

**European Securities Markets Expert Group
(ESME)**

**Report on Directive 2003/71/EC
of the European Parliament and of the Council
on the prospectus to be published when securities
are offered to the public or admitted to trading
- Report -**

Brussels, 5 September 2007

1. Introduction

- *The Prospectus Directive is a cornerstone of European securities markets regulation.*
- *With this Report ESME intends to support the Commission's assessment of the extent to which the Prospectus Directive achieves the objectives of investor protection and market efficiency.*
- *Based on legal and economic experience the Report analyzes major conceptual principles, the practical application of selected provisions and certain issues in connection with the implementation of the Directive.*

Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading (the “Prospectus Directive”) and Regulation (EC) No. 809/2004 (the “Regulation”) have become a cornerstone of European securities markets – only two years after implementation of the Directive by the Member States of the European Union.

The European Securities Markets Expert Group (ESME) wishes to assist the European Commission in the assessment of the application of the Prospectus Directive and accompanying proposals for the review that it is required to complete before the end of 2008 in accordance with Article 31 of the Directive.

Therefore, the objective of this report is to reflect market experience of the Prospectus Directive and the Regulation, focusing in particular on the extent to which the high level objectives set out in recital (10) of the Directive have been achieved:

“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.”

These basic principles, which are fully endorsed by ESME, suggest a number of questions, which form the nucleus of this report:

- Does the Prospectus Directive, adopted in 2003, continue to reflect securities markets practices of 2007 and the foreseeable future?
- Does the Prospectus Directive protect investors and promote their access to capital markets to enable them to use securities for building up assets? Is the prospectus easily readable, read and understood by any retail investor?
- Does the Prospectus Directive support market efficiency and promote the raising of capital by issuers to allow for a growing European economy and an efficient allocation of capital?
- Is the Prospectus Directive consistent with the other EC financial markets directives and related national legislation of the Member States?

- Does the Prospectus Directive enable a harmonized implementation by the competent national authorities?

The report approaches such questions from different perspectives. The text refers to the major issues, divided into:

- Macro items which relate to some conceptual principles that are central to the Prospectus Directive;
- Micro items which relate to various significant requirements under selected articles;
- Transposition issues which discuss some important aspects of national implementation.

An appendix to the report contains detailed comments and suggestions in relation to specified articles of the Prospectus Directive.

2. Macro Issues

2.1. *The Prospectus Directive at a Glance – Passports, procedures and protection*

The passport regime has made it significantly easier to offer and list securities not only in one country, but in several countries at the same time. However, other effects may also be attributed to the Directive:

- *due to disclosure requirements, cost and subsequent obligations, issuing structures have been developed to avoid the provisions of the Prospectus Directive;*
- *due to its length and complexity, most investors do not use the prospectus as a means of information prior to investment decisions.*

The Prospectus Directive and the Regulation have made it easier to publicly offer and list securities not only in one country, but in several countries at the same time. It must be acknowledged that, unlike the previous “mutual recognition system”, the new passporting mechanism has delivered a real benefit to issuers that intend to publicly offer and/or seek admission to trading in another Member State. Preliminary data provided by the competent authorities show that more than 2,800 passports have been received by host member state competent authorities from home competent authorities over the first twelve months following 1 July, 2005.

However, in addition to their facilitation of cross border transactions, the Prospectus Directive and the Regulation have already had a significant impact on the offering of securities to the public. That impact might require further assessment.

On the one hand, the procedures and cost of preparing a prospectus might have provoked issuers to avoid the obligation to produce a prospectus, either by listing their shares only on markets that are not classified as regulated markets for the purposes of Community law (sometimes referred to as 'exchange-regulated') without a public offering; or by restricting their offering to qualified investors or otherwise ensuring that the offer falls within an exemption under the Directive. This latter effect has already be seen, in particular, in the bond markets with many blue chip corporations and non EU governments only issuing debt with a minimum denomination of 50,000 euro. This tendency has restricted the range of products that are offered to the retail investor, discriminates against him compared to qualified investors as regards his access to modern portfolio strategies and restricts market efficiency, ultimately affecting the potential of a single European capital market.

On the other hand, from the point of view of the investors, the Prospectus Directive has failed to produce an effective means of communication. For example, the average length of prospectuses has increased dramatically due to the requirement for additional information. The length and complexity of prospectuses make them more a sort of 'liability

shield' for the persons involved in the preparation (issuers, intermediaries, auditors, law firms and competent authorities), effective *ex post* in minimizing the risk of potential litigation, rather than a document to be used *ex ante* by an investor when making investment decisions.

2.2. *Extent of harmonization - Lack of a harmonised implementation and interpretation in the Member States*

- *In practice, the intended maximum harmonization has not been achieved.*
- *Competent authorities tend to maintain or to adopt diverging domestic rules and practices, while unclear provisions aggravate this tendency.*
- *Level 3 action by CESR can assist, but in some instances an effective maximum harmonization can only be achieved by amending the Prospectus Directive.*

One aim of the Lamfalussy procedure – which governs the Prospectus Directive and the Regulation – is to create a higher level of harmonisation among Member States in the field of securities regulation and supervision. However, despite the increased level of pan-European legislative convergence (Lamfalussy Level 1 and Level 2), many differences still persist in the way the new regulatory regime provided for by the Prospectus Directive and Regulation has been implemented and interpreted across the European Community.

Up until now, the Prospectus Directive and Regulation have not achieved full harmonisation of the disclosure regime and access to capital requirements across the Member States. They remain fragmented in a number of ways which inhibit the development of an effective single market for securities.

There are a number of reasons for this situation. In many cases, there is evidence of the existence of a sort of 'path-dependence' mechanism, according to which national competent authorities tend to maintain their own habits. On the one hand, they adopt or retain domestic rules and practices which are inconsistent with or additional to the principles of the Prospectus Directive and Regulation; on the other hand, they adopt diverging interpretation of unclear provisions of the Prospectus Directive and Regulation.

In other cases lack of harmonization in the proper functioning of the Prospectus Directive and Regulation is not an effect of the kind of 'path dependence' by regulators mentioned above. Rather, it might be a response to stakeholders' needs, a sort of market-driven regulatory result.

The CESR report on the supervisory functioning of the Prospectus Directive and Regulation (CESR 07-225, June 2007; the "CESR's Report") underlines those aspects, stating that the main concerns of market respondents focus on the diverging practices of competent authorities.

The following list gives an overview of such lack of harmonization due to:

(a) divergent interpretation of existing law:

Article 2 (1)(a)	transferable securities
Article 2 (1)(d)	public offering
Article 3 (2)	retail cascade
Article 5 (4)	final terms
Article 9	validity of a prospectus
Article 10 (2)	annual information
Article 13	approval time lines
Article 15	control of marketing
Article 16	supplements
Article 18	notification
Article 23	contents of notification document

(b) divergent implementation into national law:

Article 2 (1) (h)	offers of less than 2,500,000 Euro
Article 6	member state liability standards (allowed by PD)
Article 14	prospectus notices
Article 16	time frames for withdrawal (allowed by PD)
Article 21	fees raised by authorities (allowed by PD)

In all cases, the effect is to increase the complexity, risk and cost of cross-border offers and admissions to trading which is detrimental to issuers and investors and frustrates the objectives of the passporting regime established by the Prospectus Directive and Regulation. More generally, this situation is contrary to the fundamental principles of the single market under the EC Treaty.

In addition to the remedies suggested in this paper for (re)establishing the efficiency of the passport for prospectuses introduced by the Prospectus Directive, it is also important to ensure the harmonization of practices of the national competent authorities by strongly reaffirming the fact that the Prospectus Directive and Regulation are “maximum harmonization” measures to an extent that excludes additional or varying national requirements. To achieve this effect, legislative action at national or at EU level could be necessary. A step in this direction has recently been achieved by CESR, since it is expressly stated in CESR’s Report that the Prospectus Directive is a maximum harmonization directive (see page 5 of that Report).

National competent authorities should also be encouraged to align their practices strictly with the Directive and Regulation. However, ESME is convinced that the lack of harmonization has also been a result of the high number of unclear provisions in the Prospectus Directive, allowing for divergent interpretation by competent authorities. The fact that a thorough impact assessment had not been carried out before the adoption of the Prospectus Directive has almost certainly contributed to this problem since lack of conceptual clarity and unclear drafting might have been identified and eliminated at that stage. It cannot be expected that level 3 action, even if coordinated by CESR, could address all the instances of divergent interpretation or application mentioned in this report: the intended level of maximum harmonization could only be achieved by an amendment of

the Prospectus Directive. It is the view of ESME that full harmonization is needed to best achieve the Directive's objectives of investor protection and market efficiency.

If this objective cannot be achieved, regulatory competition should be allowed by changing the definition of 'home Member State' in the Directive to disconnect an issuer's home competent authority from the issuer's seat of incorporation. We believe that this connection is a major flaw in the EU legislation on prospectuses and deserves closer and further examination.

2.3. *Public offering, admission to trading and official listing – Very small differentiation among types and strategies of issuers*

- *The concept of one single prospectus for all types of issuers as well as for public offering and listing is a good idea in theory but may not work in practice.*
- *Greater differentiation between different types of issuers should be considered, reflecting the fact that different kinds of investors are satisfied with different levels of disclosure.*
- *In addition, a more distinct delineation between the concepts of public offering and admission to trading appears to be necessary, including a clearer definition of “public offering”.*

The Prospectus Directive is based on a concept which is convincing in theory - one prospectus that applies for almost every type of issuer and issue (e.g. shares, structured bonds) as well as for both public offers and admission to trading and official listing (on a regulated market). Well known frequent issuers, such as blue chip corporations, are treated in the same highly regulated manner as issuers which enter the market for the first time and whose creditworthiness is difficult to evaluate. The Regulation only provides for a lighter-touch regime for financial institutions, on the grounds that they are subject to regulatory supervision.

Any review of the Prospectus Directive should consider whether a broader differentiation between the various types of issuers or types of issue would be appropriate, for example based on the number of issues and their volume, to make it easier for frequent issuers or financial institutions to issue new securities.

Under certain circumstances, investors are satisfied with different levels of disclosure. Why, for example, have AIM (London), AlterNext (Paris), the Entry Standard (Frankfurt) and the EuroMTF (Luxembourg) become attractive to certain kinds of companies (and investors)? Some issuers prefer these 'exchange-regulated markets' to regulated markets (as defined in the ISD, and from November 2007, in MIFID) that trigger the application of requirements of Community law such as the Prospectus regime and ongoing obligations under the Transparency Directive. For example, from the beginning of 2009 exchange-regulated markets will facilitate issuances by third country issuers that might otherwise experience difficulties in complying with the requirement to use IFRS for their financial disclosures under the Transparency Directive, in cases where their national accounting standards are not considered as "equivalent" to IFRS. Similarly, once the

current transitional exemption expires, such markets may be attractive to third country issuers that become subject to a requirement to restate their historical financial information for the purposes of a prospectus if it is not drawn up in accordance with IFRS or third country standards that are 'equivalent' to IFRS. Overall, exchange-regulated markets have been able to create a regulatory regime which better meets the needs of particular issuers, such as smaller companies. These developments have provided helpful flexibility to the market, where the directives might have been too rigid.

It is almost impossible to estimate how many companies that are currently listed on an exchange-regulated market would have applied for a listing on a regulated market if the option of an exchange-regulated market had not been available, and how many would have decided not to apply for listing for reasons of cost. The strong increase in the European IPO activities over the last few years due to the bullish equity markets has made it impossible to identify clearly the number of such companies. However, the existence of exchange-regulated markets has provided companies with an alternative route to admission to trading, and it is likely that some companies that have used such a route would not otherwise have listed their securities, or would have done so on a regulated market only at a later stage.

In addition, the idea behind one single prospectus for offering and listing - that a public offering always leads to stock exchange trading - is not valid. Some issuers make a public offering only, while others may privately place the new securities and apply for an admission to listing only because the institutional investors, with which the securities are placed, may be subject to the obligation to invest in traded securities only. Therefore, even the assumption that admission to official listing means effective trading in the securities afterwards does not hold.

Furthermore there is significant uncertainty in identifying the precise moment when a public offering starts or even when it ends. In some cases, even companies being listed on an exchange-regulated and prospectus-exempt market decide to produce a prospectus. By doing so, they are seeking to eliminate legal risks in the event a competent authority or – even worse - a court might consider some action by the company to constitute a public offer within the scope of the Prospectus Directive. This is particularly the case where retail investors trade in securities on an exchange-regulated market. These issues are not dealt with adequately in the Prospectus Directive, but should be considered when any amendment of the Directive is discussed. The Prospectus Directive should be amended to clarify the meaning of a public offer, in order to create legal certainty.

2.4. Scope and exemptions – Launch strategies and types of securities not reflected in the Directive

- *The Prospectus Directive is based on a very traditional model of how securities are placed and traded.*
- *It should reflect the flexible and innovative offering structures which have been developed by the market and represent an established balance of opportunities and risks between issuers and investors.*

The Prospectus Directive is based on a very traditional model of how securities are placed and traded. The directive best fits the model of an issuer that decides to launch an offer of shares at a determined time in the following months, prepares a prospectus, starts a subscription period with a fixed price, sells all the shares and lists them afterwards on a regulated market. However, this model is no longer representative: the world of new issuing activities has changed dramatically.

Even the IPO market has become a flexible business with issuers deciding within days to tap the market without fixed prices or volumes, with the ability to interrupt the subscription if market sentiment changes. In the case of debt securities, such practice is standard – there may be a span of no more than a few hours between the first discussion of an idea and the launch of the bond or a reference pricing when approaching investors, in order to be open to any market movement. In contrast to such market practice, most derivative securities are issued with fixed terms and conditions and an initial selling price without any concrete demand for the product having been identified. They are intended to provide portfolio ideas to investors and the placement is effectively done via the secondary market trading.

The most important point is this: such market practice has not been imposed by the issuers but has been developed for many years as a balancing of interests – in terms of opportunities and risks - between issuers and investors. The Prospectus Directive should reflect this level playing field.

As a consequence the range of exemptions in the Directive should be revised, especially with respect to share offerings so as to reflect the importance of smooth equity refinancing opportunities for the growth of the economy and the political strategy of support for small and medium sized companies, as well as the equity participation of employees in their company.

It should be considered whether to introduce a new exemption, in addition to the current exclusion in Article 1(2)(j), allow small and medium sized credit institutions to place their own plain vanilla debt securities with their own clients without a prospectus, without any financial threshold on the total consideration of the securities offered. MiFID requirements, such as the information required under Article 19(3) or the suitability and appropriateness tests under Article 19(4) and (5), would apply in such cases.

2.5. *The contents of a prospectus – information document versus protection document*

- *The length and complexity of prospectuses is a result of the provisions of the Directive, coupled with a tendency by issuers to provide more detailed information.*
- *It should be discussed whether the prevention of potential litigation is a recognised and accepted function of a prospectus, or whether competent authorities should focus on imposing an easily analyzable and comprehensible format.*
- *The summary should not be restricted to a prescribed length, but should enable issuers to provide meaningful information.*

The principal objective of the Prospectus Directive was to protect the retail investor, and this is reflected in the various exemptions for offers to 'qualified' investors and for offers of high value securities. Recitals (19) and (20) express the objective that potential investors should be provided with information in an easily analyzable and comprehensible form that enables them to take the investment decisions in full knowledge of the facts. Recital (21) states that information is a key factor in investor protection; a summary conveying the essential characteristics of, and risks associated with, the issuer, any guarantor and the securities should be included in the prospectus. To ensure easy access to this information, the summary should be written in non-technical language and normally should not exceed 2,500 words in the language in which the prospectus was originally drawn up. However, this recital should not be read prescriptively: the number of words should be considered as a guideline, but not as a fixed upper limit. For many prospectuses, especially base prospectuses, a meaningful summary necessarily exceeds such limit.

Although no one would disagree with these aims, a closer look at current market practice gives rise to doubts as to whether the Prospectus Directive has really met these objectives.

Conversely, there has been a tendency in the market for, mainly institutional, investors to demand more information, and there is some evidence that issuers have decided to provide (and competent authorities have decided to impose) more disclosure to minimize legal risk and potential court action.

The result, however, is identical: many investors have difficulties in understanding the technical language and the complex structure of information as well as analyzing the importance of various types of information. As a consequence, most retail investors rely only on the marketing material prepared in connection with a public offering. The summary is often a simple "cut and paste" exercise of various parts of the prospectus without any attempt to simplify the language of such parts (often very technical) as required by the Prospectus Directive.

An internal survey by ESME of 31 IPOs carried out between January and June 2007 in two Member States shows that the average length of an IPO prospectus exceeds 300 pages. The minimum number of pages was 198, the maximum number 472. In a third Member State, however, the average length of the prospectus, based on the evidence of another 12 IPOs, is only about 200 pages. Registration documents, even for financial institutions, comprise up to 300 pages, while some base prospectuses including the

registration document have an overall volume of 750 pages. A standard package of 500 pages of paper weighs 2.5 kilo, which means that such set of documentation weighs almost 4 kilo!

Under these circumstances the character of a prospectus might have already changed: instead of being a source of information for the investor it might have become a liability shield protecting the offeror, the issuer, the banks and other intermediaries involved in the offer, as well as the competent authority responsible for approving the prospectus. This tendency is illustrated by a court decision in one Member State, which condemned the competent authority for the negligent supervision of public offer prospectuses under the previous regime. The result is inconsistent with the objectives set out in the recitals mentioned above.

Notwithstanding, a clear recommendation is difficult. One could accept that the Prospectus Directive should also play a role in minimising the potential for litigation, as argued by some respondents to CESR's consultation (see page 16 of the CESR's Report). However, this function does not correspond with the Directive's main objectives of ensuring investor protection and market efficiency. Therefore, the Commission and competent authorities should adhere to and enforce the principle laid down in Article 5 that information in a prospectus should be presented in an easily analyzable and comprehensible form. It should be recognized that the Prospectus Directive and the Regulation establish the minimum disclosure obligations necessary to meet the information requirements of retail investors, but leave it exclusively to the discretion of issuers to disclose further items of information if they consider it necessary to satisfy investor demand or individual business strategies.

As the CESR's Report demonstrates, the practices of national competent authorities are not always consistent with this principle and may aggravate the issues discussed in this section. Since Article 3 of the Regulation provides that competent authorities cannot require information that is additional to that specified in the relevant Annexes to the Regulation, those authorities should limit their scrutiny to the completeness of the prospectus, which includes the consistency of the information given and its comprehensibility (in compliance with the definition of "Approval" in Article 1.1(q) of the Prospectus Directive).

3. Micro Issues

3.1. Article 2 – Definitions: transferable securities

- *A minimum harmonization of the definition of transferable securities is necessary in order to avoid inconsistencies and uncertainties that arise if the definition is left to the national commercial laws.*

The Prospectus Directive applies to transferable securities, as defined in the ISD and, from 1 November 2007, in MiFID. As already mentioned, the definition of such transferable securities raises some questions. Because the range of securities that fall within the definition will to some extent be determined by national company or commercial law, the incomplete harmonization between Member States of the definition of transferable securities causes uncertainty and inconsistencies in the practical implementation of the Prospectus Directive by the Member States. It is unclear, for example, how employee and other options or shares in private companies are treated, and whether debt securities with a maturity of less than 12 months are always considered as “money market instruments”. Moreover, preference shares could be considered either as “equity” or as “non-equity”; a clear definition of derivative securities is missing; and the concept of “same class of shares” is not found in all Member States.

3.2. Article 2 – Definitions: the 1,000 euro threshold and third country issuers

- *The freedom to choose the home Member State should be extended to all kinds of debt securities.*
- *If the 1,000 euro threshold is intended to protect retail investors in particular jurisdictions, this is undermined by that fact that other issuers can use the passport regime to access investors in the same jurisdictions.*

One of the major steps towards creating a single European securities market has been the rule that issuers of non-equity securities can choose the competent authority for the approval of their prospectuses. They can decide to submit the documents to the competent authority of the country of their registered office (if in the EU), with the competent authority of a Member State where the securities will be offered or admitted to trading, or with a competent authority with specific expertise in checking certain types of prospectuses. The latter option is available if the issuer applies, for formal reasons only, to make a public offering in the country of the relevant competent authority. The result is that the Prospectus Directive has established a limited competition among the competent authorities of the Member States.

However, Article 2(1)(m)(ii) imposes an arbitrary threshold. For debt securities with a denomination of less than 1,000 euro, the more restrictive home Member State rules under Article 2(1)(m)(i) (EU issuers) or Article 2(1)(m)(iii) (third country issuers) apply. As this 1,000 euro threshold does not apply to most derivative securities, it should also be abolished for debt securities. There is no reason why the authority of the State where an EU issuer has its registered office should have exclusive competence to approve such prospectuses. The only argument to support the lack of choice of home Member State – that of protecting retail investors in a particular Member State - does not make sense since, as a result of the passport under the Directive, issuers with a different home Member State can use a prospectus approved by another competent authority to offer securities to those same retail investors. For issuers, however, this threshold causes practical problems because they may need to draw up a number of prospectuses – for example, one to cover a debt issuance program within the 1,000 Euro threshold and another for their remaining debt issuance activities (which might exceed that threshold). It would make sense, both for the issuer and for the competent authority, if both prospectuses were submitted to the same authority for approval. However, this would then effectively remove the freedom of choice for the higher denomination debt.

Moreover, if the 1,000 euro threshold were to be abolished, the uncertainty regarding the threshold of non-equity securities in a currency other than euro of “nearly equivalent to 1,000 euro” would also be removed.

As far as the definition of derivative securities is concerned, it should be amended to reflect the common market practice that the redemption of a derivative security does not require an actual exercise or conversion of rights. The words “as a consequence of their being converted or the rights conferred by them being exercised” should therefore be deleted from Article 2(1)(m)(ii).

3.3. *Article 3(2) – Impact on retail bond market: the 50,000 euro exemption and application to distribution by 'retail cascade'*

- *The retail bond market has been severely affected by the increasing costs of raising capital for corporates, and by restrictions of investment opportunities for retail investors.*
- *Issuers are increasingly deciding to issue bonds with a denomination of at least 50,000 euro, thereby avoiding the requirements to produce a standard prospectus.*
- *Lack of clarity about the meaning of the final paragraph of Article 3(2), and its application in particular to selling by 'retail cascade', impose a high level of legal risk on issuers and intermediaries using the standard prospectus while issuing and placing retail bonds.*

As a result of its flawed conception, its unclear wording and divergent implementation by the competent authorities, Article 3(2) has had a significantly detrimental effect on the retail bond market in particular. The access of retail investors to investment opportunities is becoming increasingly restricted. A number of highly rated

international household companies, whose names are known to ESME, have already ceased or announced that they intend to cease issuing retail bonds.

By way of example, one blue chip company which is a household name to capital markets, has reported to ESME that bonds sold to retail investors would have a lower yield of approximately 8 basis points compared with bonds sold to wholesale investors. Based on the company's 2006 issuance, financing through the issue of retail, rather than wholesale, debt would represent a saving of approximately 1.9 million euro to the company. However, this company has considered suspending its retail debt issuance because of uncertainties about the interpretation and application of Article 3(2) to the distribution of bonds to the retail market by 'cascade' selling. The experience of this issuer would suggest that the Prospectus Directive has not necessarily succeeded in the explicit objective of lowering the cost of capital that is identified in CESR's Report, (see executive summary).

The reason that issuers might wish to offer securities in a way that does not trigger the obligation to produce a prospectus is not their intention to exclude retail investors, but the burden of preparing a prospectus together with other relevant issues such as many legal uncertainties, including in particular concerns about the right for investors to withdraw from a transaction following the publication of a supplement to the prospectus in accordance with Article 16 of the Prospectus Directive.

First, Article 3(2) contains some necessary exemptions from the obligation to publish a prospectus for an offer of securities. They are based on the principle that qualified or wholesale investors should be able to make their investment decisions on the basis of fewer information items than retail investors. Given their higher level of knowledge, they should not necessarily need a prospectus. Even if the issuer prepares a prospectus (for example, because the securities are also to be admitted to trading on a regulated market), where the securities have a unit denomination of at least 50,000 euro it can make use of the reduced disclosure requirements under Annex VII of the Regulation.

In practice, however, Article 3(2) has decreased the range of investment opportunities for retail investors. In particular, the exemptions in point (c) for offers of securities for a consideration of at least 50,000 euro and point (d) for offers of securities with a minimum denomination of 50,000 euro, are increasingly used for debt securities and have already led to a limited availability of retail bonds in major markets. According to figures provided by the Stuttgart stock exchange, in 2006 42 per cent of the bonds listed in Stuttgart had a denomination of 50,000 euro, while in 2005 the figure was only 8 per cent. If this development continues, retail investors, who are supposed to be protected by the Prospectus Directive, will be excluded from the bond market.

In this context, it should be noted that the exemption in point (d) of Article 3(2) is less attractive than that in point (c), because the market demands not only denominations of 50,000 euro or multiples thereof, but also the flexible units of 51,000 or 52,000 euro.

In addition to the impact caused by the availability of the exemptions for 'wholesale' and 'professional' offers under Article 3(2), the effect of the Prospectus Directive on the retail bond market may be aggravated by the considerable uncertainties about the application of the Directive to distribution by "retail cascade". A retail cascade typically occurs when debt securities are sold to retail investors through a group of intermediaries

and not directly by the issuer itself. In some markets, almost all primary offerings of debt securities involve an initial sale of securities by the issuer to one or more large firms, followed by an on-sale by those firms. The sale by the intermediaries to investors generally takes place over a period of several weeks to months. During that period, the price at which the intermediaries offer the securities to their customers will fluctuate - typically many times a day - in line with secondary market prices. In such cases there are multiple offers by different offerors in accordance with different terms of business.

The final paragraph of Article 3(2) provides that a prospectus is required for the placement of securities through financial intermediaries if none of exemptions under points (a) to (e) of Article 3(2) applies to the 'final placement' of those securities. This provision gives rise to a number of questions in the context of a retail cascade. It appears to require some or all stages of a cascade offer to be considered together, but it is not clear in what circumstances offers by intermediaries will be aggregated. The provision is not expressly restricted to cases where the issuer intended or knew that the securities would be sold on by the financial intermediaries.

An issuer 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. There should only be one prospectus for a particular issue, even if different intermediaries carry out placement activities. An extended period of responsibility to update a prospectus may mean that ongoing financial information published in accordance with the Transparency Directive must also be included in supplements to the prospectus, thus attracting prospectus-standard liability and withdrawal rights under Article 16 of the Prospectus Directive.

It should be clarified 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 it is almost beyond its control ("retail cascade"). This is the only possible interpretation of the exemptions that lives up to the expectations of the Prospectus Directive and is not misleading for issuers. Therefore, the final sentence in Article 3(2) should be eliminated.

At present, some competent authorities are discussing with issuers whether the identity of the "placers" beyond the primary syndicate (e.g. the intermediate purchasers in the distribution chain) should be disclosed in the prospectus, whether secondary market trading (including screen based trading and transactions carried out on MTF) should be considered as triggering the prospectus requirement, and whether there can be a "final offer price" for the purposes of Article 8 in the case of a retail cascade. As indicated above, any public offering for a longer period of time as requested by retail bond distributors leaves the issuers with an unlimited risk regarding the obligations to update, supplement and renew the prospectus. While these discussions might alleviate the immediate problems for some issuers, the application of Article 3(2) to cascade distribution should be considered carefully in any review of the Prospectus Directive.

3.4. Article 4 – Rights issues and employee investment schemes

- *The Prospectus Directive should support equity raising by corporates as one of the drivers of economic growth.*
- *The exemption regime provided for by Article 4 does not promote that objective.*
- *A revision should focus particularly on conventional rights issues and on share offerings for employees.*
- *It should alleviate the burdens for transactions of small size, of small and medium sized enterprises, of non-listed share companies and of companies from outside the EU.*

One of the drivers of economic growth is the opportunity for companies to finance their expansion by raising equity in an efficient, timely and smooth manner. The Prospectus Directive should support such financing, but the exemption regime provided in Article 4 of the Prospectus Directive has failed to achieve this goal. Conversely, the exemption regime has added an unnecessary level of regulation and additional burdens for issuers when carrying out certain corporate transactions – e.g. the requirement for a prospectus in some cases, supplementary document in others. The exemptions provided are inconsistent with each other; they delay the raising of capital; and impose the full range of disclosure requirements for too many types of transactions without ensuring the EU passport. This is especially true for small and medium sized companies which are not used to publishing prospectuses on a regular basis.

The revision of the exemption regime should focus in particular on conventional rights issues and share offerings for employees. If an exemption is provided for rights issues, then it would also be appropriate to extend the exemption to other types of issues where all existing shareholders have the opportunity to participate in proportion to their current shareholdings, e.g. open offers.

First, the exemption for rights issues could be broader. At present, the exemption in Article 4(1)(d) for offers of new shares to existing shareholders, and in 4(2)(e) for the admission to trading of such shares, apply only where the shares are offered *free of charge*., while for admission to trading only there is a further exemption for capital increases of less than 10 per cent. Under Article 3(2)(e) an offer with a total consideration of less than 100,000 euro is entirely exempt from the requirement to publish a prospectus. This makes the exemption in Article 4(1)(d) to a large extent superfluous, since an offer free of charge would clearly fall within Article 3(2)(e).

In general, *all* share offerings to existing shareholders by the way of a rights issue should be exempt from the prospectus requirement: these investors 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 are already invested. In such cases, the rationale of the exemptions (see Commission Proposal for the Prospectus Directive COM (2002) 460 final) should apply: companies are required to report to their shareholders, and 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.

The document currently required for shares offered free of charge should also be adequate in such cases.

As soon as non-shareholders are able to acquire such new shares (for example via the purchase of rights or a secondary market transaction), an exemption parallel to that in Article 4(2)(a) (for shares representing less than 10 per cent of shares of the same class already traded) should be available for public offerings. In this respect, the 10 per cent threshold should be set at a higher level: the two years experience has proved that the current threshold satisfies neither issuers, nor market needs, nor the objective of investor protection. ESME suggests that the threshold could be increased to 20 or 25 per cent, or, alternatively, it could be replaced with a fixed financial threshold (e.g. 25,000,000 euro per year). If these proposals were adopted, the exemption in Article 4(2)(a) should also be amended accordingly.

Furthermore, the prospectus requirements and exemptions regime should also allow for an efficient cross border public offering of traditional rights issues to shareholders in other Member States. At present, the issuer must either produce a full prospectus for offers to more than 100 shareholders in any Member State and follow the passporting procedure, including the translation of the summary, or exclude shareholders in these countries from the rights offer (provided that such an exclusion is permitted under the applicable national laws and does not breach the general principle of equality recognized at EU level (for instance by the Takeover Directive; see the general principles under Article 3(1)(a) of this Directive) and in certain Member States). The cost and complexity of preparing a prospectus for a traditional rights issue can be extremely high, and it can be very difficult to identify whether the threshold of 100 shareholders is exceeded. A practical and useful solution could be the creation of a standard set of equivalent information to be provided in any applicable exemption. The Directive could be amended in order to provide such a standard on the basis of technical advice from CESR and allow for its passporting.

Equally important is an amendment to the current exemption in Article 4(1)(e) for securities offered, allotted or to be allotted to existing or former employees or directors. The exemption as currently drafted is too restrictive to be useful to a significant number of employers operating share schemes for employees in the EU. Financial participation of employees in Europe is considered by the Commission as an important factor in group motivation and cohesion. It is especially important for small and medium sized companies where individual employees could have a significant role in the success of the employer. Employees of a company are not comparable to outside investors in terms of their information needs. Their level of understanding of the company is likely to be very different. The exemption under Article 4(1)(e) should therefore be more liberal: in particular, the condition restricting its availability to companies which have securities already admitted to trading on a regulated market should be removed or at least modified in a way that encompasses equivalent markets outside the EU. Alternatively, an offer of shares to employees should not be considered as a public offer for the purposes of the Prospectus Directive.

Under the present law a prospectus-exempt issue for companies which do not meet the conditions for the exemption in Article 4(1)(e) is only possible if the company has fewer than 100 employees per Member State (or the offer falls below the value thresholds specified in Articles 3(2)(e) or 1(2)(h) of the Directive). The requirement to draw up a

prospectus, however, is onerous for small and medium sized companies whose shares are not listed on a regulated market, or for third country issuers - in particular multinationals from the U.S. and Canada with subsidiaries within Member States but no listing within the EC. The inability of such issuers to take advantage of the exemption is in effect deterring multinationals from setting up employee share schemes or from continuing schemes that were in existence long before the Directive was implemented, while certain non-EU companies are switching from stock plans for employees to cash plans.

3.5. Article 5 (4) – Base prospectus and final terms

- *The concept of the Base Prospectus is a core element for the issuance of debt and derivative securities.*
- *In order to improve efficiency and flexibility the possible content of the final terms should not be interpreted restrictively, and a base prospectus should be valid for a specific security throughout the whole offering period.*

The markets for debt and derivative securities within the Member States would no longer operate properly if the format of the base prospectus and final terms had not been included in the Prospective Directive. For example, by the end of July 2007 in one Member State 200,000 issues of securities had been carried out under a base prospectus which would not have been possible under a stand-alone prospectus. However, the concept has to be adjusted to achieve the objectives of market efficiency and market flexibility that are mentioned in recitals 10 and 24 of the Directive.

It is of utmost importance that final terms can be used effectively. It should be clarified that the reference to the “final terms of the offer” in Article 5(4) of the Directive should not be interpreted restrictively as referring only to the items set forth in item 5 of Annex XII under the heading “terms and conditions of the offer”. Such a narrow interpretation would mean that the final terms for a base prospectus could only include information on the amount, time period of offer, method of payment for the securities, pricing, names and addresses. This would frustrate the objectives for the use of a base prospectus and would considerably restrict accepted market practices.

This is not what was intended by the base prospectus. In line with Article 22(2) and (4) of the Regulation, final terms should be considered as including any "information items regarding the securities (but not the issuer) which are not known at the time of approval of the base prospectus and can only be determined at the time the public offer takes place including, but not limited to, the underlying, pay-out structure and related risk factors". Any possibility that the reference in Article 5(4) could be interpreted narrowly can be removed by exchanging the current wording by the wording mentioned above, or by deleting the words "of the offer".

In addition, it should be made clear that the same base prospectus (and especially the same set of terms and conditions) should be valid for a security, identified by one specific ISIN Code, for the whole life time of that security. The regime specifying that a base prospectus is valid for 12 months should not be interpreted in a manner that a new

prospectus has to be prepared every 12 months if the public offering continues. Investors could be confused by the existence of several documents relating to same security. Therefore, the Directive should specifically exempt any increase of an existing non-equity security that is already the subject of a base prospectus and final terms from the obligation to prepare a new prospectus. Such exemption should be included in the list of exemptions in Article 4 of the Directive.

As a first step competent authorities should agree on a common interpretation regarding these elements. At present, the attitudes of different authorities vary from a laissez-faire approach to a restrictive application. Such divergence is damaging, and the restrictive approach in particular is a major obstacle to market efficiency and flexibility as described under section 2.4. of this report.

3.6. Article 6 – Different Member State liability standards

- *The general principle of 'maximum harmonization' should extend to the harmonization of the liability standards applicable to a prospectus.*
- *The current wording of the Prospectus Directive creates uncertainties especially for cross border offerings and could allow for liability arbitrage.*

The Prospectus Directive is part of a network of other EC Directives and national law, and the interrelationships could lead to inconsistencies and conflicts. Article 6 of the Prospectus Directive is a very obvious example: it obliges Member States to ensure that at least the issuer and other specified persons are responsible for the information given in a prospectus, and that national laws on civil liability apply to those persons. As a consequence, the same information will be subject to different liability standards, depending on the home Member State where the prospectus had been approved (see also section 2.5 of this document) and possibly also the State where it is used if, under the relevant conflicts of law rules, the host State regime for civil liability applies. Therefore, this could give rise to a liability arbitrage to the extent that the issuer has a choice of its home State. In accordance with the arguments in section 2.2. regarding maximum harmonization, an amendment promoting a harmonised liability standard is necessary to provide issuers with legal certainty, although it is acknowledged that this would impact upon national civil law which has been exempt from harmonization.

The circle of persons responsible for the contents of the prospectus differs from State to State. Some Member State laws only include legal persons, others also natural persons, while a third group also extends to the financial institutions involved in the issue of a security, even if they do not explicitly accept responsibility.

The Prospectus Directive should make it clear that the issuer should be primarily liable for information contained in a prospectus. The wording of the Directive “at least” gives rise to ambiguous or divergent interpretations in this regard. Although it is recognised that the minimum harmonization in this respect was intentional, the result is detrimental for issuers.

Furthermore, there is no rule in the Prospectus Directive as to which liability regime applies if a prospectus is approved by the home Member State and notified into other jurisdictions. This would be subject to the general conflicts of law rules. This uncertainty could lead either to a liability arbitrage in favour of the Member State with the lowest level of responsibility or to an avoidance of public offerings in Member States with an extremely high level of responsibility.

Regarding cross border offerings, it should also be clarified that a pure translation drawn up in a language customary in the sphere of international finance pursuant to Article 19(2) of the Prospectus Directive is deemed to have been approved for the purposes of prospectus liability, if the same text contained in a prospectus in the language accepted by the respective competent authority has already been approved. The problem arises, as some competent authorities only approve prospectuses in one language, but not bilingual prospectuses (see also section 3.10. of this Report).

3.7. *Article 9 – Validity of the prospectus*

- *The validity period, especially of base prospectuses, should be extended to 24 months in order to avoid the burdensome redrafting.*

Article 9(4) of the Prospectus Directive provides that a prospectus is valid for a period of 12 months from its date of publication. Given the time needed for the redrafting of a prospectus by the issuer and the approval of a prospectus by the competent authorities, the preparation for the renewal has to start nine months after the publication of the previous prospectus. Except for the update of the issuer information, which could be done via supplements, in most cases the changes and amendments are small. Therefore, it should be possible to issue new securities for an extended period of 24 months under an approved prospectus, especially a base prospectus. As suggested under section 3.6. of this report, following the issue of a security, the documentation for that specific security (e.g. base prospectus plus final terms) should be valid for the whole offering period (except for supplements, etc.).

However, in practice the validity of the prospectus is also linked to the validity of the financial statements included in that document. Indeed, if an issuer wishes to use a registration document that includes financial statements older than 15 months to make an offering of securities, it seems that it would be required to update the registration document so as to include its most recent annual financial statements. There appears to be a discrepancy between Article 9(4) and the provisions set out in item 20.5.1 of Annex I, according to which the last year of audited financial information may not be older than 15 months from the date of the registration document if such document includes non audited interim financial statements.

3.8. Article 16 - Supplements to the prospectus

- *It may be appropriate in certain cases to link a supplement to a prospectus with a withdrawal right for the investor (put option), but the general and indiscriminate put option in Article 16 confronts an issuer with an unlimited risk when offering securities and should be abolished.*
- *In addition, the provision on supplements does not reflect market needs regarding amending information, does not correspond with other EU directives, allows for diverging interpretations, restricts the later inclusion of non material information into a prospectus and creates uncertainties for cross border issues.*

It is important that prospectuses should be supplemented. If such a supplement is published during the subscription period for a particular security, or if the issuer makes major changes to the terms and conditions, the investor must have the right to withdraw his acceptance. But a withdrawal right is not appropriate in all cases. For example, if the investor bought a speculative call warrant and after a few months suffers losses from falling markets, should he be entitled to get back his initial investment if the issuer publishes a supplement according to which its credit worthiness has been substantially improved due to a gold treasure found in the ground under the office building?

This example might be exaggerated and the investor would have to rely on a positive court action before he would get any money, but the case is covered by the present wording of Article 16. The Article disrupts the balance of interest between issuers and investors and its amendment should be a matter of priority. The need for amendment does not result from the mere fact of the supplement, but from the combination of that requirement with the free put option that is effectively granted to investors by an unconditional withdrawal right.

Major open issues, raised by the present text, are as follows:

- What is meant by “significant” and “material” in the context of Article 16(1)? How can issuers provide investors with information that is not "significant" or "material" (for example a change in the board of directors, especially for debt securities, a change in the address of an intermediary or a passporting to another country during the life time of the issue) as the Prospectus Directive does not foresee any other addition to a prospectus?
- For how long does the obligation for a supplement exist? For certain types of securities the “final closing of the offer” could be the maturity of the security. It is not clear whether the start of trading on a regulated markets terminates the requirement to produce a supplement under Article 16(1), even if the offer has not finally closed. The text of the Directive itself is ambiguous on this point and some Member States have tried to implement it differently in order to reduce the withdrawal risk.

- How does Article 16 interact with the obligation for immediate *ad hoc* information on the economic situation of an issuer laid down in the Market Abuse Directive? Is a supplement still necessary even if the *ad hoc* information has already been made public?
- Why does significant and material information have to be approved by competent authorities? If information could substantially influence investment decisions, it should be made public immediately and not after an approval period of 7 days.
- Why is it not possible to supplement a registration document? The inclusion of information on an issuer in the securities note means it may be more complicated for investors easily to identify all information on an issuer. It is also inconsistent with the independent character of the registration document.
- Why does the Article not allow for the final terms to be supplemented? Final terms form the final prospectus together with the relevant base prospectus.
- What does “have already agreed to purchase” mean? Does the withdrawal right expire after the valuation date/settlement date of a transaction?
- If the issuer intends to passport an issue to another country and the host member state requires additional information should this information be added to the prospectus by a supplement?
- If the issuer has passported the securities into another country, does the withdrawal right comply with the implementation of the home or the host Member State (which may differ since the Directive sets a *minimum* time limit for withdrawal)?

3.10. Article 19 – Use of foreign languages

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| <ul style="list-style-type: none">▪ <i>The language regime allows the issuers to offer securities throughout Europe by drawing up a prospectus in a language customary in international finance.</i>▪ <i>However, the language regime should be more flexible, especially if an issuer wishes to provide the retail investor in the host Member State with documents in his own language.</i> |
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The language regime of the Prospectus Directive is one of the core success factors of this Directive, because it allows the issuers to offer securities on a European basis by drawing up a prospectus in a language customary in the sphere of international finance with the summary only translated into the official language(s) of the relevant Member States.

However, the language regime should be more flexible. Competent authorities can insist on reviewing prospectuses in their own language (or a language customary in the sphere of international finance). Some issuers, however, offer securities aimed primarily at

retail investors, in some cases in different countries at the same time. Very often issuers consider the summary as insufficient and would like to provide more legal information in the language(s) of the host country for a better understanding by retail investors. If the issuer decides to provide other parts than the summary in the foreign language(s) (for example the final terms, the terms and conditions or a description of the risk factors) such document could easily be considered as an unapproved prospectus which could either give rise to liability problems under Article 6 or raise the question as to whether such document would be “marketing” material only.

In addition, some competent authorities are only willing to approve prospectuses which are prepared in a single language but not in two languages. A translation in the other language could only be provided as a non binding translation which is added to the notification document submitted to competent authorities of the host Member State. As the translation is not approved, the “second language version” is an unapproved prospectus.

4. Transposition issues

4.1. Article 13 - Approval timelines

- *Many national authorities do not comply with the time lines set out in the Prospectus Directive although the terms for the approval are clear and inflexible.*
- *Predictable time lines are necessary to ensure the timely and successful launch of new securities.*
- *In many cases the delay seems due to the fact that the approval process goes beyond the scrutiny of the completeness of the prospectus.*

According to Article 2(1)(q) of the Prospectus Directive, approval is the positive act at the outcome of the scrutiny of the completeness of the prospectus by the competent authority of the issuer's home Member State, including the consistency of the information given and its comprehensibility. The terms for the approval are strictly set out in Article 13 which does not subject them to any particular condition. Therefore, the imposition of additional requirements by competent authorities is unlawful. Nevertheless, ESME is aware of current practices such as linking or delaying the starting date for the period of approval of the prospectus to the date the competent authority receives the approval decision issued by a different authority (e.g. in one Member State, the admission-to-listing decision released by the Stock Exchange). Practices of this kind clearly breach the clear deadlines set out in Article 13 of the Prospectus Directive.

It should also be noted that many national authorities do not comply with the time lines set out in the Prospectus Directive, which does not provide for sanctions in the case of a failure of compliance. An internal survey carried out by ESME regarding IPOs between January and June 2007 in three Member States with major markets has shown that the effective approval period for one of those States was 107 days, while for the other two the average approval period was only around 40 days. This latter period seems quite fair taking into consideration the initial 20 days period and one or two subsequent “updating sessions”. However, it must be taken into account that the approval period in one of those States before the Prospectus Directive had been implemented was 15 days, including “updating sessions” both in law and practice.

It is necessary to provide for clear and certain time lines to ensure the timely and successful launch of many securities offers which are often subject to certain market conditions. Clear time lines are also essential for carrying out preparatory activities (e.g. marketing, road shows, advertising). Unpredictable time lines may also affect decisions about the nature of the offer (whether public or institutional): qualified investors are usually

preferred to retail investors due to the time needed for preparing individual marketing materials.

In many cases, the delay in approving the prospectus seems due to the fact that in performing the approval procedure national competent authorities judge the prospectus on its merit, even providing comments on the wording. This goes beyond the “*scrutiny of the completeness of the prospectus (...) including the consistency of the information given and its comprehensibility*” as provided for by the Prospectus Directive and interferes with what should be the sole responsibility of the issuer.

4.2. Article 14 - Prospectus notices

- *Any prospectus should be easily accessible for investors.*
- *Given the new media developed in recent years and the internet in particular, it should be required, as a minimum standard, that all prospectuses be published on the website of the competent authority or CESR and of the issuer.*
- *The requirement for notices of prospectuses or even of final terms should be abolished as the contents of the notice as well as the distribution of a newspaper are limited.*

The precise content of the notices is set out in the Regulation (Article 31). Notwithstanding, some national competent authorities require additional contents which are not specified by the Regulation. In at least one Member State, a so-called “market standard” endorsed by the competent authority informally requires the publication of certain information (e.g. the risk factors). This is an evident breach of the Prospectus Directive and Regulation, and should be treated as such.

It should also be taken into account that a prospectus should be easily accessible for investors. In particular, based on past practice, Member States have chosen among various methods of publication although the choice of means of publication set out in Article 14(2) is left to the issuer, not to Member States. Given the new media developed in recent years and the internet in particular, an amendment should be made to require, as a minimum standard, the publication of all prospectuses on the website of the competent authority or even of CESR (something like a “European securities prospectus exchange (ESPE)”), as well as on the web site of the issuer. In addition, any investor should be entitled to be provided free of charge with a printed copy of the prospectus by the issuer, in line with Article 14(7).

Notices of prospectuses, and the notices of final terms that are currently required by some competent authorities, should be abolished by means of an agreed interpretation among Member States and competent authorities. First, this requirement discriminates against issuers whose home Member State insists on these notices, as according to a statement by the Commission Services the notice requirement can only be imposed by the home Member State only. This means that passported issues do not have to be announced in the host Member State if the home Member State does not require it, irrespective of whether the host Member State does. Secondly, such notices only appear in one newspaper

with a limited distribution compared to the internet. This could delay the time of the public offering and do not contain any relevant information for an investment decision, especially in the case of prospectuses or final terms covering various tranches of securities. Furthermore, other EU directives no longer treat newspapers as the principal form of publication, but only as a supplementary one. Finally, the cost of such notices can amount to several million euro per year: ESME has been provided with an estimate by a banking association that the cost for the notices regarding prospectuses for non-equity securities exceeds three million euro.

In light of the above, a cost benefit analysis of the means of publication of the prospectus would be useful in order to evaluate whether certain means are expensive, time consuming and disproportionate to the purposes of the rules in question.

4.3. *Article 15 – Marketing for new issues*

- *The principle that all marketing must be clearly recognisable and consistent with the information in the prospectus is sound.*
- *However the competent authorities should restrict their role to an ex post observation and do not impose any ex ante control.*

Any modern placement of securities is inherently tied to marketing – the title of Article 15 - “Advertisements” - does not cover the reality of capital markets. Term sheets, mailings, road shows with institutional and even retail investors, advertisements in newspapers, banners on the internet and the various types of public relations via press, television and internet are part of almost any new issue. The importance of marketing grows with investors requiring five lines of information only while the relevant prospectus comprises some hundred pages.

The principle that all marketing must be clearly recognisable and consistent with the information in the prospectus is sound, as is the power of the competent authorities to exercise control and forbid the distribution of marketing not consistent with the prospectus. However, as a matter of agreed interpretation, all competent authorities should restrict their role to an *ex post* observation and should not carry out the *ex ante* control as already carried out by some Member States. In the latter case, an amendment of the Directive should exclude such practice.

A requirement to submit any material prior to its publication for inspection is time consuming and delays marketing activities, especially public relations and traditional print advertising. Moreover, experience for about two decades from some Member States shows that marketing, even for retail investors, has worked smoothly and properly with only very few complaints. Finally, competent authorities should take into consideration the fact that the number of marketing items in a mature market could easily exceed some 10,000 pieces a year, thereby absorbing significant regulatory resources if subjected to ex ante control that could be better employed ensuring efficient and timely approval of prospectuses.

5. Conclusion

The Prospectus Directive could be considered as a mile-stone in the construction of a single European securities market. The new system of notification, the common rules for the contents of a prospectus, the language regime, and other basic principles represent step forwards towards this objective which, despite a lot of hurdles, has been achieved to a major extent.

Notwithstanding this achievement, problems have been identified. This report submitted by ESME intends to represent comments from market practitioners and experts based on their two years experience of the Prospectus Directive on the degree of alignment with market and the practicability of individual provisions of the Prospectus Directive, together with the efficiency of its implementation. Based on the findings presented in this report and the attached grid, ESME is convinced that the Prospectus Directive should be amended by the European Parliament and the Council. The suggested amendments do not affect the core principles of the Directive, but aim 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.