. The methodology for calculating the administrative burden can be found in Annex VI[79].

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 launched in the EU from the obligation to publish a prospectus	€ 392,000	€ 98,000	1	€ 490,000	37	**€ 18,130,000**
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**

[79] For the purpose estimating the reduction of administrative burdens for the preferred policy options, different elements in the calculations are provided. The wage cost is the estimated direct average wage cost of performing the relevant tasks. In addition an overhead of 25% is added to the calculation of the reduction of the administrative burden. In cases where only the *total* cost of relevant tasks have been obtained an identical proportionate distribution between the wage cost and the overhead has been assumed and used for the calculation presented in the table in section 8.3. The frequency refers to the number of times per year the task is undertaken by the firms included in the calculation. The number of companies refers to the number of entities that are assumed to benefit from the reduction in the administrative burden in a given year.

The identifiable reduction of administrative burdens from the preferred options amounts to approximately **€ 302 million** on an annual basis**.**

8.4. Summary of the final outcome

In view of the conclusions reached in this impact assessment, the European Commission considers appropriate to present a proposal amending the Prospectus Directive[80]. The proposal should aim at solving the problems identified in this impact assessment:

– Article 3.2 of the Prospectus Directive should be amended 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).

– The definition of qualified investor in Article 2.1(e) should be modified to encompass the persons that are considered professional clients under MiFID.

– 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.

– The content of the summary of the prospectus should be standardised in line with the packaged retail investment products approach to be set up in spring by the European Commission. The limit of 2.500 words should be deleted from recital 21 of the Prospectus Directive.

– All employees in the EU should have the same opportunities of financial participation. The exemption for employee shares schemes should be extended accordingly in Article 4.1(e) of the Prospectus Directive.

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

– Issuers of non-equity should choose the 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.

– The raise of capital through the issuance of rights should be subject to proportionate disclosure requirements, likewise the raise of capital of small quoted companies and small credit institutions. 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.

[80] For further additional minor changes see Annex IX.

– 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.

9. 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. Where needed, the Commission services will offer assistance to Member States for the implementation of the legislative changes in the form of transposition workshops with all the Member States or bilateral meetings at the request of any of them. When necessary, the Commission will pursue the procedure set out in Article 226 of the Treaty in case any Member State fails to respect its duties concerning the implementation and application of Community Law.

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. The Commission will be monitoring the application of the Prospectus Directive, as amended, through CESR, ESME and an extensive and continuous dialogue with all major stakeholders, including market participants (issuers, intermediaries and investors), and consumers. It may also use of the findings of studies carries out by stakeholders. The assessment will be carried out along the following criteria: investor protection, consumer confidence, effectiveness, market efficiency, legal certainty, administrative burdens. The main elements that would be used during the evaluation would be the following:

– investor satisfaction with the functioning of the prospectus, in particular with the summary of the prospectus.

– evolution of the functioning of the prospectus for the placement of securities through financial intermediaries in the EU;

– evolution of the functioning and number of qualified investors and issuers/offerors using the national register of qualified investors;

– times that issuers choose a home Member State different than the one where they have their registered office for offers of non-equity securities with a denomination below €1.000;

– number of employee share schemes launched in the EU;

– evolution of rights issues in the EU;

– number of small quoted companies raising capital in the EU;

– number of credit institutions offering the securities mentioned in Article 1.2.(j) of the Prospectus Directive;

– evolution of the private placements versus public offers.

ANNEX I

1. CESR Report

Based on the findings presented in the report, it seems that most market participants are satisfied with the new European legislation on prospectuses. Although they have highlighted a few obstacles in the practical application of the passport, they consider that the passport mechanism envisaged in the Prospectus Directive is working much better than the previous mutual recognition process and has lead to an increase in the number of pan-European offers. Nevertheless, they have also identified certain provisions in the Prospectus Directive and Prospectus Regulation that are causing some practical difficulties.

The report identifies those aspects where CESR considers there is a need to further assess whether legislative action would be necessary. Among others, concerns have been raised in respect to the limited scope of the exemption of publishing a prospectus for offers or admissions to trading on regulated markets of securities to employees; the lack of specific regulation in relation to the registration document (passport, supplements, etc.); the need to assess the usefulness of the annual document to be published in accordance with Article 10 of the PD; the circumstances when a supplement should be published (linked to the withdrawal right granted for investors in such cases); and the interpretation of the "re-sale" provisions in Article 3.2 of the PD.

2. ESME Report

Based on the findings presented in the report, ESME is convinced that the Prospectus Directive should be amended in order to facilitate the achievement of the following objectives:

- to promote retail investors and employees with an access to the full range of investment opportunities;
- to promote market efficiency in public offerings, trading and listing securities within a single European capital market;
- to increase the use of a prospectus by investors for effectively analyzing prospects and risks of a security prior to the investment decision;
- to disburden issuers from requirements that provide no significant added value in information to investors;
- to achieve a better balance in some respects of the allocation of risk between issuers and investors;
- to reflect changes in the structure of international securities markets since the time when the Directive was negotiated in 2001 to 2003;
- to strengthen harmonization by achieving a common understanding of the rules by the national competent authorities.

3. CSES Study

The study suggests that any review of the prospectus regime should focus on reducing the cost burdens of specific requirements that are particularly burdensome and that only marginal changes should be made to the Prospectus Directive. The most important issues for change that were identified were the abolition of Article 10 and clarifications to the definition of a “public offer” to reduce legal uncertainty surrounding the retail cascade.

ANNEX II – OUTCOME OF THE CONSULTATION

The majority of the contributors welcomed the changes suggested by the European Commission. The outcome of the consultation could be summarised as follows:

– Respondents are very keen about the abolition of the annual document required in Article 10 and the €1.000 threshold set Article 2.1.(m)(ii) of the Prospectus Directive.

– The proposal concerning employees share schemes is generally supported, with a clear preference for a wide exemption (i.e. exempt all offers of securities to employees). A minority suggests that the exemption should only be granted to third country companies that are listed in a market whose disclosure requirements are similar to those required in a regulated market in the EU.

– The suggestion for the alignment of the definitions of qualified investors and professional clients is generally welcomed, with some minor technical comments. There is no consensus among stakeholders on whether the national register of qualified investor mentioned in Article 2.3 of the Prospectus Directive has to be suppressed or not.

– The majority of respondents favour the harmonisation of the time frame for the exercise of the right of withdrawal in two days, though there is no common position on whether the issuer should be entitled to extend the period for the exercise of such a right.

– The majority of respondents are in favour of exempting issuers from the obligation to provide information about the State guarantor. However, some respondents made clear that the prospectus should contain the information about the guarantee.

– There were different approaches in relation to the issue of the retail cascade. A number of respondents agree with the suggestion of the deletion of the last sentence in Article 3.2 of the Prospectus Directive. Some others consider that such deletion would create more uncertainty and advocate for a clarification of the functioning of the prospectus in relation to the placement of securities through financial intermediaries.

– Divergent views have been expressed concerning rights issues. A significant number of respondents are against the total exemption. There is some support for a short form disclosure regime for rights issues. A minority expressed disagreement with a special treatment for rights issues.

– There are divergent views concerning the treatment of small quoted companies. A number of respondents are in favour of raising the threshold of 2,5 Million € of Article 1.2(h) of the Prospectus Directive. Others are sympathetic with the idea of a short form disclosure regime for the prospectus of the small quoted companies. Finally, some others point out that the small quoted companies imply higher risk and therefore should produce a full prospectus in case they want to raise capital in the securities markets.

– There is agreement on the need of improvement in relation to the summary of the prospectus. Stakeholders provided different ideas about how it could be improved.

– Some respondents took the opportunity to raise other issues that were not included in the consultation.

ANNEX III – SUMMARY OF DISCUSSIONS AND LIST OF PARTICIPANTS IN THE MEETING HELD IN BRUSSELS ON 12 MARCH 2009 ON THE CONSULTATION OF THE PROSPECTUS DIRECTIVE

DG MARKT services held a meeting with a number of stakeholders associations on 12 March 2009. The aim of the meeting was to have an exchange of views on the Prospectus Directive review. The meeting was attended by representatives from issuers, intermediaries, investors and consumers (see list attached).

1. Investor protection and market efficiency: what elements of the Prospectus Directive would you improve in order to enhance investor protection and market efficiency?

   – *Stakeholders expressed general support to the initiative of the Commission.*
   – *A number of participants signalled that there are still differences in the way the directive has been implemented and applied by Member States.*

2. Measures to facilitate the raising of capital:
   - Do you see benefits in the proposed alignment of the definition of professional clients in MiFID and qualified investors in the Prospectus Directive (Paragraph 3.1 of the background document)?

     – *Participants supported the alignment of both definitions.*

   - Do you see any benefit in the proposed suppression of the threshold of 1000€ for the free determination of the Home Member State for issues of non-equity securities (Paragraph 3.6 of the background document)?

     – *The majority of the participants supported the Commission proposal. The change proposed by the Commission allows issuers to choose the competent authority that is more familiar with the product and extends the choice of home Member State to derivative securities (which are not denominated).*

   - Do you consider that the deletion of Article 10 of the Prospectus Directive will help to reduce administrative burdens in the European Union (Paragraph 3.4 of the background document)?

     – *There was unanimous support for the deletion of Article 10 of the Prospectus Directive.*

   - Will the proposed harmonisation of the time frame for the exercise of the right of withdrawal (Paragraph 3.5 of the background document) facilitate cross-border offers?

Participants expressed various views:

- *support of the Commission approach to harmonise this deadline to two days;*
- *harmonisation of the deadline – however a longer period than two days should be envisaged;*
- *harmonisation of the deadline but possible extension by the issuer or the Member State;*
- *the right of withdrawal should not be permitted after the settlement of the security;*
- *positive events should not trigger the right of withdrawal.*

3. Measures to reduce the cost of raising capital:
   - How small quoted companies will be affected by the two alternative proposals of the European Commission (Paragraph 4.3 of the background document)? Which solution will be more effective in reducing administrative burdens and raising capital? Do you have any other suggestion?

     - *General support for a proportionate disclosure regime; another alternative suggested: the threshold of €2.5 million in Article 1.2(h) of the Prospectus Directive should be raised to €10 million.*

   - Do you think the proposal on the rights issues (Paragraph 4.5 of the background document) will reduce administrative burdens and facilitate business by boosting the raise of capital?

     Various views expressed:

     - *a total exemption for rights issues from the prospectus requirements would not be acceptable;*
     - *rights issues should be exempted from the obligation to publish a prospectus in case the offer is addressed to existing shareholders;*
     - *a short form disclosure regime ("mini-prospectus") could be requested in case of increase of capital not reserved in exclusive to shareholders.*

4. Measures to clarify liability:
   - With reference to the distribution by "retail cascade", do you see any improvement in terms of legal certainty and business facilitation coming from the clarification proposed by the European Commission (Paragraph 3.2 of the background document)? Do you see any negative unintended consequence? Do you have any other suggestion?

     - *The majority of the participants opposed the deletion of last sentence in Article 3.2 of the Prospectus Directive as proposed by the Commission.*
     - *Some participants suggested an exemption from the obligation to publish a prospectus for the subsequent offers of intermediaries that are not acting in*

concert with the issuer. Moreover it was suggested that issuers should not be obliged (and therefore held liable) for updating the prospectus for these subsequent offers.

- In your view, what should be the priorities for a harmonized liability regime under the Prospectus Directive (Paragraph 4.7 of the background document)?

  – *Some participants called for the harmonisation of the rules of conflicts of law. It was mentioned that the lack of harmonised rules on liability produces high cost for issuers and financial intermediaries.*

5. Measures to enhance investor protection:
   - How would you improve the effectiveness of the Prospectus and its summary in terms of investor protection and completeness and accuracy of information? Would the "Key Investor Information approach" be a suitable alternative for the summary of the prospectus (Paragraph 4.1 of the background document)?

     – *All participants agreed that the summary is not functioning effectively and it does not provide suitable information to retail investors.*
     – *The "Key Investor Information approach" (KII) was considered useful for various financial products but not for equity. However, some participants warned that KII approach should not be applied as such to the securities covered by the Prospectus Directive.*

   - Do you envisage any negative effects in the exemption of issuers from providing additional information in cases where Member States act as guarantors (Paragraph 4.4 of the background document)?

     – *It was suggested that in these cases the prospectus should include a warning inviting the investors to look at the creditworthiness of the Member State guarantor.*

6. Measures to promote level playing field in employee financial participation: Do you consider pertinent to create a level playing field for non-listed companies and companies listed in a non-regulated market and widen consequently the scope of the Employee Shares Schemes exemption to cover these companies (Paragraph 3.3 of the background document)?

   – *All participants expressed general satisfaction with the proposal by the Commission in relation to this issue.*

7. Any other issue.

Some of the participants raised other technical issues not included in the consultation:

- *The threshold in 1.2(j) should be raised from €50 million to €500 million.*
- *Issuers should be able to passport and supplement the registration document of the prospectus.*
- *It should be clarified how to supplement information contained in the final terms.*
- *The validity of the base prospectus should be extended form 12 to 24 months.*
- *The summary of the prospectus should include information about the rating of the securities.*

List of participants

Name	***First Name***	***Company***
Burn	Lachlan	ICMA
Büscher	Patrick	European Savings Banks Group
Byrne	Daryl	FESE
Charlton	Lorraine	SIFMA - EPMD
Content	Jean-Michel	International Association for Financial Participation
Cooper	Janet	Linklaters
Dariosecq	Sylvie	Association Française des Marchés Financiers
Ewing	Ruari	ICMA
Fischer zu Cramburg	Ralf	Eusipa
Fiedler	Larissa	European Fund and Asset Management Association
Gugliotta	Gianluigi	European Forum of Securities Associations
Hemetsberger	Walburga	EAPB
Inel	Burçak	FESE
Jalbert	Kate	Quoted Companies Alliance
Kohl	Ulrike	European Savings Banks Group - MS
Marras	Graziella	European Fund and Asset Management Association
Maysey	Andy	IMA
Meeus	Luc	Baker & McKenzie

Misasi	Luca	European Forum of Securities Associations
Neundoerfer	Nikolaus Dominik	Eusipa
Piller	Lee	CESR
Pina Da Silva	Paulo	EuropeanIssuers
Prache	Guillaume	FAIDER
Preuße	Thomas	VÖB
Priester	Robert	EBF's Banking Supervision
Ruari	Ewing	ICMA
Spatola	Paola	EuropeanIssuers
Stonefield	Greg	White & Case
Verplancke	Marnix	KBC Securities
Warken	François	Arendt & Medernach

ANNEX IV – ASSESSMENT OF THE PROSPECTUS DIRECTIVE

1. BACKGROUND

The Prospectus Directive was adopted in November 2003 in the context of the Financial Services Action Plan proposed by the European Commission in May 1999[81]. The Directive lays down the rules governing the prospectus to be made available to the public in case a public offer or an admission to trading of transferable securities in a regulated market takes place in the EU. The prospectus contains information about the offer, the issuer and the securities, and has to be approved by the competent authority of a Member State before the launch of the offer or the admission to trading of the securities. Particular aspects of the Prospectus Directive are developed in the Prospectus Regulation[82]. Two major principles inspire the Prospectus Directive which applies since 2005: investor protection and market efficiency. One of the major achievements of the Prospectus Directive is the introduction of a "passporting mechanism": the prospectus approved by the competent authority of one Member State (the "home Member State") is valid for the entire Community without additional scrutiny by the authorities of the other Member State (the "host Member States"). This is considered to be a major achievement in terms of integration of the securities markets in the EU.

10. GENERAL ASSESSMENT OF THE PROSPECTUS DIRECTIVE

All inputs referred to under section 2 of the impact assessment are positive in their general assessment of the overall effect of the Prospectus Directive. In particular the Directive has introduced a new mechanism for notification; created a harmonised and coherent structure of disclosure requirements (able to take into account the specificity of various financial instruments as a result of a system of different building blocks and schedules) and set in place a simplified language regime.

The prospectus regime appears to have made it easier to offer securities and admit them to trading, either in one country or in several countries at the same time. The survey conducted by CSES, as part of its study, shows that a large majority of respondents are satisfied with the way the prospectus regime works. Many interviewees mentioned that, after some initial difficulties, both regulators and market participants are gaining experience of the prospectus regime. Most of the early problems have been overcome, progressively generating better quality prospectuses and reducing the average approval time[83]. Similarly, the cost of compliance decreased once participants had become used to the regime.

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81 Communication of the Commission "Financial Services: Implementing the framework for financial markets. Action Plan" COM(1999)232, 11.05.99

82 Commission Regulation 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 L149/1, 30.4.2004, p. 1-187

83 This is confirmed by data on IPOs in the EU. According to the PricewaterhouseCoopers IPO Watch Europe Survey, the third quarter of 2005 saw a significant drop in terms of value and number of IPOs,

The principal concerns expressed focused on the lack of uniform implementation in Member States and the divergent supervisory practices.

10.1. Investor protection

One of the principal objectives of the Prospectus Directive is investor protection[84]. This entails the need to ensure that complete and accurate information is provided concerning the issuer and the relevant financial instruments so that investors can make appropriate and informed investment decisions. To achieve this objective, the Directive and its Implementing Regulation take into consideration, among other elements, the nature of the investors, notably the needs of retail investors.

On the one hand, Article 5 of the Directive prescribes the overriding standard that each prospectus should attain: a prospectus is required to contain all information necessary to assess the assets and liabilities, financial position, profits and losses and prospects of the issuer and any guarantor, and the rights attaching to the securities. That information must be presented in a form that is easily analysable and comprehensible. The minimum content of a prospectus is further specified by the Implementing Regulation and is intended to reflect the nature of the issue and the securities, including information on whether they are traditionally aimed at the wholesale or the retail market. The Prospectus Regulation takes close account of the standards approved by the International Organisation of Securities Commissions (IOSCO)[85].

On the other hand, the requirement for a summary as an integral part of the prospectus[86] for "retail" securities was intended to ensure that the content of a prospectus is more easily accessible to retail investors[87]. This provision aims at striking a balance between the provision of comprehensive information and accessibility to non-professionals, as well as at counterbalancing the increasing trend to add detailed pieces of information in the prospectus as a way of shielding issuers from potential civil liability in relation to incomplete or inaccurate disclosure.

In a survey conducted by CSES[88] on investor protection under the prospectus regime (Figure 7), the majority of respondents considered that the Prospectus Directive has had a significant positive impact on the quality of information available to investors. However, due to the length and complexity of prospectuses, concerns have been

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which is mainly attributed to the fresh implementation of the Prospectus Directive. Both value and volume of IPOs increased in the following quarters, suggesting *ceteris paribus* a progressive adaptation of the market to the new disclosure regime for issues.

84 Recital 10 of the Prospectus Directive: "The aim of this Directive and its implementing measures is to ensure investor protection and market efficiency, in accordance with high regulatory standards adopted in the relevant international fora." See also recitals 16, 18, 19 and 21.

85 The members of the International Organization of Securities Commissions (IOSCO) are generally the supervisory authorities of the countries that are parties to the organisation. The IOSCO counts a total of 191 members, of whom 109 are ordinary, 11 associate and 71affiliate. They meet regularly to cooperate in promoting high standards of regulation; to exchange information on their respective experiences; to establish standards and effective surveillance of international securities transactions; and to provide mutual assistance to promote the integrity of the markets through rigorous application of the standards and effective enforcement against offences.

86 Article 5 (2) of the Prospectus Directive.

87 With this in view, recital 21 limits the summary to 2 500 words.

88 CSES Study, page 52.

raised by market participants that the primary aim of informing investors may not actually be achieved.

Fig. 7. Impact on the quality of information available to investors

Options	Quality of information for investors	
	Number of respondents	**Percentage**
Positive Impact	47	58.0
No Impact	29	35.8
Negative Impact	4	4.9
DK/No response	1	1.2
Total	**81**	**100.0**

Source: CSES study

Furthermore, the CSES survey[89] shows that, unlike institutional investors, small retail investors do not on average make use of prospectuses for their investment decisions. However, the survey shows also that the prospectus has an important role to play as a legal document for investors and for issuers (62.9%). On the one hand, the CSES study points out that there are long and complex prospectuses because there are no limits to the overall length of the documents (other than the summary) and there are potentially very severe sanctions if information are omitted. On the other hand, the legal function of prospectuses indicates that most issuers would probably produce a prospectus even in the absence of mandatory disclosure requirements because the benefits in terms of legal protection outweigh the costs of drafting the document.

In addition, issuers (especially small and medium-sized companies) may be subject to disproportionate costs and burdens that are not justified by the aim of effective investor protection[90].

10.2. Market efficiency

Recital 10 of the Prospectus Directive clearly indicates that the Directive is also aimed at ensuring market efficiency. From the viewpoint of issuers, this can be translated into a reduction of costs and other administrative burdens when raising capital across the EU. The passport regime has facilitated cross-border offers and listings delivering a real benefit to issuers: the Directive has generated a legal framework for cross-border transactions in European capital markets that goes well beyond the previous mutual recognition system established by its predecessor[91]. Data collected in the last three years on the number of passports sent and received show a steady increase in the number of pan-European offers, especially for debt issues[92]. In particular, the wide circulation of passports received across Member States seems to

89 CSES Study, page 51.

90 This issue is described and analysed more in detail in section 3.2.4 of this impact assessment.

91 Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public.

92 See Annex VIII.

indicate that the passporting system succeeded in opening capital markets to a wider range of European countries compared to the previous system[93].

The language regime, which allows a prospectus drafted in a "language customary in the sphere of international finance" to be used across Europe and requires a translation only for the summary, is also considered as an improvement that has considerably reduced costs for issuers interested in accessing a wider pool of capital. According to the CSES survey, translation costs are no longer a significant issue in the preparation of prospectuses, although there were initial problems in the introduction of the language regime[94].

There is evidence that the introduction of the prospectus regime has increased the preparation costs of prospectuses to a certain extent, although much depends on the original prospectus legislation applicable in the Member States before the entry into force of the Directive. Nevertheless, they tend to decrease over time as a result of specialisation and economies of scale. On the whole, the evidence gathered seems to indicate that cost considerations are a substantial issue only for a minority of market participants, mainly small and medium-sized issuers, which raise capital less frequently and for smaller amounts.

The costs associated with the elaboration of a prospectus are part of the direct costs of a capital issue. The CSES study found that there were no significant differences in regulatory requirements and compliance costs that would motivate issuers to choose one venue over another in Europe. Additional costs of preparing a prospectus vary from issue to issue depending on the work that has already been done.

Costs include both in-house costs incurred by the issuer as a result of time spent preparing the document and dealing with administrative questions, and the fees of auditors and accountants, legal and financial advisers, regulatory fees, translation fees, etc. all varying from issue to issue. The greatest expenses are accountancy and auditing fees: pro-forma financial statements, forward-looking statements and historical financial information, all to be approved by auditors, constitute the most significant cost.

The CSES study provided the following estimates of the total costs of prospectuses, by type of prospectus (Fig. 8).

Fig. 8. Total costs of prospectus by type of prospectus

	Average amount (€ thousand)		**Average amount (€ thousand)**
Equity Prospectus		**Base Prospectus (continuous issue)**	
Legal Costs	339	Legal Costs	73
Accounting Costs	409	Accounting Costs	17
Administrative Costs	62	Administrative Costs	10
Translation	16	Translation	8
Other costs	39	Other costs	32

93 See Annex VIII.

94 See CSES report, chapter 5.

Publication Costs(i.e. electronic publication)	47	Publication Costs(i.e. electronic publication)	4
Total	912	Total	145
Non-Equity Prospectus		**Supplemental Questionnaire**	
Legal Costs	33	Legal Costs	11
Accounting Costs	11	Accounting Costs	0
Administrative Costs	4	Administrative Costs	6
Translation	6	Translation	2
Other costs	3	Other costs	0
Publication Costs (i.e. electronic publication)	6	Publication Costs (i.e. electronic publication)	0
Total	63	Total	19

Source : CSES survey

In addition, it should be taken into account that the costs are different for an initial public offering and for a rights issue. A member of ESME provided us with an estimation of costs and tasks involved in the preparation of a prospectus for an initial public offering in Germany. This cost estimate can be considered a reasonable approximation of the average cost across all EEA member states. (Fig. 9)[95].

Fig. 9 Estimation of costs and tasks involved in the preparation of a prospectus for an IPO in Germany and other EEA member countries.

Party	**Task**	**Cost (in euro)**
External auditors	Due Diligence (financial and tax) by external auditors on behalf of the lead manager	75,000 to 125,000
Transaction counsel	Preparation of prospectus including relevant legal opinions (except for the prospectus the transaction counsel takes care of legal due diligence, legal and disclosure opinions which could not really separated from the prospectus work. The full cost for the transaction counsel could range from 350,000 to 450,000 euro). If the underwriters ask for their own counsels additional cost should be 150,000 to 200,000 euro (all inclusive, including prospectus)	200,000 to 300,000
"Publication"	Printing, distribution, publication	40,000 to 60,000
Lead Manager	Normally the preparation of a prospectus lasts for about three to four months with three to five prospectus meetings with the representatives of the lead manager, the transactions counsels and the issuer. In addition, the lead manager has to take into account for at least 80 hours per person of reading, analyzing and commenting the various versions of the prospectus drafts as well as the contacting of the authorities. Normally the prospectus team of the lead manager consists of two to three people with an average daily rate of 1,500 euro.	50,000 to 75,000
Issuer	The preparation of a prospectus comprises senior management, officers from the financial and the investor relation departments. It comprises internal sessions of preparing and coordinating the material for the transaction counsels, the prospectus sessions, the proof reading, commenting and amending of the various drafts. In most cases	100,000 to 150,000

95 Data provided by the member of ESME Dr. Wolfgang Gerhardt in his reply to a questionnaire sent by Commission services for the impact assessment of the Prospectus Directive.

	coordination and final proof reading is done by a senior level. The time request for this task could be at least the double of the time for the lead manager.	
Auditors of the issuer	Comfort letter for the financial statements to the banks. In most cases the auditors of the issuer are involved in the preparation and checking of prospectus material by the issuer.	25,000 to 50,000
Insurance	For the comfort letter. The insurance premium is calculated on the volume to be placed. The premium per 1 million euro varies from 5,000 to 7,000 euro. As the amount of coverage varies from issue to issue no figure is included in the table. An amount of 500,000 euro, however, has frequently been observed in the market.	
Sum	**Except for insurance of comfort letter**	**490,000 to 760,000**
Source: Dr. Wolfgang Gerhardt, member of ESME		

10.3. Costs of compliance, administrative costs and administrative burden

A precise figure for the *overall costs of compliance* at EU level with the Prospectus Directive is not available, as the figures above only refer to compliance cost elements (costs of publishing different types of prospectus; number of prospectuses approved). Data is not available however on the breakdown of prospectuses into different categories for which costs are different.

Currently there is no expert estimate to delineate *administrative costs* (business as usual costs) and administrative burden (those burdens that would not be incurred in the absence of legislation). It is reasonable assumption that a large part of the compliance costs are business as usual costs.

The impacts of the options examined in this impact assessment however belong to the sphere of reducing *administrative burden*, as it is expected that firms are not likely to maintain those practices for which currently existing legal obligations will be eliminated.

There is therefore wide-ranging consensus among market participants that any review of the Prospectus regime should focus on reducing the burdens of specific requirements that are particularly burdensome and which would only require marginal changes to the Directive[96].

10.4. Range of investment opportunities

Recital 41 of the Prospectus Directive expressly states that the disclosure regime under the Directive should respect "the need to provide investors with a wide range of competing investment opportunities", as well as "the importance of reducing the cost of, and increasing access to, capital". Statistical data gathered suggest that the passporting of prospectuses between Member States has increased since the Prospectus Directive came into force (see number of passports sent in Annex VIII). This is likely to have extended the choice of investments available as well.

[96] See the CSES study, page 50.

The graphic below (Fig. 10) shows that after the implementation of the Prospectus Directive (1 July 2005) the number of prospectuses approved increased until the second half of 2007, where the trend turned down, reflecting the market sentiment created after the burst of the subprime crisis.

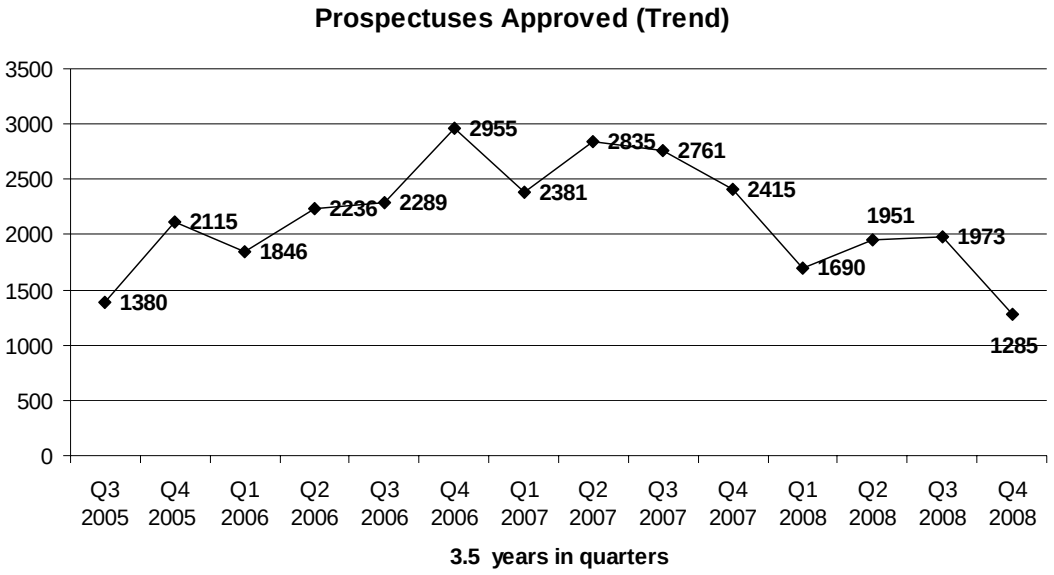

Fig.10. Prospectuses approved from 1 July 2005 to 31 December 2008. Source: CESR data.

ANNEX V – FIGURES

FIGURE 1 – NUMBER OF QUALIFIED INVESTORS REGISTERED PER MEMBER STATE

Member State	Number of qualified investors registered	Member State	Number of qualified investors registered	Member State	Number of qualified investors registered
Austria	0	Germany	204	Netherlands	23
Belgium	26	Greece	1	Norway	31
Bulgaria	44	Hungary	1	Poland	15
Cyprus	0	Iceland	139	Portugal	No register
Czech Rep.	0	Ireland	0	Romania	1
Denmark	0	Italy	No register	Slovenia	60
Estonia	0	Latvia	1	Spain	No register
Finland	2	Lithuania	0	Sweden	No register
France	526	Luxembourg	11	UK	245

Source: Questionnaires sent via CESR to competent authorities of the Member States

Figure 2 – Number of days for the exercise of the right of withdrawal after the supplement of a prospectus per Member State

Member State	Number of days for withdrawal	Member State	Number of days for withdrawal	Member State	Number of days for withdrawal
Austria	2	Iceland	2	Slovenia	2
Belgium	2	Ireland	2	Spain	2
Bulgaria	2	Italy	2	UK	2
Czech Rep.	2	Latvia	2	Cyprus	3
Denmark	2	Luxembourg	2	Greece	3
Estonia	2	Netherlands	2	Romania	3
Finland	2	Norway	2	Lithuania	5
France	2	Poland	2	Sweden	5
Germany	2	Portugal	2	Hungary	15

Source: Questionnaires sent via CESR to competent authorities of the Member States

Figure 3 – Number of prospectuses approved for purpose of ESS

	Figure 3			
Member State	**Non-EU listed**	**Non-RM in EU**	**EU non-listed**	**Other/ Not specified**
Belgium	24	0	7	NA
France	59	0	0	NA
Germany	11	1	0	NA
Netherlands	2	0	1	NA
Sweden	-	-	-	5
UK	-	-	-	approx. 4

Source: Questionnaire sent via CESR to competent authorities

Figure 4 – Number of rights issues in the EU

Year	Rights issues in EU
2006	309
2007	399
2008	320

Source: Thomson Reuters

Figure 5 – Market capitalization for companies listed in Cyprus, Finland, France, Germany, Greece, Italy and UK

Market capitalisation, m€	Number of companies	Total market cap. m€	Turnover m€
0 - 10	1,193	6,498	15,750
10 - 50	1,492	49,350	45,089
50 - 100	726	54,509	49,038
100 - 200	570	80,318	102,577
200 - 300	284	71,496	55,423
300 - 400	172	61,787	55,571
400 - 500	122	97,134	41,064
500 - 600	98	102,047	31,592
600 - 700	86	55,822	47,445
700 - 800	74	55,009	64,212
800 - 900	47	43,596	34,995
900 - 1,000	29	25,652	45,172
1,000 - 3,000	343	711,934	607,682
3,000 - 10,000	198	1,294,725	1,028,579
> 10,000	139	7,418,885	4,723,321
Not available	148	37,112	0
Total	5,721	10,165,872	6,947,510

Source: MiddleNext, Paris

Figure 6 – Comparison between the cost of an offer of €50 million and an offer of €500 million

	Offer of €50 million	**Offer of €500 million**
Minimum fixed costs of prospectus (lawyer, consultant, internal)	100,000 €	100,000 €

Minimum running expenses (publication, supplements, internal like permanent monitoring)	50,000 €	50,000 €
Additional costs for prospectus per year	150,000 €	150,000 €
Increase in the funding cost in relation to the capital raised	**0.3 %**	**0.03 %**

Source: European Association of Co-operative Banks

ANNEX VI – ESTIMATION OF REDUCTION IN ADMINISTRATIVE BURDEN

The preferred options presented in section 7 are likely to reduce considerably the administrative burden in some areas[97]. In most cases it is possible to provide a reasonable estimate of the reduction of the administrative burdens. However, in some cases no data are available to provide such an estimate and instead a qualitative description of the impact is provided. Although disclosing information towards investors is considered as necessary to raise capital, and firms would have to provide some information to their investors even in the absence of regulation (i.e. it is business as usual, an administrative cost), there are certain provisions in the Prospectus Directive that were identified as posing additional disclosure requirements that firms will almost certainly not maintain without the regulatory obligation (administrative burdens). Here only this latter aspect, administrative burden is discussed. Not all of the measures addressed above in this impact assessment relate to an administrative burden and those are consequently excluded from the following analysis.

The quantification of the administrative burden reduction in this Impact Assessment is done in line with the EU Standard Cost Model. For the purpose estimating the reduction of administrative burdens for the preferred policy options, as provided in section 8.3, different elements in the calculations are provided. The wage cost is the estimated direct average wage cost of performing the relevant tasks. In addition an overhead of 25% is added to the calculation of the reduction of the administrative burden. In cases where only the *total* cost of relevant tasks have been obtained the an identical proportionate distribution between the wage cost and the overhead has been assumed and used for the calculation presented in the table in section 8.3. The frequency refers the number of times per year the task is undertaken by the firms included in the calculation. The number of companies refers to the number of entities that are assumed to benefit from the reduction in the administrative burden in a given year.

Amend the Prospectus Directive to clarify that the intermediary could use the initial prospectus if it is still valid and updated (retail cascade)

The policy option to clarify that the intermediary could use the initial prospectus if it is still valid and updated will reduce the administrative burden in relation to retail cascades. The impact will depend on the amount of times a new prospectus will not be produced and on the saved associated costs. The way retail cascades work and the obligations of intermediaries participating in a retail cascade vary considerably among Member States. Five Member States have pointed out that retail cascades do not occur in their jurisdiction while it is common practice in other Member States. Consequently the reduction of the administrative burden will vary among Member States. The cost of producing a non-equity prospectus is estimated to an average of € 63,000 in the CSES study.

[97] As it was referred to above, there is no expert estimate available on what is the administrative burden part of compliance costs. The impacts of the options examined in this impact assessment however belong to the sphere of reducing *administrative burden*, as it is expected that firms are not likely to maintain those practices for which currently existing legal obligations will be eliminated.

Align definitions of qualified investors/professional clients and keep the register of qualified investors

The alignment of the definitions of qualified investors and professional clients is likely to reduce to some extent the administrative burdens. First, in some cases intermediaries will save the costs of access to the national registers. Second, a number of clients may decide not to use the register and instead rely on their classification as a professional client. Third, competent authorities may benefit from the reduction of the administrative burdens to maintain such registers. The reduction of the administrative burdens is likely to be larger in those countries where the registers are actively used.

Deletion of Article 10 of the Prospectus Directive, to avoid duplication of transparency requirement

The deletion of Article 10 of the Prospectus Directive would clearly reduce the administrative burden for issuers with securities admitted to trading on a regulated market. The number of companies with listed shares is estimated to at least 12,000 and a reasonable estimate of the average cost of complying with such obligation on an annual basis is €2,500[98]. This implies a possible annual reduction of administrative burden of €30 million.

Exemption of all kinds of Employee Shares Schemes launched in the EU from the obligation to publish a prospectus

An exemption of Employee Shares Schemes from the obligation to public a prospectus will clearly reduce the administrative burden for companies wishing to enter into such arrangements. The number of prospectuses from 2006 to 2008 that could have come under such an exemption was at least 111 (37 on average on a yearly basis). Using the lower range of the estimate for the cost of producing a prospectus (€ 490.000) the total reduction in administrative costs is estimated to be € 490.000 saved in 37 cases annually, i.e. € 18.13 million.

Reduction of disclosure requirements for rights offers

A reduction of the disclosure requirements in relation to rights offers is likely to provide a significant reduction of the administrative burden for companies issuing rights. The number of offers in the EU in the period 2006 to 2008 across Europe was 1028, averaging 343 per year. Based on an analysis of the elements that should not necessarily be disclosed in right issues, it is estimated that the reduction of the costs compared to producing a regular prospectus (that would otherwise cost € 490,000) would be approximately € 233,000[99]. The

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98 The cost estimate of € 2,500 to 5,000 was provided for Germany, but it is comparable for all EEA member countries. . The lower end of the range (€ 2,500) is used in the estimation in an attempt to take into account that the reduction in administrative costs will take place in high-cost as well as low-cost countries.

99 Figure 9 presents a breakdown of the cost of producing a prospectus. The estimation provided assumes that the costs related to external auditors are reduced by 100%, transaction counsel is reduced by 30%, publication is reduced by 20%, lead manager is reduced by 50%, issuer is reduced by 50% and auditors of issuer is reduced by 100%. These figure are broad estimates based on indications of elements to be excluded in 'A Report to the Chancellor of the Exchequer: by the Rights Issues Review Group', published November 2008, as well as on general considerations. The actual reduction of costs would depend on, among other things, the legal advice from the CESR in the event that this policy option was implemented.

calculation is based on an estimated reduction of the various costs elements provided in Figure 8[100]. Based on these figures the administrative costs saved should be € 233,000 in an average of 343 cases annually in the EU, i.e. in the magnitude of € 80 million.

Reduction of disclosure requirements for small quoted companies

Reducing disclosure requirements for small quoted companies is likely to provide a significant reduction of the administrative burden for small quoted companies wishing to raise capital. Based on an analysis of the elements that should not necessarily be disclosed, it is estimated that the reduction of the costs compared to producing a regular prospectus would lie in the range of 10 to 20 percent[101]. A conservative estimate of the reduction of administrative costs for small quoted companies would be € 49,000. Small quoted companies may be defined as companies with a market capitalisation of less than € 500 million. In addition, a company would, in order to get a reduction of the administrative burden, need to issue more than € 2.5 million a year. For the purpose of estimating the number of companies which would benefit from reduced disclosure requirement we may exclude companies with a market capitalisation below € 10 million, assuming that generally companies with a higher market capitalisation raise capital exceeding the € 2.5 million threshold. Figure 5 provides the number of companies with a market capitalisation between € 10 and 500 million as well as the total number of companies in a subset of Member States. Based on these assumption 58.8% of the companies may benefit from the reduced disclosure requirements. Although data set in Figure 5 only cover a limited number of Member States it is reasonable to assume that the distribution of market capitalisation is representative and 58.8% of all quoted companies will benefit from reduced disclosure requirements. As mentioned in section 3.2.4.2 the number of companies listed on a regulated market exceeds 12,000. In addition it is reasonable to assume that new capital is raised once every two years. In other words the reduction of the administrative burden is approximated € 49,000 saved bi-annually by 7056 companies, or approximately € 173 million.

Exclude information on guarantor in case of government guarantee schemes

Securities for which the government would provide a guarantee would typically be bonds. According to the CSES study the cost of producing a non-equity prospectus is significantly lower than for an equity prospectus. The CSES estimate the total cost of a non-equity prospectus to €63,000[102]. In the case of a guarantor of the security a significant amount of information needs to be provided. The cost of providing this information in the case of a government guarantor can be estimated by considering the various cost elements of a non-equity prospectus. The cost is estimated to approximately €29,000[103], which can consequently be saved by excluding information on the guarantor in case of a government guarantee. The

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100 See Annex IV.

101 The estimate is based on general considerations on the composition of a prospectus. However, there are considerable uncertainties in relation to this estimate and the advice from the CESR would be needed to provide more reliable figures.

102 The costs presented in the CSES study are distributed as follows: 33,000 for legal costs, 11,000 for accounting costs, 4,000 for administrative costs, 12,000 for translation and publication and 3,000 for other costs.

103 The estimate is based on a reduction in the cost of producing the prospectus by 30% for legal costs, 100% for accounting costs, 50% for administrative costs, 80% reduction for translation and publication and 50% reduction for other costs.

total number of prospectuses involving a government guarantor is estimated to 85[104] during the last 3 years (28 on average on a yearly basis). Based on these figures the annual reduction of the administrative burden is estimated to € 812,000.

[104] Information provided by Germany, Ireland, Italy, Luxembourg, Poland, Portugal and Spain indicates that a total of 49 prospectuses have been approved in those countries within the last 3 years. 17365 prospectuses were approved in these Members States during the last three years, compared to a total of 30112. Extrapolating the number of prospectuses involving a government guarantee provides us with the very rough estimate of 85.

ANNEX VII – POLICY OPTIONS

With the intention to meet the objectives set out in the previous section, the Commission services have analysed different policy options. The first section reflects the most relevant policy options that have been considered in relation to the increase of effectiveness in the prospectus regime. The second section contains the list of policy options that have been analysed in relation to the situations of unjustified burdensome requirements imposed to companies raising funding in securities markets and to the intermediaries involved.

1. POLICY OPTIONS FOR THE INCREASE OF LEGAL CLARITY AND EFFECTIVENESS IN THE PROSPECTUS REGIME.

10.5. Policy options in case of subsequent placements of securities through financial intermediaries (retail cascade).

(1) **Option 1 – No action at EU level.** This would leave scope for the industry and supervisors to apply the common interpretation adopted by the CESR members[105]. (For an overview of how the situation may evolve without EU level action, please see section 7.1.1 describing the "baseline scenario").

(2) **Option 2 – 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[106].** In this case the further resale of the securities is almost beyond the control of the issuer. The issuer therefore should not be responsible for publishing a prospectus in cases where the initial public offering is exempt, or remain responsible for updating the prospectus when the initial offers of the cascade have closed. This could be achieved by deleting the final sentence in Article 3(2) of the Prospectus Directive.

(3) **Option 3 – Amend Article 3(2) of the Prospectus Directive to clarify that whenever an intermediary offers securities to the public (i.e., makes a non-exempted offer) the intermediary should put at the disposal of the public a valid prospectus.** 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

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105 See question number 56 "Retail cascade offers" of the frequently asked questions regarding prospectuses at www.cesr.eu. (Document reference CESR/09-103).

106 This option was suggested by ESME. See ESME report on the Prospectus Directive, September 2007, p. 15.

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.

10.6. Policy option in relation to the divergent definitions for qualified investors and professional clients

(1) **Option 1 – No action at EU level.**

(9) **Option 2 – 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.** This alignment would reduce complexity and cost for investment firms in the event of a private placement: the firm will be able to define the persons to whom the placement is to be addressed relying on its own list of professional clients.

This policy option could be implemented by extending the definition of qualified investors in article 2.1(e)(i) and (ii) of the Prospectus Directive to include the definitions of professional clients and eligible counterparties as defined in Annex II of MiFID.

(10) **Option 3 – In addition to the alignment proposed in option 2, the system of central registers could be removed from the Prospectus Directive.** The system of central registers has met limited interest in the Member States because private investors are concerned by the dissemination of information regarding their wealth and experience. This policy could be implemented by deleting Article 2.1(e)(iv) and (v), Article 2.2 and Article 2.3 of the Directive.

10.7. 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)

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Harmonize the different periods of time for the exercise of the right of withdrawal.** This policy option could be implemented by setting a common period of time in all Member States for the exercise of the right of withdrawal under Article 16.

(11) **Option 3 – Harmonize the different periods of time with possibility for issuer to grant longer time.** This option would amend Article 16 of the Prospectus Directive by setting a common period of time in all Member States for the exercise of the right of withdrawal after the publication of the prospectus supplement and by allowing the issuer to grant a longer time limit for the exercise of such right of withdrawal.

(12) **Option 4 – Harmonize the different periods of time at the settlement of the securities.** This policy option would amend Article 16 of the Prospectus Directive by setting a common period of time in all Member States but subject to the settlement of the securities. The time limit for withdrawal of investors' acceptances after the publication of the prospectus supplement in all Member States will expire at the settlement of the securities. The aim of this additional limit is to limit the risks of the issuer when offering securities.

10.8. Policy options in relation to the lack of harmonised rules on liability

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – Harmonize the liability standards applicable to the prospectus.** One policy option is to harmonize the liability standards applicable to the prospectus in order to avoid liability arbitrage and provide issuers with legal certainty in cross-border offerings This policy option could be implemented by defining common liability standards in Article 6 of the Prospectus Directive.

10.9. Policy options in relation to the summary of the prospectus

(1) **Option 1 – No action at EU level.** This policy option would imply that the current limitation of 2,500 words and Annex I and IV of the Prospectus would be maintained.

(2) **Option 2 – Provide retail investors with appropriate information in an easily analyzable and comprehensible form in order to make investment decisions in full knowledge of facts.** This policy option could be implemented by deleting the limitation of 2,500 words in recital 21 of the Prospectus Directive and all indicative items for the summary in Annexes I and IV of the Directive, and by developing new standards in the Prospectus Regulation on the basis of the Key Investor Information approach under the UCITS IV Directive. This policy option should follow the approach adopted by the European Commission in its Communication on Packaged Retail Investment Products. A logical consequence of having a more substantial summary document would be 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.

11. SITUATIONS OF DISPROPORTIONATE OR BURDENSOME REQUIREMENTS IMPOSED TO COMPANIES RAISING CAPITAL IN SECURITIES MARKETS AND TO THE INTERMEDIARIES INVOLVED.

11.1. Policy options for bringing forward a level playing field for Employee Shares Schemes

(1) **Option 1 – No action at EU level.**

(2) **Option 2 – 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).** Taking into account that the securities of these companies are negotiated in a trading venue, there is already information on these companies available in the public

domain[107]. The cost of producing a prospectus for this type of offers is not justified. This policy option could be implemented by deleting in Article 4.1(e) of the Prospectus Directive the word "regulated".

(3) **Option 3 – Amend the Directive and extend the exemption in Article 4.1.(e) including not only the employee share schemes of companies that are listed in a non-regulated market ("exchange-regulated" market or third country securities markets) as proposed in option 2, but also encompass companies that are not listed**. Even if the securities of the issuer are not negotiated in a trading venue, the employees should not be treated as common investors in terms of their information needs; they already work for the company and therefore are more familiar with its assets, liabilities, financial position, profit, losses and prospects (Article 5 of the Prospectus Directive) than the outside investor[108]. This policy option could be implemented by deleting the sentence "which has securities already admitted to trading on a regulated market" from Article 4.1(e) of the Prospectus Directive.

11.2. Policy options in relation to the overlapping of transparency obligations (Article 10 of the Prospectus Directive)

(1) **Option 1 – No action at EU level.** Maintain the disclosure requirement under Article 10 of the Prospectus Directive which provides annually and at glance investors with a historical overview on all available information published according to various laws.

(2) **Option 2 – Eliminate the obligation established in Article 10 of the Directive.** This policy option implies the abolition of the requirement for issuers whose securities are admitted to trading on a regulated market to provide and file with the competent authorities a document containing or referring to all information they have published or made public in the previous twelve months according to their obligations with regard to companies and securities legislation at European community or national levels and third country levels. This policy option could be implemented by deleting Article 10 of the Prospectus Directive[109].

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107 The high standards of transparency laid down in the Transparency and Market Abuse Directives are not compulsory for issuers traded in non-regulated markets. However, issuers asking for the admission to trading in an "exchange regulated" market have to comply with the internal rules on disclosure requirements set up by the market operator aiming at achieving the flow of sufficient and adequate information for the functioning of the market.

108 This policy option is inspired by the suggestions included in the report from ESME. See pages 17 and 18 and the Annex of the report

109 As a consequence of the proposed amendment, Article 11 of the Prospectus Directive needs also to be amended, inasmuch as it makes reference to Article 10, and the reference to Article 10(1) in Article 9(4) needs to be replaced by Article 16(1).

11.3. Policy options in relation to the restriction for the choice of home Member State for the issuers of debt

(1) **Option 1 – No action at EU level.** Maintain the €1000 threshold below which issuers of non-equity securities cannot choose their home Members State and the competent authority that is to approve their prospectus.

(13) **Option 2 – Provide for the choice of the home Member State for issues of non-equity securities below the €1000 threshold.** This policy option could be implemented by deleting the €1000 threshold and amending Article 2(1)(m)(ii) of the Prospectus Directive.

11.4. Policy options for facilitating the raise of capital through the issuance of rights

(1) **Option 1 – No action at EU level.** Within the current framework of the Prospectus Directive competent authorities have the possibility to limit the disclosure requirements in a prospectus for rights issues: in accordance with Article 8.2 of the Prospectus Directive, the competent authorities are entitled to authorise the omission of information from the prospectus when it is of minor importance. Second, in accordance with Article 23.4 of the Prospectus Regulation, the information that is not pertinent to the offer to which the prospectus relates could be omitted. Taking into account that the offer of rights is addressed to existing shareholders, there is no need for the prospectus to contain all the information that is required in case of an initial public offering. The issuer planning a rights issue could decide with its competent authority which of the information items required by the Prospectus Regulation can be omitted from the prospectus. A coordinated approach among supervisors could be enhanced by CESR guidelines.

(2) **Option 2 – Share offerings to existing shareholders by the way of a rights issue could be exempted from the prospectus requirement**. This type of offers could be covered by including a new exemption in Article 4. The document currently required for shares offered free of charge in Articles 4.1(d) and 4.2(e) of the Prospectus Directive should also be adequate in such cases.[110]

(3) **Option 3 – The prospectus disclosure requirements for right issues could be reduced:** existing shareholders already have access to a range of financial and other information about the issuer from the periodic and episodic statements and disclosures made in accordance with the Transparency and Market Abuse Directives[111]. If the prospectus disclosure obligation is reduced the processes for the preparation and approval of the prospectus would speed up and the issuer will have to face less costs.

This policy option could be achieved by introducing in the Prospectus Directive the principle of a reduced disclosure regime for prospectus for rights issues and the possibility for the European Commission to put in place

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110 This policy option is inspired by the suggestions included in ESME report. See pages 16 and 17.

111 Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse) OJ L 96, 12.4.2003, p. 16–25.

a special "proportionate" regime for rights issues through implementing legislation. The implementing Regulation could be amended subsequently in order to establish a "proportionate" disclosure regime and define the information items to be included in the prospectus for a rights issue.[112]

11.5. Policy options for providing proportionate disclosure requirements for small quoted companies

(1) **Option 1 – No action at EU level.** The amount of information of the prospectus could be reduced by virtue of Articles 8.2 of the Prospectus Directive and 23.4 of the Prospectus Regulation. The disclosure requirements that have to be included in a prospectus for small quoted companies could be reduced (i) if the competent authorities authorise the omission of information from the prospectus when it is of minor importance (Article 8.2 Prospectus Directive) and (ii) by omitting the information that is not pertinent to the offer to which the prospectus relates (Article 23.4 of the Prospectus Regulation). In this case there is no need to change the Directive or the Regulation. It will be less costly for small quoted companies to produce a reduced prospectus.

(2) **Option 2 – Small quoted companies could be exempted from the obligation to publish a prospectus by raising the threshold in Article 1(2)(h) of the Prospectus Directive.** Increasing the threshold for the exempted offers could facilitate fundraising for these companies. This could be achieved by raising the €2.5 million threshold in Article 1.2(h) of the Prospectus Directive.

(3) **Option 3 – The principle of a "proportionate" prospectus for small quoted companies could be introduced.** This policy option could be achieved by introducing in the Prospectus Directive the principle of a reduced disclosure regime for prospectus for small quoted companies and the possibility for the European Commission to put in place a special "proportionate" regime for small quoted companies through implementing legislation. The implementing Regulation could be amended subsequently in order to establish a "proportionate" disclosure regime and define the information items to be included in the prospectus for small quoted companies.

11.6. Policy options for providing proportionate disclosure requirements for small credit institutions

(1) **Option 1 – No action at EU level.** Like in the previous two cases, the amount of information of the prospectus for offers above the limit of €50 million could be reduced by the competent authorities by virtue of Articles 8.2 of the Prospectus Directive and 23.4 of the Prospectus Regulation.

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[112] This policy option is inspired by the suggestion included in the Report to the Chancellor of Exchequer by the Rights Issue Review Group, published in the UK by the FSA and HM Treasury in November 2008. The Annex E of the document contains a very detailed analysis of the information items that could be omitted in a rights issue prospectus.

(2) **Option 2 – Small credit institutions could be exempted from the obligation to publish a prospectus by raising the threshold in Article 1(2)(j) of the Prospectus Directive..** Increasing the threshold for the exempted offers could facilitate fundraising for these companies. This could be achieved by raising the €50 million threshold in Article 1.2(j) of the Prospectus Directive.

(3) **Option 3 – The principle of a "proportionate" prospectus for small quoted companies could be introduced.** This policy option could be achieved by introducing in the Prospectus Directive the principle of a reduced disclosure regime for prospectus for small credit institutions and the possibility for the European Commission to put in place a special "proportionate" regime for small credit institutions through implementing legislation. The implementing Regulation could be amended subsequently in order to establish a "proportionate" disclosure regime and define the information items to be included in the prospectus for small credit institutions.

11.7. Policy options in relation to the prospectus disclosures in case of government guarantee schemes should be rationalised

(1) **Option 1 – No action at EU level.** The amount of information of the prospectus related to securities guaranteed by a Member State could be reduced by virtue of Articles 8.2 of the Prospectus Directive and 23.4 of the Prospectus Regulation: as described in the first policy option of the points related to the rights issues, the small quoted companies and small credit institutions, the information about the State guarantor required in Annex XVI of the Prospectus Regulation could be reduced if it is considered not pertinent or of minor importance.[113]

(2) **Option 2 – Issuers of securities guaranteed by the government of a Member State could be exempted from the obligation to provide information about the guarantor in the prospectus.** This option could be implemented by including at the end of Article 1.3 of the Prospectus Directive a specific derogation for Member States and possibly for regional and local authorities.

(3) **Option 3 – The same policy option could be extended to cover the information not only about the guarantor, but also about the guarantee.** In this case, this option could be implemented by (i) including at the end of Article 1.3 of the Prospectus Directive a specific derogation.

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[113] This policy option is inspired in the common interpretation provided by CESR in the question number 70 of the frequently asked questions regarding prospectuses: "Disclosure requirements for securities which are unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities" (See CESR Q&A on Prospectus in www.cesr.eu)

11.8. Policy options in relation to the printed form (paper copy) of the prospectus

(1) **Option 1 – No action at EU level.** Maintain the obligation of delivering a paper copy of the prospectus free of charge if the prospectus is published in electronic form and in case is requested by the investor.

(2) **Option 2 – Abolish the obligation to deliver a paper copy of the prospectus.** This option could be implemented by deleting paragraph 7 of Article 14 of the Prospectus Directive.

11.9. Policy options in relation to the translation of the summary of the prospectus

(1) **Option 1 – No action at EU level.** Maintain the obligation of providing a translation of the summary of the prospectus together with the notification of the approval of the prospectus.

(2) **Option 2 – Abolish the obligation to translate the summary of the prospectus.** This option could be implemented by deleting the second sentence in Article 18.1 of the Prospectus Directive.

ANNEX VIII – NUMBER OF PROSPECTUSES APPROVED AND PASSPORTS SENT – *SOURCE: CESR DATA*

Prospectuses Approved	Q3 2005	Q4 2005	Q1 2006	Q2 2006	Q3 2006	Q4 2006	Q1 2007	Q2 2007	Q3 2007	Q4 2007	Q1 2008	Q2 2008	Total first year	Total second year	Total third year
AUSTRIA	8	25	12	26	19	23	17	18	21	14	5	16	71	77	56
BELGIUM	43	37	29	46	18	35	44	39	31	31	12	16	155	136	90
BULGARIA	0	0	0	0	0	0	17	16	19	27	35	20	0	33	101
CYPRUS	1	4	2	4	4	2	5	1	5	2	4	6	11	12	17
CZECH REPUBLIC	16	25	6	7	4	6	5	5	6	8	3	0	54	20	17
DENMARK	3	12	11	17	8	24	24	24	20	20	15	17	43	80	72
ESTONIA	1	2	0	3	3	1	1	5	4	0	0	2	6	10	6
FINLAND	6	14	12	22	4	9	11	20	7	16	4	16	54	44	43
FRANCE	42	93	70	91	60	99	67	74	46	81	30	38	296	300	195
GERMANY	142	159	141	238	231	175	160	194	205	141	116	151	680	760	613
GREECE	2	8	3	7	2	3	7	9	10	13	6	2	20	21	31
HUNGARY	3	12	7	16	15	21	21	24	18	14	17	20	38	81	69
ICELAND	11	39	8	35	6	17	9	29	10	51	19	39	93	61	119
IRELAND	265	523	469	536	718	739	640	821	842	494	344	381	1793	2918	2061
ITALY	21	22	10	35	265	483	186	220	437	318	168	132	88	1154	1055
LATVIA	3	0	5	2	4	6	5	5	2	1	2	2	10	20	7
LITHUANIA	0	0	0	0	12	3	10	8	1	2	4	6	0	33	13
LUXEMBOURG	134	359	332	409	368	433	465	479	450	429	448	421	1234	1745	1748
MALTA	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	0	2	0	0	2
NETHERLANDS	77	68	64	76	66	70	50	55	66	52	16	31	285	241	165
NORWAY	51	60	68	42	44	62	76	94	50	69	47	61	221	276	207
POLAND	4	4	13	16	17	38	34	32	41	23	44	19	37	121	127
PORTUGAL	12	12	16	10	2	16	7	6	4	8	0	17	50	31	29
ROMANIA	0	0	0	0	1	7	1	4	1	7	6	3	0	13	17
SLOVAKIA	5	13	10	5	2	7	5	7	7	14	6	15	33	21	42
SLOVENIA	4	9	6	4	5	5	7	2	7	11	6	7	23	19	31
SPAIN	35	94	74	89	88	131	120	120	82	107	55	68	292	459	312
SWEDEN	68	99	55	78	47	81	63	67	37	60	37	61	300	258	195
UK	423	422	423	422	276	459	324	457	332	402	241	328	1690	1516	1357
TOTAL	1380	2115	1846	2236	2289	2955	2381	2835	2761	2415	1690	1951	7577	10460	8817

Passports Sent	Q3 2005	Q4 2005	Q1 2006	Q2 2006	Q3 2006	Q4 2006	Q1 2007	Q2 2007	Q3 2007	Q4 2007	Q1 2008	Q2 2008	Total first year	Total second year	Total third year
AUSTRIA	5	11	13	23	27	14	24	23	29	8	4	22	52	88	63
BELGIUM	6	7	3	7	3	6	4	4	2	7	1	4	23	17	14
BULGARIA	~	~	~	~	~	~	0	0	0	0	1	0	~	0	1
CYPRUS	0	1	1	1	1	1	0	0	0	0	0	2	3	2	2
CZECH REPUBLIC	0	0	0	0	0	1	0	0	0	0	0	0	0	1	0
DENMARK	0	1	0	1	1	0	1	0	0	2	2	0	2	2	4
ESTONIA	1	0	0	1	0	0	0	1	2	0	0	0	2	1	2
FINLAND	0	1	1	0	~	~	1	1	1	1	0	0	2	2	2
FRANCE	1	15	12	8	5	9	7	11	8	14	8	13	36	32	43
GERMANY	46	60	107	118	109	103	86	113	197	150	70	87	331	411	504
GREECE	0	0	0	1	0	0	0	0	0	0	0	0	1	0	0
HUNGARY	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ICELAND	0	0	0	2	1	1	0	3	0	1	0	2	2	5	3
IRELAND	20	14	19	23	55	67	76	75	63	65	57	37	76	273	222
ITALY	1	0	0	1	0	0	1	0	0	0	0	0	2	1	0
LATVIA	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LITHUANIA	~	~	~	~	0	0	1	1	0	1	0	0	~	2	1
LUXEMBOURG	45	78	92	103	86	86	121	152	108	132	137	138	318	445	515
MALTA	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	0	0	0	0	0
NETHERLANDS	N/A	N/A	N/A	N/A	29	25	20	21	56	32	6	15	N/A	95	109
NORWAY	0	0	1	1	0	0	0	5	4	6	5	5	2	5	20
POLAND	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PORTUGAL	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
ROMANIA	~	~	~	~	0	0	0	0	0	0	0	0	~	0	0
SLOVAKIA	0	0	0	1	0	0	0	0	0	0	0	2	1	0	2
SLOVENIA	0	0	0	0	0	0	0	0	0	0	1	4	0	0	5
SPAIN	0	0	1	2	0	0	0	1	1	2	1	1	3	1	5
SWEDEN	0	3	1	5	3	2	4	9	4	10	8	4	9	18	26
UK	45	71	76	93	111	134	159	175	116	131	164	170	285	579	581
TOTAL	170	262	327	391	431	449	505	595	591	562	465	507	1150	1980	2125

ANNEX IX – ADDITIONAL MINOR CHANGES

In addition, the European Commission will include some minor technical suggestions that were suggested by stakeholders during the consultation for the review of the Prospectus Directive and for which no major impacts are expected:

– Article 1.2 (h) and (j) and Article 3.1 (e) – Threshold of maximum offering amounts: the Prospectus Directive is not clear as to whether the maximum offering amounts set out in Article 1.2 (h) and (j) and Article 3.1 (e) should be computed on a EEA-wide basis or on a country-by-country basis. This legislative ambiguity has lead to varying interpretations of the relevant thresholds in the different Member States that restrict availability of the exemptions. As clarified in the common positions agreed by the CESR[114], these thresholds should be calculated on an EEA-wide basis, thus Article 1.2 (h) and (j) and Article 3.1 (e) would be amended accordingly.

– Article 9.1, 9.2 and 9.3 – Validity of the prospectus, base prospectus and registration document: a number of stakeholders considered that the validity period of 12 months of the prospectus, base prospectus and registration document in Article 9.1, 9.2 and 9.3 should be extended to 24 months, as the regular approval process imposes some administrative burden for issuers. Provided they are supplemented in accordance with Article 16, this amendment will not impair investor protection, but enhance administrative burden reduction for issuers.

– Article 9 (4) – Supplement to the registration document: a number of stakeholders considered that the registration document, which contains information on the issuer, should be supplemented in accordance with Article 16 and no longer updated in accordance with Article 10.1 or by the securities note, which instead contains information on the securities. Article 9.4 should be amended inasmuch it makes reference to Article 10 (to be deleted). Accordingly the first sentence of Article 12.2 should also be deleted.

– Article 16 – Supplements to the prospectus: respondents to the consultation claim that the current wording of Article 16.1 of the Prospectus Directive is not sufficiently clear as to when the requirements to publish a supplement to the prospectus ends in cases where the securities are to be admitted to trading on a regulated market. In particular, it is unclear how the two alternatives "start of trading of the securities on a regulated market" and "final closing of the offer to the public" relate to each other and 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 closed. In order to avoid any uncertainty, Article 16.1 should be amended as follows: "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 earlier of the final closing of the offer to the public or, as the case may be, the time when trading on a regulated market begins, shall be mentioned in a supplement to the prospectus."

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[114] See question number 26 "Way of calculation of limit of 2.500.000 EUR set in Article 1.2.h) Directive" of the frequently asked questions regarding prospectuses at www.cesr.eu. (Document reference CESR/09-103).

– Article 18 – Notification of the approval of the prospectus to the issuer: in accordance with Article 18 of the Prospectus Directive the competent authority of the home Member State shall provide to the host competent authorities the certificate of approval attesting that the prospectus has been drawn up in accordance with the Prospectus Directive. In practice, uncertainty has arisen as to whether and when a notification has actually been effected. To avoid confusion, the notification procedure of Article 18 of the Prospectus Directive should be amended so that the competent authority of the home Member State provides the certificate to the issuer in addition to the host competent authorities. This will reduce costs and risks for the issuers who will have certainty that they have 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.