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IMPACT ASSESSMENT

Accompanying the document

COMMISSION DELEGATED REGULATION

amending Regulation (EC) No 809/2004 as regards the format and the content of the prospectus and base prospectus, of the summary and of the final terms and the disclosure requirements

{C(2012) 2086 final}
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1. INTRODUCTION

The Prospectus Directive (the "**Directive**" or "**Amended Directive**")[1] is a centre piece of the Financial Services Action Plan and is one of the first Directives adopted under the Lamfalussy legislative approach. The Directive lays down the rules governing the prospectus which must be made available whenever a public offer or an admission to trading takes place on a regulated market in the EU.

The framework created by the Directive has eased the possibility to offer securities in different Member States, thereby boosting competition among issuers and generating a wider variety of available products to investors. In the context of the current financial climate, it has also provided a sound framework in terms of investor protection and disclosure obligations for the financial instruments it covers. 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 Directive has had a significant positive impact on the quality and appropriateness of information available to investors.[2]

On 23 September 2009, the Commission published its proposal for the revision of the Directive in order to further enhance investor protection, increase efficiency in the prospectus regime, and reduce administrative burdens for companies when raising capital in the European securities markets.[3] The Directive 2010/73/EU amending the Prospectus Directive was adopted on 24 November 2010 and published on 11 December 2010.[4]

It is intended that investor protection will be strengthened by improving the quality and effectiveness of disclosures, including the summary of the prospectus, while efficiency will be increased through reducing administrative burdens for issuers through the implementation of a proportionate disclosure regime.

The Amended Directive requires amendments to the Commission Regulation (EC) No 809/2004 (the "**Regulation**") through a Delegated Regulation. This Impact Assessment assesses the policy options for the provisions of the Delegated Regulation relating to the format of the final terms to the base prospectus and the proportionate disclosure regime regarding SMEs and issuers with reduced market capitalisation (the "**Small Caps**").[5] Other

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1 OJ L345/64, 31.12.2003, p.64.

2 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.

3 http://ec.europa.eu/internal_market/securities/docs/prospectus/proposal_240909/proposal_en.pdf

4 Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 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, OJ L 327, 11.12.2010, p.1-12: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:327:0001:0012:EN:PDF

5 See Article 2.1(f) and (t) of the Amended Directive. Small and medium enterprises ("SMEs"), within the meaning of the Prospectus Directive, are companies, which, according to their last annual or

provisions are also considered but are not addressed in detail: they concern the format and content of the summary of the prospectus, the proportionate disclosure regime regarding rights issues and credit institutions, and the consent to use a prospectus within securities distribution networks. In addition to these changes, it was felt that further harmonisation and clarification of some technical details is or may be necessary in certain existing provisions of the Regulation. The legal basis has thus been laid for the development of more detailed provisions in certain minor areas.

This Impact Assessment must be read alongside the Impact Assessment which preceded the adoption of the Directive 2010/73/EU (the "**Prior Impact Assessment**") and which provides the overall rationale for action in this area and the framework within which the scope and purpose of the Delegated Regulation can be understood.[6]

1.1. Procedural Issues

The initiative is based on the amendments to the Directive introduced by the Directive 2010/73/EU, the Communication from the Commission to the European Parliament and the Council – Implementation of Article 290 of the Treaty on the Functioning of the European Union,[7] and the Framework Agreement on Relations between the European Parliament and the European Commission.[8]

Subject to Articles 24b and 24c of the Amended Directive, the Commission has the power to adopt the Delegated Regulation in accordance with Article 290 of the TFEU and Article 24a of the Amended Directive. In particular, in accordance with Article 5(5) of the Amended Directive, the Commission is under the obligation to adopt the Delegated Regulation in relation to the format of the final terms to a base prospectus, to the format of the summary of the prospectus, and to the detailed content and specific form of the key information to be included in the summary by 1 July 2012.

This Impact Assessment takes into consideration the Final Report of the European Securities and Markets Authority (ESMA)'s Technical Advice on Possible Delegated Acts Concerning the Prospectus Directive as Amended by the Directive 2010/73/EU (the "**Advice**")[9] following the formal request from the Commission services of 20 January 2011. ESMA was invited to consider the earlier Impact Assessment work of the Commission and the supporting external studies by the European Securities Markets Expert Group (ESME)[10] and the Centre for

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consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding 43 MEUR and an annual net turnover not exceeding 50 MEUR. Companies with reduced market capitalisation are companies listed on a regulated market that had an average market capitalisation of less than 100 MEUR on the basis of the year-end quotes for the previous three calendar years.

6 Available at: http://ec.europa.eu/internal_market/securities/docs/prospectus/proposal_240909/impact_assessment_en.pdf

7 Communication of 9.12.2009. COM(2009) 673 final.

8 OJ L304/47, 20.11.2010, p.47.

9 http://www.esma.europa.eu/system/files/2011_323.pdf

10 ESME was an advisory body to the Commission, composed of securities markets practitioners and experts. It was established by the Commission in April 2006 and operates on the basis of the Commission Decision 2006/288/EC of 30 March 2006 setting up a European Securities Markets Expert Group to provide legal and economic advice on the application of the EU securities Directives (OJ L 106, 19.4.2006, p. 14–17). http://ec.europa.eu/internal_market/securities/docs/esme/05092007_report_en.pdf

Strategy & Evaluation Services (CSES).[11] In addition, ESMA consulted widely with all major stakeholders, including securities regulators, market participants (issuers, intermediaries and investors), and consumers.

1.1.1. Impact Assessment Steering Group

The Steering Group for this Impact Assessment (IASG) 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 four times. The last meeting of the IASG took place on 7 November 2011. The contributions of the members of the Steering Group have been taken into account in the content and shape of this Impact Assessment.[12]

1.1.2. IAB opinion and remarks taken into account

DG MARKT services sent the Impact Assessment Report to the Impact Assessment Board on 11 November 2011. The Board analysed this Impact Assessment and delivered its opinion on 9 December 2011 after a written procedure scrutiny. In course of this procedure the members of the Board provided DG MARKT services with comments to improve the content of the Impact Assessment that led to some modifications to the text. These are:

- improved explanation on the problems arising from the articulation between the base prospectus and the final terms including clarification on the scale of likely changes to final terms compared to the current situation, including additional costs reasonnably expected;

- updating of savings estimated from impact assessment related to the amended Directive measures for the proportionate regime with segmentation for SMEs and Small Caps;

- improved clarification on monitoring indicators collected on an on-going basis.

1.2. Consultation of interested parties and external expertise

1.2.1. Consultation of ESMA

According to Article 19 of the ESMA Regulation,[13] ESMA should serve as an independent advisory body to the Commission, and may, upon a request from the Commission or on its own initiative provide opinions to the Commission on all issues related to its area of

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11 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.
http://ec.europa.eu/internal_market/securities/docs/prospectus/cses_report_en.pdf

12 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.

13 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC. OJ L331/84, 15.12.2010, p.84.

competence. Moreover, according to Article 6(1)(gc) of the ESMA Regulation, ESMA has taken over all existing and ongoing tasks from CESR.[14]

On 20 January 2011, the Commission services sent a formal request for advice (the "**Mandate**")[15] to ESMA on possible delegated acts concerning the amended Prospectus Directive consisting of three separate parts.[16] The first part of the Mandate refers to (i) the format of the final terms to a base prospectus, to the format of the summary of the prospectus, and to the detailed content and specific form of the key information to be included in the summary (to be adopted by Delegated Regulation by 1 July 2012); (ii) the proportionate disclosure regime introduced for some preemptive offers of equity securities, offers by SMEs and Small Caps, and offers of non-equity securities referred to in Article 1(2)(j) by credit institutions; and (iii) the criteria to be applied in the assessment of the equivalence of a third country legal and supervisory framework. The second part relates to possible minor technical adjustments and to the clarification of certain provisions of the Regulation in order to increase legal clarity and efficiency in the regime of the Directive. In the third part, the Commission services have invited ESMA to assist the Commission in the preparation of a comparative table of the liability regimes applied by the Member States in relation to the Directive.

Following receipt of the Mandate, on 26 January 2011 ESMA launched a Call for Evidence[17] for interested parties to submit comments by 25 February 2011.[18] On 15 June 2011, ESMA published a Consultation Paper[19] and received 55 responses.[20] In both Call for Evidence and Consultation Paper it has been necessary to bring forward the consultation closing date by one month to ensure that the final advice can be provided to the Commission by 30 September 2011 to allow this latter one to comply with the restricted timetable set by co-legislators. The ESMA's Consultation Paper contained targeted questions to stakeholders on the possible impact of proposed measures, possible alternative solutions, and expected costs and benefits of the measures. The responses came from European and national associations representing issuers and financial services providers, legal and accountancy firms, as well as regulated markets, stock exchanges and individual issuers. ESMA has also benefited from the advice of the Consultative Working Group established to assist the ESMA's Corporate Finance Standing Committee.

1.2.2. External Expertise

This Impact Assessment has also made use of the following studies: the Advice, the Study on the costs of compliance with selected FSAP measures,[21] the CSES's Study on the Impact of the Prospectus Regime on EU financial markets,[22] and the ESME's Report on the Prospectus Directive.

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14 Commission Decision 2009/77/EC of 23 January 2009 establishing the Committee of European Securities Regulators, OJ L25, 29.1.2009, p.18.

15 See Annex 7.1.

16 See http://ec.europa.eu/internal_market/securities/docs/prospectus/esmaadv_en.pdf

17 See http://www.esma.europa.eu/popup2.php?id=7450

18 ESMA received 36 submissions available at: http://www.esma.europa.eu/index.php?page=responses&id=178

19 See http://www.esma.europa.eu/popup2.php?id=7601

20 These are available at: http://www.esma.europa.eu/index.php?page=responses&id=184

21 See: http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_cost_of_compliance_en.pdf

22 Study commissioned by DG Internal Market and Services, prepared by the Centre for Strategy and Evaluation Services (CSES), June 2008.

2. PROBLEM DEFINITION

2.1. Background

The Amended Directive aimed to solve the following problems[23]:

- **Enhancement of the level of investor protection and ineffectiveness derived from the lack of legal clarity in the Directive.** The lack of legal clarity makes issuers and intermediaries liable for unexpected risks. This increases the cost of legal advice and – in order to be protected against any contingency – issuers and intermediaries include non-mandatory disclosures in the prospectus in order to protect themselves from liability as much as possible. The prospectus therefore has become extremely long and obscure for retail investors and does not allow any comparability among the various securities.

- **Situations of unjustified burdensome requirements imposed on companies raising funds from securities markets and on the intermediaries involved.** The disclosure regime has proven burdensome when applied to some pre-emptive offers of equity securities,[24] offers by SMEs and Small Caps or some offers of non-equity securities by credit institutions.

These problems make it difficult for investors to effectively analyse and compare prospectuses and generate cost burdens for companies when raising capital in the European securities markets. These problems erect barriers to integrated European securities markets, hamper competition, and reduce transparency across markets.

The Amended Directive addressed these problems and introduced legislative solutions.[25] Supported by the Prior Impact Assessment, it envisaged the implementation of the new framework through the adoption by the Commission of a Delegated Regulation amending the Regulation.

2.2. Problems to be addressed through a Delegated Regulation

The Delegated Regulation implements the principles and the policy choices made by the legislator in the Amended Directive. It is deemed to bring calibrated and appropriate answers to the loss of confidence of investors inadequately informed and protected, to ineffective and burdensome disclosure requirements, as well as to the current inefficiencies of the financial markets in the Union. In particular, it addresses the following problems:

– **Problem 1: the current system of the base prospectus and the final terms compromises investor protection and lacks legal clarity.** According to Article 13 of the Directive, any prospectus must be approved by the competent authorities.

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23 More detailed information regarding these problem areas can be found in the Impact Assessment of the Commission's proposal to amend the Prospectus Directive (p.7-17). Available at: http://ec.europa.eu/internal_market/securities/prospectus/index_en.htm

24 Pre-emptive offers or rights issues are a common way for listed issuers to raise capital. This way is protective for shareholders because it offers existing shareholders the possibility of subscribing to the issue or selling their rights if they do not intend to subscribe. Shareholders are not diluted if they exert their pre-emptive rights and will otherwise receive compensation if they do not subscribe to the issue and sell their rights.

25 See Annex 7.2.

According to Article 5(4)of the Prospectus Directive, where the final terms of the offer are not included in either the base prospectus nor in a supplement, the final terms shall be made available to investors, filed with the competent authority of the home Member State[26] and communicated, by the issuer, to the competent authority of the host Member State(s) when each public offer is made as soon as practicable and, if possible, in advance of the beginning of the public offer or admission to trading. The final terms shall contain only information that relates to the securities note and shall not be used to supplement the base prospectus. Recital 17 of the amended Directive further explains that the final terms to a base prospectus contain only information which is specific to the issue and which can be determined only at the time of the individual issue. Accordingly, the content of the final terms is reflecting the information directly linked to the market conditions, for example, the price, the level of interest, the time period during which the offer will be open, the name and address of financial intermediaries responsible for the placement of securities.

The rationale behind the final terms is to allow issuers to tap the market in the most efficient manner according to market conditions. Final terms are only filed, with an ex-post approval, contrary to the base prospectus which is ex-ante approved by the home competent authority. Final terms were introduced because the 10 days period granted to competent authorities for approval of a prospectus does not allow issuers to benefit from the market "windows" (where the market is supposed to present the most favourable conditions for a successful offer). Nevertheless, the issuer is liable towards the investors for the whole information included both in the base prospectus and the final terms.

From the perspective of investor protection, the ex-ante approval of the base prospectus, which contains the largest part of information to be disclosed, remains crucial as court enforcement of investor's rights is always more costly with a final decision occurring in several months or years after the end of the securities offer.

As the final terms are subject to an ex-post approval, whereas the base prospectus is subject to an ex-ante approval by the home competent authority, some issuers used this flexibility to elude approval checks by providing information which was not linked to the specific issue in the final terms. The absence of any precise mandatory disclosure requirement in the Regulation has generated inconsistency and permitted abuses in the various market practices relating to the form of the presentation and the content of the final terms filed as a separate document.[27] CESR had already identified a certain level of inconsistency and tried in vain to reach a more consistent approach.[28] Moreover, according to ESMA, issuers still use final terms to disclose information which would need to be vetted by competent authorities thereby circumventing the legal requirement of Article 16 of the Directive to have a supplement approved in case of new information capable of affecting the assessment of investors.[29]

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26 See Recital 21 of the Regulation.

27 See the Advice, p. 22.

28 See the Advice, p. 23. See CESR FAQ No 57. http://www.esma.europa.eu/popup2.php?id=7312

29 Such information includes, among others, material changes of the risk factors, redemption structures, and terms and conditions, included in the approved base prospectus to which the final terms relate, and

Moreover, consolidated final terms were sometimes used in order to comply with national civil liability rules, contrary to the regime and purpose of Prospectus disclosures. Also the practice to replicate and/or amend in the final terms securities note's items already determined by the base prospectus seems to be contrary to the principles of the amended Directive according to which it is an approved base prospectus which has to contain all information necessary to enable investors to make an informed investment decision and, as clarified by the amended Directive, final terms cannot be used to supplement the approved based prospectus. They must contain only information that relates to the securities note which is specific to the issue and which can be determined only at the time of the individual issue.[30]

This lack of harmonization and legal clarity in relation to the form of the presentation and the content of the final terms, and what new information triggers the obligation of an approved supplement, is detrimental to both investors and issuers, and, because of the various market practices existing in the Member States, it seriously risks affecting the confidence of investors and the functioning of the passport mechanism in cross-border offers of securities in the Union.[31] Given the importance of the interests at stake and the fact that no prior impact assessment was carried out, the options relating to this problem will be assessed in this Impact Assessment.

– **Problem 2: the summary of the prospectus does not ensure a high level of investor protection:** due to the length and complexity of prospectuses, their summary should be a key source of information for retail investors. In accordance with Article 19 of the Directive, sometimes the summary is the only document translated in the language of the host Member State. The lack of a harmonized format for the summary and of a detailed content and specific form of the key information to be included in it determines inconsistency in the length and quality of the information provided. This undermines investors' confidence and impedes any comparability among similar securities. The Amended Directive has addressed this problem and defined what key information a summary needs to provide.[32] An assessment of the possible options and a cost-benefit analysis is included in the Prior Impact Assessment and is not repeated in this Impact Assessment.[33] Any possible alternative options will be considered in the Impact Assessment accompanying the Packaged Retail Investment Products' (PRIPs) initiative[34]. The Delegated Regulation implements the new provisions of the Amended Directive by introducing a new Annex in the Regulation and by defining the harmonized format and content of the summary with minor additional impact.[35] The content of the summary could precisely be adapted to ensure consistency with standards adopted within coming PRIPs initiative.

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new information which ESMA considers to be significant pursuant to Article 16 of the Directive and thus requiring a supplement approved by the competent authorities. See the Advice, p. 23.

30 See Recital 17 of Directive 2010/73/EU and Article 5.4 of the Amended Directive.

31 The Directive has introduced a "passport mechanism" by which any prospectus approved by the competent authority of one Member State is valid for public offers and admissions to trading of securities in the entire Union.

32 See Recital 15 of Directive 2010/73/EU and Articles 2.1(s) and 5 of the Amended Directive.

33 See the Impact Assessment accompanying Directive 2010/73/EU, p.21.

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

35 See Annex 7.3.1.

– **Problem 3: the disclosure requirements of the Regulation can be disproportionately burdensome for some issuers and offers of securities**. Burdensome and duplicative disclosure requirements bring no benefits to investors and to an efficient capital market. They drive up the cost of capital and have deterrent effects for some issuers looking to raise capital. This hinders the realisation of integrated and efficient financial markets in the Union. These negative effects are all the more remarkable when considering the costs related to the offerings or admission to trading by SMEs and Small Caps[36] (Problem 3.1), to offers of non-equity securities referred to in Article 1(2)(j) of the amended Prospectus Directive issued by credit institutions (Problem 3.2), or in the case of pre-emptive issues of equity securities (rights issues) (Problem 3.3), given their size, the amount they might raise, and the amount of information already disclosed to the markets. The Amended Directive has introduced the principle of a proportionate disclosure regime for those issuers and offers of securities with the idea to possibly develop it in a Delegated Regulation but making sure that no prejudice is caused, if any action is undertaken, to the ultimate objective of ensuring a high level of protection and confidence of investors.[37] An assessment of the possible options and a cost-benefit analysis is included in the Prior Impact Assessment[38] and will not be repeated in this Impact Assessment at least for Problems 3.2 and 3.3 given the absence of real alternative options and the minor additional impact of the new Annexes introduced by the Delegated Regulation[39]. However for Problem 3.1, given the importance of SMEs and issuers with Small Caps market capitalisation in the economy of the Union and the need to ensure that investors in those companies are adequately protected, alternative options are analysed to strike the right balance between the objectives of investor protection and reduction of administrative burdens.

– **Problem 4: in order to enhance investor protection, issuers need to disclose their consent to the use by financial intermediaries of their prospectus in case of retail cascade**. Financial intermediaries placing or subsequently reselling the issuer's securities should be entitled to rely upon the initial prospectus published by the issuer as long as this is valid and duly supplemented and the issuer consents to its use. The Amended Directive has addressed this problem and clarified the responsibilities of the issuer and the financial intermediaries.[40] It has enhanced legal certainty (especially for liability purposes) for investors, issuers and financial intermediaries, and investor protection (investors will be informed about the existence of the consent and of eventual conditions restricting the use of the prospectus). An assessment of the possible options and a cost-benefit analysis is included in the Prior Impact Assessment and will not be repeated in this Impact Assessment.[41] The Delegated Regulation implements the new provisions of the Amended Directive introducing format and modalities according to which the consent, including the conditions attached thereto, to use the initial prospectus by financial intermediaries will be

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36 According to the Impact Assessment accompanying the amended Prospectus Directive, the reduction in administrative burdens on an annual basis (due to the reduction of disclosure requirements) was estimated at 172,872,000€ for small quoted companies and at 79,919,000€ for rights issues.

37 See Recital 18 of Directive 2010/73/EU and Article 7.2(g) of the Amended Directive.

38 See the Impact Assessment accompanying Directive 2010/73/EU, p.23.

39 See Annex 7.3.2.

40 See Recital 10 of Directive 2010/73/EU and Article 3.2 of the Amended Directive.

41 See the Impact Assessment accompanying Directive 2010/73/EU, p.21.

disclosed. This will have very limited impact in terms of costs and require minor adjustments to the Annexes of the Regulation[42].

– **Problem 5: Technical adjustments and clarification of some requirements of the existing Prospectus Regulation**. Six years have passed since the entry into force of the Regulation and some minor disclosure requirements of the Annexes require some clarification and technical adjustments. The impact of these amendments is minor but will benefit issuers in terms of legal clarity. The problem does not require to be treated in this Impact Assessment because of the absence of alternative options and its minor implications[43].

2.3. Scope of the Impact Assessment

An impact assessment is carried out in relation to the new provisions of the Delegated Regulation dealing with **the format and content of the final terms (Problem 1)**. The new disclosure requirement was introduced in the Amended Directive by the legislator and did not fall within the scope of the Prior Impact Assessment. As stressed by a considerable number of participants to the public consultation launched by ESMA, the new disclosure requirements are expected to benefit investors but may also increase costs for issuers[44]. Therefore, alternative options are taken into consideration. The Impact Assessment also assesses the possible effects of alternative options for the specific requirements of **the proportionate disclosure regime for SMEs and Small Caps (Problem 3.1)**.

The other provisions of the Delegated Regulation dealing with **Problems 2, 3.2, 3.3, 4 and 5** are also considered but not fully addressed in this Impact Assessment. Some follow the amendments to the Directive and have been already the object of a full and proper impact assessment. No real alternative options are available or taken into consideration and their additional impact is marginal, if not nil, when compared with the estimates of the Prior Impact Assessment. Others are purely technical adjustments to a number of requirements of the Regulation with negligible impact on stakeholders and in line with the general objectives of increased investor protection and legal clarity. The reasons for not doing full analysis in this Impact Assessment are further explained in Annexe 7.2.

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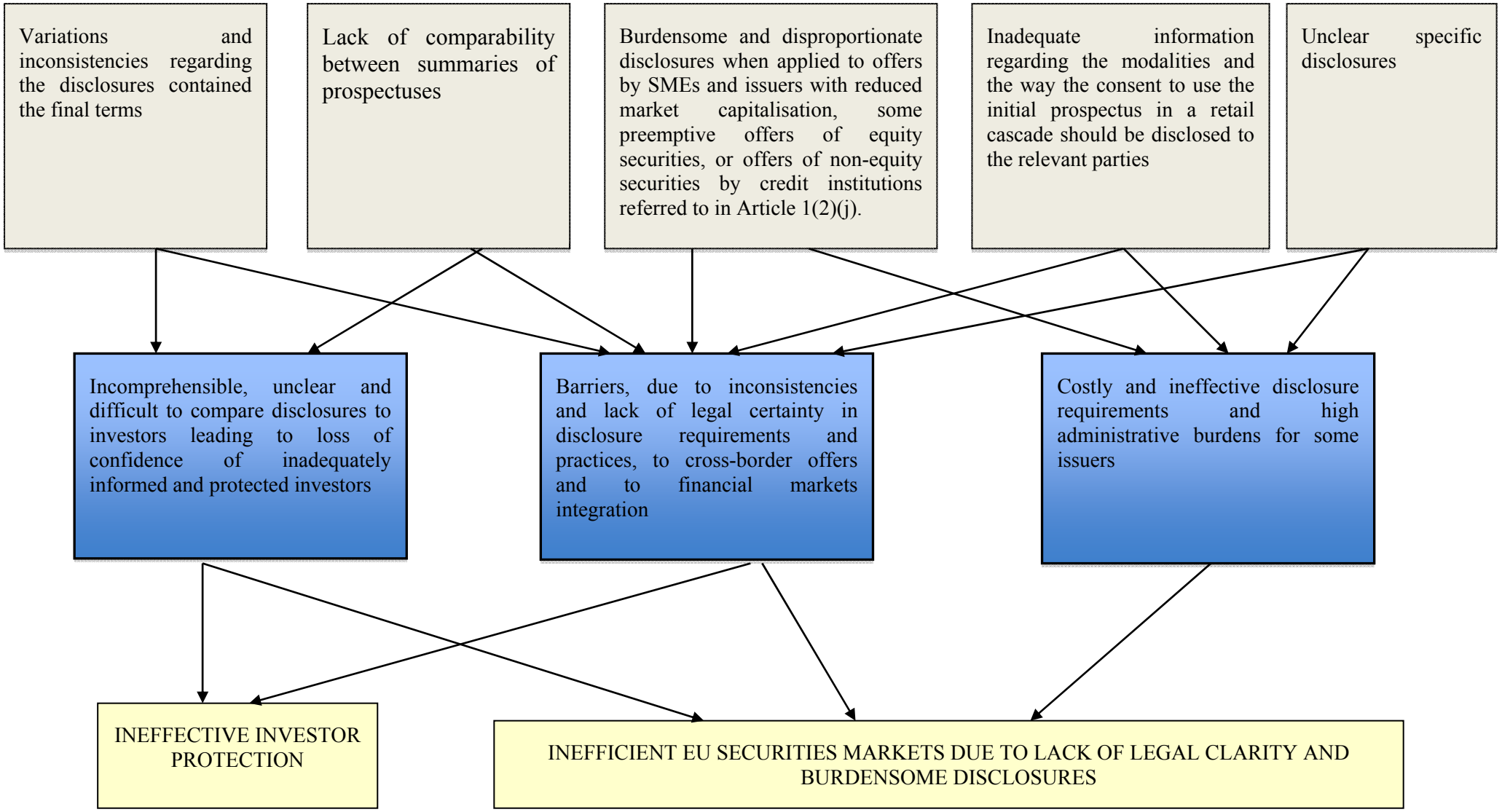
42 See Annex 7.3.3.

43 See Annex 7.3.4.

44 See for instance the responses to ESMA's consultation paper from Deutscher Derivate Verband, Eusipa, Europeanissuers.


Variations and inconsistencies regarding the disclosures contained the final terms
Lack of comparability between summaries of prospectuses
Burdensome and disproportionate disclosures when applied to offers by SMEs and issuers with reduced market capitalisation, some preemptive offers of equity securities, or offers of non-equity securities by credit institutions referred to in Article 1(2)(j).
Inadequate information regarding the modalities and the way the consent to use the initial prospectus in a retail cascade should be disclosed to the relevant parties
Unclear specific disclosures
Incomprehensible, unclear and difficult to compare disclosures to investors leading to loss of confidence of inadequately informed and protected investors
Barriers, due to inconsistencies and lack of legal certainty in disclosure requirements and practices, to cross-border offers and to financial markets integration
Costly and ineffective disclosure requirements and high administrative burdens for some issuers
INEFFECTIVE INVESTOR PROTECTION
INEFFICIENT EU SECURITIES MARKETS DUE TO LACK OF LEGAL CLARITY AND BURDENSOME DISCLOSURES

2.4. How would the Problems evolve without action?

In considering the evolution of identified issues in the absence of action at the European level it is important to understand that the co-legislators required the Commission to act. It is therefore not possible to consider a base line of no action, as the positions taken in Directive 2010/73/EU already presuppose the adoption of a Delegated Regulation. The Amended Directive already indicates that further adjustments, within the scope of the solutions it introduces and which are supported by the Prior Impact Assessment, are required in order to avoid inconsistent or conflicting implementation by Member States.

Furthermore, taking into account that offers of securities may have a cross border dimension[45], this exercise will be better addressed at EU level. In the absence of action at European level, practices and enforcement would remain inconsistent across jurisdictions, leading to patchy investor protection standards and legal uncertainty damaging the functioning of efficient financial markets in the Union. Lack of action at the European level could lead to greater divergence in disclosure requirements within the Prospectus regime, potentially leading to greater costs for issuers as well as for investors.

2.5. The EU's right to act and justification

The Prospectus framework exists at the European level as a mechanism for creating a mutual recognition mechanism in the form of the Prospectus, as a single passport for offering securities to the public or admitting them to trading on a regulated market in any Member State. The problem areas addressed in the review of the Directive related to issues regarding the effective functioning of that framework which required changes at European level.

The specific issues identified in relation to the provisions of the Delegated Regulation are strongly linked to and support the amendments to the Directive and indeed are generally mandated as part of them.

The analysis of concrete options for the provisions of the Delegated Regulation will consider the precise nature and extent to which harmonisation is necessary, always with the principle of subsidiarity in view. However, action solely at Member State level would not be able to effectively or efficiently address the issues that the Delegated Regulation is designed to address, given the centrality of the single market and the cross-border dimension of securities markets. Action solely at Member State level would run the risk of erecting or maintaining barriers to further integration and efficiency in EU security markets as a whole, including barriers to issuers and investors that operate on a cross-border basis, thereby potentially raising risks for investors, whilst also increasing costs.

The legal basis for action is provided (and delimited) by the power of the Commission to adopt delegated acts introduced by Article 24a of the Amended Directive.

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[45] See the Reports on ESMA Data on Prospectuses Approved and Passported for Jan 2010 – June 2010 and respectively July 2010 to December 2010: 4 591 prospectuses were approved in the EU Member States in 2010; 871 prospectuses were passported (sent) and 3226 prospectuses were received by the UE national competent authorities.

3. OBJECTIVES

The objectives identified for the review of the Directive remain applicable for the relevant provisions of the Delegated Regulation, given that the underlying problems also remain the same[46].

1. Enhancement of investor protection

The provisions of the Delegated Regulation will enhance investor protection in (Problem 1) the framework of the base prospectus and its final terms, filed as separate document, harmonizing the form of the presentation and the content of the final terms, and defining what new information triggers the obligation of an approved supplement. Moreover, they will strike a (Problem 3.1) balance between the objectives of investor protection and reduction of administrative burdens for SMEs and Small Caps. Investor protection will also be enhanced by (Problem 2) the summary of the prospectus and the key information disclosed in it, and the (Problem 4) clarification of the format and modalities by which the issuer will consent to the use of its initial prospectus by financial intermediaries in case of retail cascade.

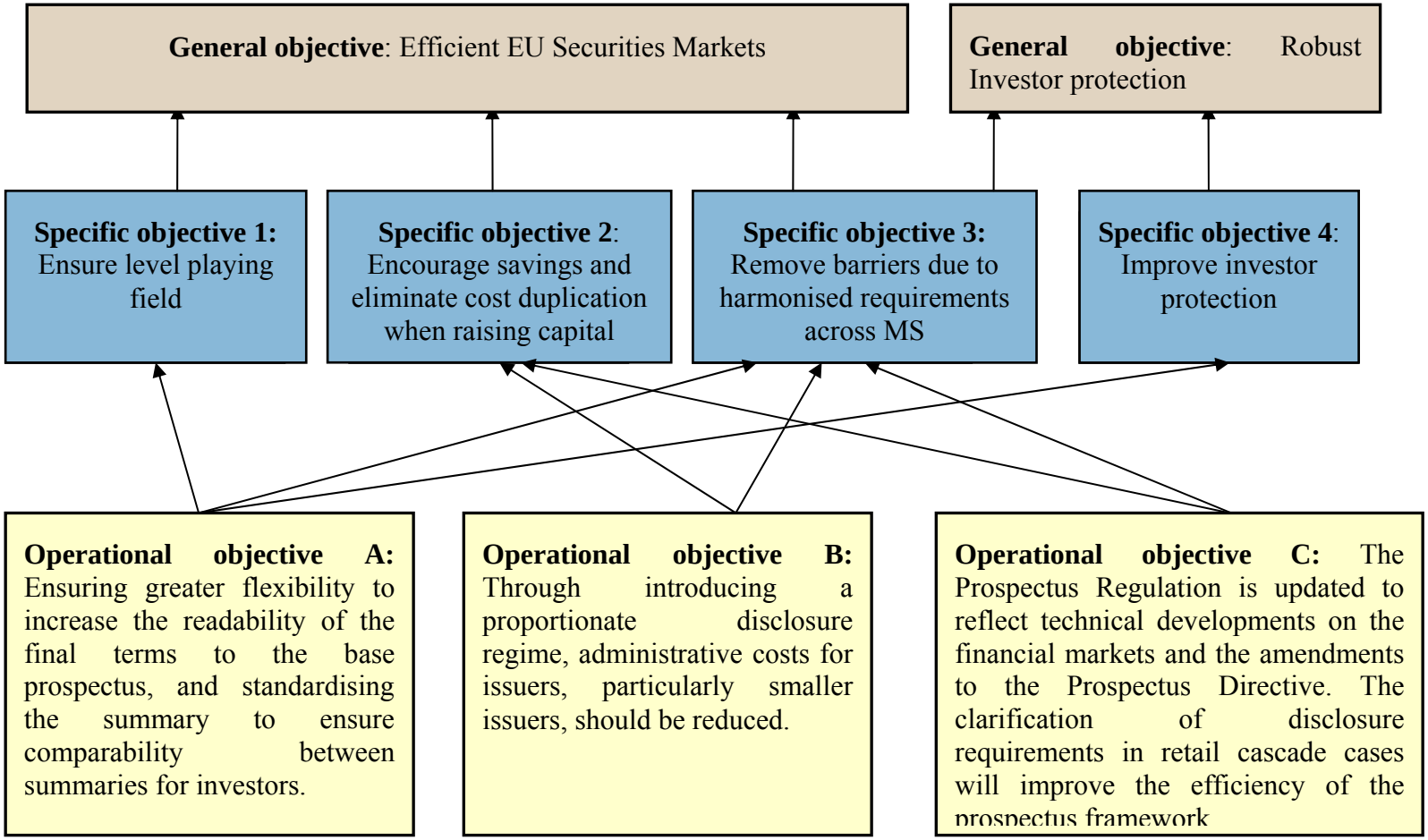
2. Increase of legal clarity in the provisions of the Directive and of the Regulation

The provisions of the Delegated Regulation will enhance legal clarity for investors, issuers and competent authorities (Problem 1) in the framework of the base prospectus and its final terms, filed as separate document, harmonizing the form of the presentation and the content of the final terms, and defining what new information triggers the obligation of an approved supplement. They will also clarify (Problem 4) the format and modalities by which the issuer will consent to the use of its initial prospectus by financial intermediaries in case of retail cascade, and (Problem 5) some unclear provisions of the Regulation.

3. Reduction of administrative burdens

The Delegated Regulation will also enhance the effectiveness of the prospectus regime by implementing (Problem 3) the proportionate disclosure regime for SMEs and Small Caps, rights issues, and (Problem 5) certain offers by credit institutions, and by clarifying some provisions of the Regulation.

[46]See the Impact Assessment accompanying Directive 2010/73/EU, p.20.


General objective: Efficient EU Securities Markets
General objective: Robust Investor protection
Specific objective 1: Ensure level playing field
Specific objective 2: Encourage savings and eliminate cost duplication when raising capital
Specific objective 3: Remove barriers due to harmonised requirements across MS
Specific objective 4: Improve investor protection
Operational objective A: Ensuring greater flexibility to increase the readability of the final terms to the base prospectus, and standardising the summary to ensure comparability between summaries for investors.
Operational objective B: Through introducing a proportionate disclosure regime, administrative costs for issuers, particularly smaller issuers, should be reduced.
Operational objective C: The Prospectus Regulation is updated to reflect technical developments on the financial markets and the amendments to the Prospectus Directive. The clarification of disclosure requirements in retail cascade cases will improve the efficiency of the prospectus framework

4. CONSISTENCY OF OBJECTIVES WITH INITIATIVES IN OTHER AREAS

The envisaged provisions of the Delegated Regulation share the same objectives of and are consistent with other legislative initiatives currently underway, as for the reviews of the Markets in Financial Instruments Directive (MiFID)[47], the Market Abuse Directive (MAD)[48], the Transparency Directive,[49] and the "Packaged Retail Investment Products" (PRIPs) initiave[50]. The **MiFID** review aims at improving transparency and integrity of financial markets for market participants and regulators or at increasing the level of investor protection. For instance, the proposal aims to facilitate better access to capital markets for SMEs and contains a proposal to introduce the creation of a specific label for SME markets. This will provide a quality label for platforms that aim to meet SMEs' needs. The proposed proportionate regime would promote the creation of a network of markets specialised in SMEs. The **Transparency Directive** harmonises the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market. The current review of the Transparency Directive plans to simplify accounting rules for SMEs, potentially saving them up to €1.7 billion per year. The proposals would also reduce burdensome reporting obligations for listed companies, including SMEs, adding further to cost savings. The current **MAD review** contains proposals to extend and improve the disclosure of information to the market regarding instruments admitted to trading on various markets and facilities and reinforce the prevention, detection, investigation and sanctioning of insider trading and market manipulation. The **PRIPs initiative** is also relevant as it is deemed to improve the transparency and comparability of investment products and ensure effective rules always govern the sales of the products.

5. ANALYSIS AND COMPARISON OF POLICY OPTIONS

This section provides a view of the analysis and comparison of policy options in relation to the format and content of the final terms (Problem 1) and to the proportionate disclosure requirements for SMEs and Small Caps (Problem 3.1). To aid clarity and ease comprehension only the most relevant choice between options for each issue has been shown. The analysis and comparison has nonetheless been conducted on the basis of all the relevant objectives.

5.1. Description of the Policy options

5.1.1. Format and content of the final terms to the base prospectus

Policy options to enhance investor protection and legal clarity in the system of the base prospectus and the final terms as a separate document
Option 1 – Baseline – No action at EU level **Option 2** – Categorization of elements to be included in the final terms and no replication of securities note items already determined by the base prospectus

47 See http://ec.europa.eu/internal_market/securities/isd/mifid_en.htm
48 See http://ec.europa.eu/internal_market/securities/abuse/index_en.htm
49 See http://ec.europa.eu/internal_market/securities/transparency/index_en.htm
50 See http://ec.europa.eu/internal_market/finservices-retail/investment_products_en.htm

Option 3 – A principle based approach based on an assessment of the final terms at the time of the specific issue (no categorization of elements to be included in the final terms and possibility to replicate securities note items already determined by the base prospectus)

Option 1 – Baseline – No action at EU level

Before the approval of the amendment to the Prospectus Directive, the sole non-legally binding guidance in relation to the split between information within the base prospectus and final terms was issued by CESR. This lack of clarity and binding requirement made it difficult for competent authorities to ensure proper enforcement of Prospectus Directive rules, leading to a reduction of investor protection across EU financial markets. The Amended Prospectus Directive provides now that final terms shall only contain information that relates to the securities note and shall not be used to supplement the base prospectus. In option 1, the delineation between base prospectus and final terms would not be more clearly stated than the above provisions and this is obviously not sufficient to avoid any discrepancy in the information provided to investors. Accordingly, this is not a viable alternative and the baseline option will simply help clarify the impact of the other options and it is not a valid option in itself. Moreover, the Commission is under the obligation to adopt delegated acts by July 2012.

Option 2 – Categorization of elements to be included in the final terms and no replication of securities note items already determined by the base prospectus.

This approach requires a clear categorization of the information items from the applicable securities notes schedule of the Regulation which indicates whether such items can or cannot be included in the final terms to the base prospectus. Items are classified within three categories (A, B, C)[51]. For instance, for one security to be offered/admitted to trading the following items should appear:

– in the base prospectus:

  A. Legislation under which the securities have been created; the type of the underlying; the restrictions on the free transferability of securities;
  B. Provisions relating to interest payable; amortisation and repayment procedures; method used to relate an underlying with the security;

– in the final terms:

  C. Currency and amount of the issue; nominal interest rate; due date for interest; information about the past performance of the underlying and its volatility.

This will clarify what information needs to be included in the base prospectus at the time of its approval and what information can be subsequently included at the time of the issue in the final terms prepared as a separate document and filed with the competent authorities. This approach will strike a balance between the need to ensure that material information is included in the base prospectus and is vetted by the competent authorities, thereby protecting investors, and the flexibility of the system of the base prospectus which allows issuers with an

[51] The envisaged categories are category A (items under this category have to be included in the base prospectus and no additional information can be added in the final terms), category B (the base prospectus contains all the general principles of such item and placeholders for the relevant details not known at the time of the approval of the base prospectus) and category C (items that can be filled in the final terms).

approved base prospectus to tap the market without undergoing the process of having the final terms of the offer approved by competent authorities. This categorization follows the rationale of the Amended Directive according to which final terms to a base prospectus should contain only information relating to the securities note which is specific to the issue and which can be determined only at the time of the individual issue and that any other new information which is capable of affecting the assessment by investors should be included in an approved supplement to the base prospectus[52]. It follows that items which are already known at the time of the approval and are included in the base prospectus, and any non-applicable information in relation to the individual issue cannot be reproduced in the final terms. This will enhance the readability of the final terms documents and ensure that the vetted base prospectus is presented in an easily analysable and comprehensible form in accordance with Article 5.1 of the Directive. Option 2 is fully in line with the ESMA Technical Advice. Among the stakeholders, the majority of issuers favoured a more flexible approach (option 3) whereas other market actors (national authorities, trading platforms, investors' representatives) welcomed the legal clarity offered by option 2.

In addition, the harmonisation of the content of base prospectuses/final terms benefits competition and investors by allowing effective comparison between all similar securities offered. This will also facilitate offers from third country issuers.

Option 3 – A principle based approach based on an assessment of the final terms at the time of the specific issue

This option requires simple amendments to the Regulation introducing basic principles guiding competent authorities and issuers in the substantive assessment of whether information is specific to the issue and can be determined only at the time of the individual issue. It means that the content of the final terms will simply be ruled by additional principles, mainly that final terms will only contain the information known on the time of the specific issue based on a substantive assessment of whether information is specific to the issue. This would result in level 2 provisions indicating for specific items that they cannot be substantially altered within the final terms. This would maintain a large degree of interpretation for both issuers and competent authorities. For example, in relation to the requirement to set out all possible pay-outs in the base prospectus, only a principle-based clause would be added in the Regulation stating that the method for calculating the amount(s) due under the securities may not be substantially altered in the final terms[53]. This would permit to complete payout formulas, underlying and similar information as well as the relevant additional risk factors by way of non-substantial modifications in the final terms and would avoid having detailed and lengthy base prospectuses. Under this option, replication of securities note items already determined by the base prospectus is not prohibited and there is no issue specific summary but the summary of the base prospectus should only be read together with the final terms.

5.1.2. Proportionate disclosure regime for SMEs and Small Caps

Article 7(2) (e) of the Prospectus Directive requires, when establishing the different models for prospectuses, to take into account the various activities and size of the issuer, in particular for SMEs and companies with reduced market capitalisation (Small Caps). For such

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52 See Recital 17 of Directive 2010/73/EU and Article 5.4 of the Amended Directive.

53 Article 22(4) of the Regulation would for instance be amended by adding that "The method for calculating the amount(s) due under the securities may not be altered substantially in the final terms".

companies the information shall be adapted to their size and, where appropriate, to their shorter track record without prejudice to investor protection[54].

According to Article 2(1) (t) of the Prospectus Directive, Small Caps are companies listed on a regulated market that had an average market capitalisation of less than EUR 100 000 000 on the basis of end-year quotes for the previous three calendar years.

According to Article 2(1) (f) of the Prospectus Directive, "small and medium-sized enterprises" means companies, which, according to their last annual or consolidated accounts, meet at least two of the following three criteria: an average number of employees during the financial year of less than 250, a total balance sheet not exceeding EUR 43 000 000 and an annual net turnover not exceeding EUR 50 000 000.

SMEs and Small Caps often face significant difficulties in obtaining the financing they need in order to grow and innovate. Yet, they contribute for a large part to the EU economic growth and provide the majority of all new jobs in the past years. Tackle these difficulties is one of the objectives of the Single Market Act[55] and Small Business Act for Europe[56]. This is the reason why, the proportionate disclosure regime aims to allow SMEs and Small Caps to access wider sources of capital in the financial markets.

However, the application of the proportionate regime means *de facto* a reduction of the information provided and therefore investors would get less disclosure. This may compromise investor protection, depending on what information items are not disclosed[57]. There is therefore a trade-off between investor protection and administrative costs for SMEs and Small Caps. The current impact assessment explores whether there are possibilities to reduce administrative burden further, and what would be the implications of different options on investor protection. Bearing in mind that the drafting of a prospectus is not required for offers made by private placement (i.e. offers limited to qualified investors/eligible counterparties) or for offers addressed to fewer than 150 natural or legal persons, the definition of proportionate disclosure regime only deals with offers largely distributed to the public, in particular to retail investors. Moreover, as many items of the Regulation include a materiality test, which generally stems from Article 5.1 of the Directive (even before its review), SMEs and Small Caps already have the means, when fulfilling the disclosure requirements of the Regulation, to adapt that information to their size.

In relation to the **content of the proportionate disclosure regime for SMEs and Small Caps**, on the basis of their size, the amount raised and, where appropriate, their shorter track record, ESMA has assessed what disclosure requirements must be considered core to the prospectus regime and therefore cannot be omitted[58]. Additionally, in order to further adapt the existing disclosure requirements to SMEs and Small Caps, some items would be redrafted[59]. Also, historical financial information limitation to the latest 2 (instead of 3)

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54 See Recital 18 of Directive 2010/73/EU.

55 Single Market Act (COM (2011) 206).

56 Review of the Small Business Act for Europe (COM (2011) 78).

57 National competent authorities and different stakeholders (EUMEDION-Corporate Governance Forum, the Hellenic Bank Association, German Banking Industry, the European Banking Federation, the London Stock Exchange, the Institute of Chartered Accountants in England and Wales) agreed in responses to ESMA's consultation paper that it is not prudent to extensively minimize investor information for the sake of costs.

58 See the Advice, p.107.

59 For instance, items 5.2.3, 7.2, 9 and 19 of Annex I of the Regulation.

financial years will significantly reduce the burden of all items where information regarding the period covered by historical financial information is required.

On the basis of the ESMA technical advice, the Commission has made its own assessment of which items could be redrafted in order to reduce burdens for SMEs and Small Caps. The key drivers for such assessment were first to avoid as far as possible the duplication in the prospectus of any information which is available elsewhere than in prospectus and to adjust the level of information to the size of SMEs and Small Caps as requested by the Prospectus Directive. The result of this assessment is the following:

Annexes of the Prospectus Regulation concerned:	Annex I[60] Annex IV[61] Annex IX[62] Annex X[63]
Items omitted:	**Item 8.1**: information regarding any existing or planned material tangible fixed assets, including leased properties, and any major encumbrances thereon **Item 10.1**: information concerning the issuer's capital resources (both short and long term) **Item 10.3**: information on the borrowing requirements and funding structure of the issuer **Item 10.5**: information regarding the anticipated sources of funds needed to fulfil commitments referred to in items 5.2.3. and 8.1 **Item 20.3:** Financial Statements
Items redrafted	**Item 6**: Business overview **Item 9**: Operating and financial review **Item 19**: Related party transaction **Item 20.1**: Historical financial information **Item 20.6**: Interim and other financial information

The current impact assessment will thus assess alternative options on the scope, with the above described contents.

Policy options in relation to the scope of the proportionate regime for SMEs and Small Caps
Option 1 – Baseline – No action at EU level
Option 2 – A proportionate disclosure regime except in the case of Initial Public Offers (IPOs)[64] and initial admissions on regulated markets

60 Annex I – Share Registration Document.

61 Annex IV – Registration Document for debt and derivative securities with a denomination per unit < 50.000 EUR.

62 Annex IX – Registration Document for debt and derivative securities with a denomination per unit ≥ 50.000 EUR.

63 Annex X – Schedule for depositary receipts issued over shares.

64 An IPO is defined as the offering of securities by a company for the first time to the public.

Option 3 – A general proportionate disclosure regime

Option 1 – Baseline – No action at EU level

This is not a viable alternative given the obligation for the Commission to adopt delegated acts by July 2012. The baseline option will simply help clarify the impact of the other options and it is not a valid option in itself.

Option 2 – A proportionate disclosure regime except in the case of IPOs and initial admissions on regulated markets

This option generally applies the proportionate disclosure regime to SMEs and Small Caps. However, it requires a full prospectus in two cases, namely (i) when a company does an IPO and the company's shares are admitted to a regulated market, or (ii) when a company's shares are first admitted to a regulated market. The rationale is that at that stage those companies are unknown to investors but are accessing a trading platform which will provide their securities visibility and liquidity. A proportionate disclosure regime at that stage may cause investors' confusion and lower levels of visibility and credibility for issuers in the lower segment, deterring investors and increasing the cost of capital in the longer term[65]. Any subsequent public offerings by companies listed on a regulated market and public offerings of companies not listed on a regulated market (whether initial public offerings or subsequent public offerings) could instead benefit from a proportionate prospectus because the companies would be either already admitted to the regulated markets, and therefore subject to the disclosure requirements of the Transparency and Market Abuse Directives, or would have less visibility because they will not be admitted to such trading platforms.

Option 3 – A general proportionate disclosure regime

This option generally applies the proportionate prospectus regime to all offerings by SMEs and Small Caps including IPOs on a regulated market and admissions to trading (first admissions to a regulated market).

5.2. Analysis of the envisaged options

The different policy options are discussed against the following objectives:

1. **Investor protection**[66]: the option maintains and, when necessary, enhances the level of investor protection achieved by the Directive.

2. **Clarity and legal certainty**: the option provides the highest possible confidence to stakeholders as of the requirements to comply with.

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65 Various stakeholders (see for instance the responses of the Hellenic Bank Association, German Banking Industry; European Banking Federation, London Stock Exchange or of NYSE Euronext to ESMA's consultation paper) also expressed their support for this policy choice. They expressed their concern that reducing requirements for SMEs within the Regulated Market framework is likely to cause investor confusion and lower levels of visibility and credibility for issuers in the lower segment, deterring investors and increasing the cost of capital in the longer term.

66 "Investor protection" aims at safeguarding and enforcing the rights and claims of a person in his role as an investor. 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 the asymmetry of information and/or lack of experience, professional knowledge.

3. **Reduction of administrative burdens**: the option reduces the administrative burdens for companies in the EU and enhances the efficiency of the disclosure requirements.

5.2.1. Format and content of the final terms to the base prospectus

Option 1 – No action at EU level

As mentioned above Option 1 is not viable due to the co-legislators' will that the Commission adopt a Delegated Regulation in relation to the format and content of final terms. Taking no action at the level of the Union will not only be not in compliance with the Directive but will also maintain the current legal uncertainties, uneven application and enforcement of the prospectus rules and low level of confidence in financial markets and rules of the Union in general.

Option 2 – Categorization of elements to be included in the final terms and no replication of securities note items already determined by the base prospectus

This Option might in part reduce the flexibility of the base prospectus regime but it would prevent any further excess in the use of final terms.

The categorization of items (especially in relation to risk factors, indexes composed by the issuer and pay-out formulas) will provide investor protection and legal clarity to the stakeholders identifying ex ante what key information triggers the obligation of an approved supplement in accordance with Article 16 of the Directive. This will facilitate the scrutiny of base prospectuses (ex ante) and final terms (ex post) and simplify the structure of base prospectuses and final terms[67].

The system will maintain some flexibility because further guidance on the content of the issue specific details[68] should be provided by ESMA either through draft implementing technical standards in accordance with Article 7.4 of the Directive or guidelines and recommendations in accordance with Article 16 of the ESMA Regulation.

Investor protection is reinforced by the "Issue Specific Summary" annexed to the final terms which will provide prospective investors with key information on the securities offered[69]. In accordance with Article 5.2 of the Directive, this will ensure comparability among similar securities by ensuring that equivalent information always appears in the same position in the

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67 In its contribution to ESMA's consultation paper, the London Stock Exchange Group (LSEG) states: "ESMA's approach is helpful as it clearly identifies the information items that can be or cannot be included in the final terms. This clarifies the respective roles and contents of base prospectus and final terms, stating when a supplement is necessary and when it is not. This approach is important also for clearly understanding the scope of the scrutiny by the competent authorities".

68 See in particular in relation to the Category B items, for which the base prospectus should contain all the general principles and only placeholders for the relevant details not known at the time of the approval of the base prospectus. ESMA will also determine a detailed list of "additional information" useful to investors that issuers will be permitted to include in the final terms on a voluntary basis.

69 The Association of Foreign Banks in Germany, the Institute of Chartered Accountants in England and Wales (ICAEW), the Federation of European Securities Exchanges (FESE), the NYSE Euronext are some of the stakeholders that agree with the proposed mechanism of combining the summary with the final terms. According to NYSE Euronext, "the summary gives investors easier access to the important terms of each individual issue". The Association of Foreign Banks in Germany supports the issue specific summary as "beneficial for both issuers and investors".

summaries. This new feature will avoid the established practice to replicate information of the base prospectus in the final terms and therefore reduce the risks of abusive/unapproved supplements. To the benefit of investor protection and legal clarity, base prospectuses will be simpler and more detailed; the final terms will be more structured but will keep part of their flexibility; and retail investors will receive an Issue Specific Summary providing key information[70].

The simplification of base prospectuses and structured final terms will require the redocumentation of many existing offering programmes with significant additional costs for issuers and competent authorities approving them. According to data published by ESMA (ex-CESR) on "Data on Prospectuses Approved and Passported", 4 591 prospectuses were approved in the EU Member States in 2010 (see Footnote 50 of the IA report). These figures do not contain the number of supplements approved and there is no other data available in relation to the number of supplements or final terms.

In addition, the following elements should be taken into account[71]:

- there will be redocumentation costs due to the new categorization but these are one-off costs[72] which will benefit the readability of base prospectuses. One can therefore consider that once the issuers will adapt their practices to the new requirements the costs will decrease[73];

- the increase of the information provided in the base prospectus will be compensated by the decrease of the complexity and the length of the final terms, which occur on a more frequent basis. For instance, the categorization of the items and the enhanced legal clarity in relation to the requirement of a supplement can only have a positive impact on the legal advice costs;

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70 In relation to the Issue Specific Summary annexed to the final terms, NYSE Euronext estimates that the "additional work and associated costs for issuers should be limited given the fact that the summaries are based on the information included in the base prospectus". FESE "believes that cost for issuers should be limited and that easier access to information be made available to investors". Some stakeholders nevertheless mention that this mechanism will imply some costs even if they do not / cannot estimate them (see the contribution from Institute of Chartered Accountants in England and Wales (ICAEW), the Finnish Structured Products Association). Other stakeholders have provided estimations; the figures are nevertheless very divergent with some estimations being around "a couple of hundred Euros per issue" (Association of Foreign Banks in Germany), around 1000 to 2000 Euros per issuance (European Association of Cooperative Banks; Royal Bank of Scotland) whereas others provide figures between 2,000€ and 10,000€ per final terms (Santander UK).

71 In consideration to the cost drivers, the familiarisation with the rules stands for 49% of costs; the legal advice constitutes 23%; and the IT training 13%. Study on the costs of the FSAP, page 84, http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_cost_of_compliance_en.pdf

72 See the contribution from the British Bankers Association stating that the costs of the prospectus are going down once the issuers get accustomed with the regime. In consideration to the cost drivers, the familiarisation with the rules stands for 49% of costs; the legal advice constitutes 23%; and the IT training 13%. Study on the costs of the FSAP, page 84, http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_cost_of_compliance_en.pdf

73 The European Association of Cooperative Banks roughly estimates a 10% increase of additional costs of the proposed measures. Nevertheless, the majority of stakeholders did not provide an estimation of the costs resulting from the proposals or admitted (see Association of Foreign Banks in Germany) that they cannot give a specific cost due to increased number of supplements or lengthy base prospectuses; the International Capital Market Association states that there will be a significant increase in the numbers of documents requiring approval by competent authorities.

– there is no certainty about the substantial increase of the number of the base prospectuses, as issuers will be able to proceed through the approval of a supplement. There will also be additional costs due to the increased number of supplements but to the benefit of investor protection and legal clarity for issuers and competent authorities[74]. Nevertheless, no key supporting information for the corresponding costs was supplied by stakeholders.

Approval of a supplement will mean lower cost implications than for a base prospectus, however a unit cost figure per supplement is not available because its related costs depend on the object and scale of the supplement. For instance, a supplement dealing with updating of the half year financial information is obviously more costly than a single change of the type of the underlying of securities issued under the base prospectus.

For these reasons, we can assume that if there is a cost increase, this will mainly occur in the form of one-off redocumentation costs and will be mitigated by the recurring reduction of legal costs due to enhanced legal clarity. Finally, the use of consolidated final terms for civil liability purposes is particularly relevant in one market which does not represent more than 10% of the prospectuses approved in the EU.

Finally, these alleged negative affects in terms of costs will be mitigated by the fact that the measures shall only apply to prospectuses and base prospectuses which have been approved by a competent authority after the date of entry into force of these delegated acts[75]. This will therefore impact the redocumentation costs for future issuers only.

Option 3 – A principle-based approach based on an assessment of the final terms at the time of the specific issue

This option would still keep the system of the base prospectus and final terms flexible and unstructured. The non categorization of items will facilitate financial innovation because the principles-based approach would permit to complete payout formulas, underlying and similar information as well as the relevant additional risk factors by way of "non-substantial modifications" in the final terms and would avoid having detailed base prospectuses.

Stakeholders argue that without this flexibility the number of "specialized base prospectus" and of supplements would increase resulting in lengthy and costly approval procedures.[76]

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74 The Federation of European Securities Exchanges (FESE) cannot give an estimate in relation to the increase in the number of supplements; the German Banking Industry also admits that "it is difficult to make a reliable estimate". The new approach in relation to final terms might lead to an increase in the number of supplements (as some of the information that is currently part of the final terms might have to be shifted to the supplement). An increase between 5 and 15% is expected according to the Association of Foreign Banks in Germany, Deutscher Derivate Verband (DDV), EUSIPA, Borse Stuttgart.

75 Where a supplement is issued on or after 1 July 2012 in relation to a prospectus or base prospectus approved before that date, the supplement should simply address the Article 16 requirements of the Prospectus Directive existing prior to 1 July 2012 (providing a new factor, material mistake and inaccuracy) rather than needing to provide a re-write of the prospectus to reflect changes introduced by the Amended Prospectus Directive. However, where a registration document has been approved before 1 July 2012 and the prospectus is drawn up on or after that date, the prospectus will have to meet the requirements of the Amending Directive.

76 According to the German Banking Industry, the number of documents (base prospectuses and supplements) needing approval will more than double. But they also admit that it is "difficult to make a reliable estimate".

Stakeholders in favour of this option also argue that the practice of consolidated final terms (final terms integrating part of the approved base prospectus) is in the interest of investor protection because it enables issuers to provide investors with a complete set of the applicable contractual terms and conditions in a single document[77].

However, this option would not eliminate inconsistencies in the use of final terms and would maintain the current level of legal unclarity relating to what information can be included in the final terms at the time of the issue and what information needs to be published only through an approved supplement.

The principles-based approach is already part of the current prospectus regime. But it has proved to be ineffective as shown by the level of inconsistency in the different market practices and despite the CESR FAQ 57[78]. This principle-based guidance issued by CESR was unable to achieve the goal of a harmonized approach for final terms and provided too much flexibility to the detriment of investor protection and legal clarity.

Moreover, the argument that the length of base prospectus, together with its costs, would increase because of the necessity to include in the base prospectus elements that were previously disclosed only in the final terms is all the more irrelevant that the Prospectus Directive requires that final terms should contain only information relating to the securities note which is specific to the issue and which can be determined only at the time of the individual issue. Any other new information which is capable of affecting the assessment by investors should be included in an approved supplement to the base prospectus[79].

This option is not cost-free as issuers would still need to change some of their practices not in compliance with the above mentioned principles and, in the absence of a clear delimitation between the information that can be provided in a base prospectus (and possible supplements), their legal costs would probably remain at the same levels as today.

In the table hereafter, the following signs have been used for assessing the magnitude of impact: "++" strongly positive, "+" positive, "--" strongly negative, "-" negative, "=" marginal/neutral, "?" uncertain, and "n.a." not applicable. These have been combined where relevant.

Table 1 - Summary of the analysis and comparison

	Investor protection	Legal Clarity	Administrative Burdens
Option 1 - Baseline (No Action)	0	0	0
Option 2 – Categorization of elements to be included in the final terms and no	+ +	+ +	- -

77 See the contributions from Deutscher Derivate Verband (DDV), EUSIPA, the International Capital Market Association (ICMA).

78 CESR FAQ on "Prospectuses: common positions agreed by CESR Members", No 57.

79 See Recital 17 of Directive 2010/73/EU and Article 5.4 of the Amended Directive.

replication of securities note items already determined by the base prospectus			
Option 3 – Flexible and Substantive Approach	=	+	-

For reasons of investor protection and legal clarity, and despite possible additional costs for issuers, **Option 2** is the preferred option.

5.2.2. Proportionate disclosure regime for SMEs and Small Caps

Option 1 – No action at EU level

As mentioned above, Option 1 is not viable due to the co-legislators' will that the Commission adopt, without prejudice to investor protection, a Delegated Regulation in relation to a proportionate disclosure regime for SMEs and Small Caps. Taking no action at the level of the Union will not be in compliance with the Amended Directive. Therefore any preferred option must strike the right balance between investor protection and reduction of administrative burdens for SMEs and Small Caps.

Option 2 – A proportionate disclosure regime except in the case of IPOs and initial admissions on regulated markets

This Option meets the objective of maintaining a high level of investor protection in particular for those investing in SMEs and Small Caps which access a regulated market the first time ensuring that the regulatory standards of those trading platforms are well preserved.[80] In any case, the proposed proportionate disclosure regime[81] will have limited impacts on investors given the amount of information which will be omitted from the Delegated Regulation[82] and as such will present some minor benefits to SMEs and Small Caps in terms of reduction of administrative burdens.

Option 2 would require a full prospectus for IPOs and/or initial admission on a regulated market on the grounds that these grant visibility and liquidity to previously unknown issuers, thus justifying a maximum protection of investors. Furthermore, this limit would only concern

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80 FESE is "concerned that a lighter prospectus regime for SMEs will not encourage investors to bring capital to SMEs (…) A lighter prospectus regime for SMEs will inevitably cause investors to perceive SMEs as less attractive given the more limited information being made available". Deutsche Borse thinks that for IPOs, SMEs should always fulfil full prospectuses.

81 The Delegated Regulation takes into account what disclosure requirements must be considered core to the prospectus regime and therefore cannot be omitted. Moreover, as many items of the Regulation already include a materiality test, which generally stems from Article 5.1 of the Directive, SMEs and Small Caps already have the means, when fulfilling the disclosure requirements of the Regulation, to adapt that information to their size. For details on the items deleted or redrafted, see Annex 7.4.

82 The general exemptions introduced by the Amended Directive are of course applicable and are not taken into consideration in this Impact Assessment in terms of reduction of administrative burdens for SMEs and Small Caps. See Annex 7.4.

SMEs as Small Caps are already admitted to trading on a regulated market (please refer to the definition above).

386 IPOs were recorded in 2010 on EU exchange markets (regulated markets and MTFs)[83]. It included IPOs of all sizes and listings by both domestic and international companies. Distinct estimations in relation to the number of prospectuses for offers made by SMEs and respectively by Small Caps are not available. According to other available data:

- more than 25% of IPOs concern non EU companies;
- 40% of the 386 IPOs are made on regulated markets and the remaining part on MTFs.

In light of these figures, option 2 would not provide any incentives for SMEs to proceed with an IPO on a regulated market rather than on MTFs.

Option 3 – A general proportionate disclosure regime

Introducing a general proportionate regime for SMEs and Small Caps might lower investor protection and dilute the regulatory framework of regulated markets. In light of the perceived higher risk profile of such companies they could be disadvantaged because they will not meet the disclosure standards expected by investors on regulated markets[84] [85]. To mitigate the impact on investor protection, the rationale of the calibration of the content of the proportionate disclosure measures was to avoid the duplication in the prospectus of any information which is available elsewhere than in prospectus. In such a case, the prospectus instead of duplicating information already available (operating financial report, financial statements, etc) has to provide where these documents can be found by the investors.

On the other hand, the option 3 is the one which really reduces administrative burdens for SMEs. Having taken into account the items 9 "Operating and financial review" and 20.1

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83 Trends in IPO listings by SMEs in the EU - City of London Economic Development, October 2011 http://www.cityoflondon.gov.uk/NR/rdonlyres/A7A91933-570E-4D8F-8322-E183A57D0CA3/0/BC_RS_Finalpublicationreport_withfrontbackcover.pdf

84 The majority of competent authorities have expressed concern about the impact of a proportionate regime on regulated markets and investor protection. Also, according to NYSE Euronext, "*it is acknowledged that a company listed on a regulated market will incur more costs and regulatory obligations compared to a private company. The advantage, of course, is that the increased visibility and financial discipline resulting from publicly listed status will render the company more attractive to investors, enabling it to finance expansion. If a company remains private, investors will expect to be compensated for the additional perceived risks this implies and often in the form of a higher cost of capital*".

85 Various stakeholders (see for instance the responses of the Hellenic Bank Association, German Banking Industry; European Banking Federation, London Stock Exchange or of NYSE Euronext to ESMA's consultation paper) were against this policy choice. They expressed their concern that reducing requirements for SMEs within the Regulated Market framework is likely to cause investor confusion and lower levels of visibility and credibility for issuers in the lower segment, deterring investors and increasing the cost of capital in the longer term. According to NYSE Euronext, "it is all the more important at the time of the IPO for the SMEs to share complete information as the IPO period is a strong confidence builder with potential investors and analysts". Several stakeholders support the measures contained in the MiFID review; for instance, in the contribution from the London Stock Exchange Group we can read that "a separate regime under MiFID for markets that cater for smaller companies, distinct from the regulated market structure would, if implemented correctly, attract investor interest as investors in smaller companies require a robust regulatory regime that provides appropriate protection over their investments. This increased investor interest and confidence would help reduce the cost of capital for issuers over the longer term". FESE, NASDAQ OMX and other stakeholders also support this rationale.

"Historical financial information" are considered as the most burdensome ones for the SMEs and the Small Caps (for each an estimated cost between 22 500 € and 113 000 €)[86],. According to estimates from several stakeholders, the average costs for SMEs and Small Caps to draw up a prospectus are currently estimated between EUR 100 000 and EUR 300 000. The cost reduction is therefore estimated at least at 20%[87], meaning a reduction of 20.000,00 to 60.000,00 € per prospectus. Moreover, these benefits will apply to 154 additional IPOs (of the 386 IPOs) compared to option 2. This means that the choice of option 3, compared to option 2, would imply additional cost reductions of around 40%, representing between 10 and 60 M € per year on a comparable trend.

This regime is supported by SMEs and Small Caps (Quoted Companies Alliance, Middlenext, MEDEF, Quantel, Europeanissuers, Hologram. Industries).

Table 2 - Summary of the analysis and comparison

	Investor protection	**Legal Clarity**	**Administrative Burdens**
Option 1 - Baseline (No action)	0	0	0
Option 2 – Proportionate Disclosure Regime except for IPOs and 1st admissions on regulated markets	-	=	+
Option 3 – General Proportionate Disclosure Regime	- -	=	+ +

Option 3 is the preferred option as it makes a real difference in favour of more easily access to the market by the SMEs and Small Caps (by reducing administrative burdens in accordance with the objective of the Prospectus Directive) without significantly harming the adequate level of investor protection.

5.3. Summary of retained options

Issue	**Retained option**	**Instrument**
Final terms	**Option 2** – Categorization of elements to be included in the final terms and no replication of securities note items already determined by the base	Commission Delegated Regulation amending Regulation 809/2004

[86] According to the final response to ESMA's technical advice from Quoted Companies Alliance (English representative organisation for small and mid cap quoted companies below £ 500 M).

[87] The level 1 impact assessment referred to a 10 to 20% cost reduction, whereas in some of the contributions received from some stakeholders to ESMA's consultation, the reduction was estimated between 20 and 30%. Therefore, the Commission chose the intermediate value of 20%.

	prospectus	
Proportionate disclosure regime for SMEs and Small Caps	**Option 3** – A General Proportionate Disclosure Regime for SMEs and Small Caps	Commission Delegated Regulation amending Regulation 809/2004

5.4. The overall impact of the proposed measures

This section provides an overall analysis of the impact of the package of preferred options for a Delegated Regulation, including the potential impact on different stakeholders.

5.4.1. Cumulative effects of the entire package

The key cost drivers of the solutions retained in the provisions of the Delegated Regulation have been identified in the Prior Impact Assessment accompanying the Review of the Directive. There is however one area where the provisions of the Delegated Regulation are likely to have additional impacts in terms of costs for issuers. These are the provisions relating to the format and content of the final terms[88]. The remaining provisions of the Delegated Regulation will also have impacts for specific populations but cost impacts in these areas are mostly originating from requirements of the Prospectus Directive.

5.4.2. Specific Impacts

5.4.2.1. Impacts on specific stakeholders

A proportionate disclosure regime would have a positive impact for those **SMEs and Small Caps** 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, SMEs will benefit from the other proportionate measures included in the Amended Prospectus Directive[89] or those envisaged in case of rights issues. The rest of the changes, in particular the policy choice in relation to final terms, are not likely to have a direct or major impact on SMEs.

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[88] According to the European Association of Cooperative Banks roughly estimates a 10% increase of additional costs of the proposed measures concerning the final terms. Nevertheless, it has to be kept in mind as stated above that most of the costs implied by the Prospectus framework are one-off costs and that the changes will improve the readability of base prospectuses. One could also agree that once the issuers will adapt their practices to the new requirements the costs will decrease (see on this point the contribution from the British Bankers Association). For instance, the categorization of the items and the enhanced legal clarity in relation to the requirement of a supplement can only have a positive impact on the legal advice costs. There might also be additional costs due to an increase in the number of supplements but to the benefit of investor protection and legal clarity for issuers and competent authorities. Finally, as stated above, the proposed measures will only apply to prospectuses and base prospectuses which have been approved by a competent authority after the date of entry into force of the proposed Delegated Regulation.

[89] The Prospectus Directive already contains provisions aimed at facilitating access to financial markets for SMEs and Small Caps:
- the threshold of 2.5 MEUR was raised and thus, offers of securities of a total denomination of 5 MEUR, calculated over a period of 12 months, are no longer within the scope of the directive;
- offers of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors are exempted of the obligation to publish a prospectus;
- the Prospectus Directive allows the incorporation of documents by reference when these documents have been previously filed, in accordance with the Transparency Directive, or approved by the Competent Authority.

Easier access to funding will enhance the development of small entities and will promote the emergence of new local and regional actors competing in the financial markets.

In relation to the proportionate disclosure regime, **companies raising capital** will find it more attractive and easier to raise capital via rights issues as a consequence of the reduction of the cost of producing a rights prospectus. Small quoted companies and 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.

Concerning the proportionate prospectus regime, **investors** will benefit from a wider range of investment opportunities. Investors would also receive a tailored prospectus in case they want to invest in small quoted companies or offers made by small credit institutions.

Overall, improving **investor protection** measures in the Prospectus framework is a clear goal of the Prospectus Directive package of changes. The notable elements that are expected to contribute to this are a harmonised format for the final terms to the base prospectus, the format for the content of the summary ensuring greater clarity and comparability, and a proportionate prospectus regime.

A standardised summary will enhance investor protection and consumer confidence. Moreover, clearer and more qualitative information means investors will be able to compare securities with other products and make more efficient investment decisions. They will also benefit from the clarification of key concepts.

5.4.2.2. Impact on supervisors

Supervisors will benefit from the clarification of certain key concepts[90] facilitating their tasks of supervision and enforcement.

5.4.2.3. Impacts on the environment, employment and third countries

It is not expected that the envisaged measures are going to have any direct impact on the natural environment, employment or on third countries.

5.4.2.4. Social impact

The package of measures as a whole may impact on the social domain indirectly. For instance, more efficient capital markets can be expected to have wider social significance by improving liquidity for issuers or by ensuring savings are allocated effectively. This will contribute to the general growth of companies and thus indirectly impact the creation of jobs.

5.4.2.5. Administrative burden

The Prospectus Directive has been focused on increasing investor protection and improving market efficiency. The impact on administrative burdens has also been of central importance, with the goal of removing unnecessary burdens.

The package delivers a number of mechanisms (as was outlined in the prior impact assessment) that can lead to reduced burdens. Notably, greater legal certainty and clarity,

[90] For instance, due to the clear division of the information that can be included in the final terms and the information that must be disclosed in the base prospectus and which is vetted by them.

regarding the final terms and summary, and harmonisation across different Member States are expected to lead to reduced compliance costs, particularly for issuers operating on a cross-border basis. Furthermore, according to the Prior Impact Assessment and object to the above observations[91], the reduction of disclosure requirements for SMEs and Small Caps was estimated at approximately € 172.8 million on an annual basis[92]. Nevertheless, this figure included companies outside the SMEs and Small Caps definitions.

According to estimates from several stakeholders, the average costs for SMEs and Small Caps to draw up a prospectus are currently estimated between EUR 100 000 and EUR 300 000. With respect to the content of the proportionate disclosure regime, the cost reduction is estimated at around 20%[93], meaning a reduction of 20.000,00 to 60.000,00 € per prospectus. With respect to the scope, under option 3, the benefits of the proportionate disclosure regime for SMEs will apply to 154 additional IPOs (of the 386 IPOs) compared to option 2. This means that the choice of option 3, compared to option 2, would imply additional cost reductions of around 40%.

The transposition and the enforcement process is also expected to improve due to the increased legal certainty (for instance in relation to the clarifications concerning the information that can be included in the final terms, or the content and format of the summary) and of course due to the nature of the instrument itself, a regulation.

5.4.2.6. Impacts on EU budget

There is expected to be no impact on EU budget.

6. MONITORING AND EVALUATION

The provisions of the amended Prospectus Directive foresee a formal evaluation of the changes aimed at measuring the number of impacts of the Amended Prospectus Directive that are extended as a result of additional requirements in the Delegated Regulation. Such an evaluation could therefore focus on a more comprehensive quantification of the effects of the Directive amendments. The evaluation could take place five years[94] after the entry into force of the Prospectus Directive as time will be needed for number of the new measures introduced to be taken up by the relevant market players[95]. The assessment will be carried out along the following criteria: investor protection, market efficiency, legal certainty, administrative burdens.

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91 The figures are potentially overestimating the cost reduction since IPOs and initial admissions to trading on a regulated market are not covered, for investor protection reasons, by the proportionate disclosure regime.

92 Impact Assessment accompanying the amended Prospectus Directive from September 2009: http://ec.europa.eu/internal_market/securities/docs/prospectus/proposal_240909/impact_assessment_en.pdf

93 The level 1 impact assessment referred to a 10 to 20% cost reduction, whereas in some of the contributions received from some stakeholders to ESMA's consultation, the reduction was estimated between 20 and 30%. Therefore, the Commission chose the intermediate value of 20%.

94 Article 31 of the Amended Directive states that five years after the entry into force of the Directive, the Commission shall make an assessment of the application of the Directive.

95 It should be kept in mind that it is often difficult to isolate the effect of the prospectus regulatory framework from other influences. There is evidence – see the CSES Study on the impact of the Prospectus regime, Annex 7.5- that the Prospectus Directive has facilitated access to a broader pool of capital, but it is only one of a number of factors which affect the markets.

The Directive 2010/78/EU of 24 November 2010[96] introduces amendments to the articles 13, 14 and 18 of the Prospectus Directive 2003/71/EC. According to these amendments, ESMA will be able to provide statistical data on the number of prospectuses and supplements.

Moreover:

– article 13(5) of the Prospectus Directive confers power to the Commission to adopt implementing technical standards developed by ESMA to establish standard forms, templates and procedures for the notifications allowing the establishment of this database;

– article 14(8) of the Prospectus Directive empowers the Commission to adopt by means of delegated acts measures to ensure the publication of approved prospectuses through ESMA's website.

Within this framework, the Commission will have the opportunity to ensure availability of data needed for the assessment of the contemplated changes of the Regulation (and especially Final Terms and proportionate disclosure prospectuses which are not specifically addressed by the Directive 2010/78/EU). Thus, data will be available in relation to the number of supplements and/or base prospectuses and the number of proportionate prospectuses issued.

[96] The entry into force of the Directive 2010/78/EU is 31 December 2011.

7. ANNEXES

7.1. Amendments by Directive 2010/73/EU to the Prospectus Directive

The Prospectus Directive lays down the rules governing the prospectus that has to be made available to the public in case a public offer or admission to trading of transferable securities in a regulated market takes place in the Union. The prospectus contains information about the offer, the issuer and the securities, and it 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.

The Directive was approved in December 2003 and applies since July 2005. One of its major achievements is the introduction of a "passport mechanism": the prospectus approved by the competent authority of one Member State is valid for public offers and admission to trading of securities in the entire Union. This is a major achievement in terms of integration of the securities markets in the EU. Two major principles inspire the Directive: investor protection and market efficiency.

The review of the Directive was part of the Simplification Exercise (Stoiber Group[97]) and required by Article 31 of the Directive. It had three objectives: (i) enhance investor protection, (ii) increase efficiency in the prospectus regime, and (ii) reduce administrative burdens for companies when raising capital in the European securities markets. The main amendments are:

- alignment of the definitions of qualified investors in Prospectus Directive and of professional clients in MiFID;

- clarification of the exemptions from the obligation to publish a prospectus in the cases of "retail cascade" offers and of employees share schemes;

- reduction of disclosure requirements for SMEs and Small Caps, small credit institutions, rights issues and government guarantee schemes;

- repeal of disclosure requirements overlapping with the Transparency Directive;

- improvement of the format and content of the summary of the prospectus; and

- other technical improvements for a more efficient functioning of the prospectus regime.

7.2. Delegated measures considered but not addressed by the impact assessment

Considering that the following measures are the outflow of the Amended Directive and that a detailed impact assessment was carried out already at that stage, the impact of these possible delegated acts will not be assessed as they do not create any additional or major costs when compared with the impact of the requirements introduced by the Amended Prospectus

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97 In January 2007, the Commission launched the Action Program for the Reduction of Administrative Burdens in the European Union to measure administrative costs arising from legislation in the EU and reduce administrative burdens by 25% by 2012. The Prospectus Directive is part of this simplification exercise.

Directive: the format and the content of the summary of the prospectus; the proportionate disclosure regime for rights issues and credit institutions; the consent to use a prospectus in a retail cascade and some purely technical adjustments of the existing implementing Regulation.

In addition, these measures are in line with the general objective of increased investor protection and legal clarity.

7.2.1. Problem 2. FORMAT OF THE SUMMARY OF THE PROSPECTUS AND DETAILED CONTENT AND SPECIFIC FORM OF THE KEY INFORMATION TO BE INCLUDED IN THE SUMMARY

The Amended Directive states that the summary of the prospectus is a key source of information for retail investors and should be short, simple, clear and easy for targeted investors to understand. The summary should focus on key information that investors need in order to be able to decide which offers and admissions of securities to consider further. Such key information[98] should convey the essential characteristics of, and risks associated with, the issuer, any guarantor, and the securities offered or admitted to trading on a regulated market, the general terms of the offer, including estimated expenses charged to the investor by the issuer or the offeror, and the total estimated expenses. It should also inform the investor of any rights attaching to the securities and of the risks associated with an investment in the relevant security.

The Amended Prospectus Directive has additionally required the format of the summary be determined in a way that allows comparison of the summaries of similar products by ensuring that equivalent information always appears in the same position in the summary.

Justification: The envisaged Delegated Regulation cover issues which the co-legislators have considered essential for ensuring effective investor protection and an efficient disclosure regime. Moreover they draw very strongly on the impact assessment for the Amended Prospectus Directive. The obligation for the Commission to adopt delegated acts under Article 5(5) of the Amended Directive practically means a drawing up of a series of essential information that will be necessary in order for investors to be properly informed about the securities under their consideration.

The reasoning for leaving this issue out of the scope of further impact analysis is that the provisions of the Amended Prospectus Directive are setting out the key contours of these more detailed disclosures and thus the greatest impact is assumed at this level. The envisaged delegated measures relate in practice to the degrees of detail of the key requirements and objectives already enshrined at the Amended Directive and which imply finding the appropriate level of standardisation of the content of the various information categories including the format in which the summary information should be provided to investors.

Moreover, these measures are not expected to create significant costs for firms or supervisors and will only contribute to enforce investor protection. Also, a majority of stakeholders

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98 Article 2(1)(s) of the Prospectus Directive.

having replied to ESMA's consultation paper supported ESMA's approach in relation to summaries[99].

Most of the stakeholders did not respond to the question of the costs resulting from the proposed approach in relation to the summary of the prospectus; others simply stated that a cost estimation was difficult to make[100] or simply asserted that the proposal might lead to additional costs[101].

The mandatory key information to be included in the summary are set out in the Tables of the Advice[102]. A summary must be made up of the five Sections in the Tables (A, B, C, D & E). These Sections must appear in a summary in that order. No other Section may be added.

The mandatory key information to be included in the summary might need to be adapted to ensure consistency with future standards adopted within Packaged Retail Investment Products' (PRIPs) initiative.

Within each of the Sections the items should be disclosed in the order in which they appear in the Tables' Sections.

Summaries should be read as an introduction to the prospectus. The purpose of the summary is to present the key information that investors need in order to be able to decide which offers and admissions of securities to consider further. Summaries should be drafted in plain language, presenting the information in an easily accessible way and ensuring that readers can understand the key information immediately.

Normally summaries should not exceed 7% of the length of a prospectus or 15 pages, whichever is the longer[103].

7.2.2. Problem 3. THE PROPORTIONATE DISCLOSURE REGIME

Problem 3.2. PREEMPTIVE OFFERS OF EQUITY SECURITIES (RIGHTS ISSUES)

In relation to preemptive offers of equity securities, the Commission invited ESMA[104] to identify items which could possibly be considered redundant considering that shares of the same class are already admitted to trading on a regulated market or a multilateral trading

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99 The Institute of Chartered Accountants in England and Wales Chartered Accountants (ICAEW) supports the idea to structure the summary to mirror the prospectus and considers that enough flexibility was provided to issuers in drafting summaries. Middlenext (independent French association representing listed SMEs and midcaps) agrees with the modular approach of the summary which combines the advantages of comparability and flexibility. London Stock Exchange Group (LSEG) supports the principle of greater comparability between prospectus summaries and therefore welcomes the effort to facilitate comparability of one prospectus summary to the next.

100 See the contributions from the Federation of European Securities Exchanges (FESE, which represents 46 exchanges in equities, bonds, derivatives and commodities), the Finnish Structured Products Association.

101 See the contributions from the Deutsches Aktieninstitut (DAI - the association of German exchange-listed stock corporations and other companies and institutions which are engaged in the capital markets development), International Capital Market Association (ICMA), the Association of Corporate Treasurers.

102 See the Advice, page 70.

103 See page 67 of the Advice.

104 See Section 3.3 of the Mandate sent to ESMA, Annex 7.1 of the present impact assessment.

facility (subject to appropriate disclosure requirements and rules on market abuse) and therefore a certain amount of information is already available to the investors and the financial markets.

Problem 3.3. OFFERS BY CREDIT INSTITUTIONS

In relation to issues by credit institutions issuing non-equity securities referred to in Article 1(2)(j) of the Prospectus Directive which decided to opt into the regime of the Prospectus Directive, the Commission had to reflect on what information could be omitted since these issuers are authorized and regulated to operate in the financial markets and that a proper balance should be sought so that the disclosure requirements are not excessively burdensome compared to the amount raised (EUR 75 000 000).

Justification: The Amended Prospectus Directive grants the Commission the power to adopt delegated acts in relation with these two issues (3.2 and 3.3). The envisaged delegated acts practically translate the power to decide the degree of specification of what the proportionate disclosures should be/contain. This specification[105] would in particular facilitate the access to capital in case of rights issues and offers by credit institutions issuing non-equity securities referred to in Article 1(2)(j) of the Prospectus Directive and harmonise the way the proportionate disclosure regime applies.

The reasoning for leaving these two issues out of the scope of the analysis is that the impact of the delegated measures is marginal compared to the impact of the Amended Directive changes, merely giving consistency to requirements established under the Amended Directive. The Delegated Regulation will only crystallise the material costs and benefits of the Amended Prospectus Directive. These measures are deemed to strike a balance between the need to ensure investor protection and the amount of information already disclosed to the markets and the size and specificities of the issues[106].

7.2.3. Problem 4. CONSENT TO USE THE PROSPECTUS IN A RETAIL CASCADE

A retail cascade typically occurs when securities are sold to investors, other than qualified investors, by intermediaries and not directly by the issuer. The Amended Directive established that a valid prospectus, drawn up by the issuer or the person responsible for drawing up the prospectus and available to the public at the time of the final placement of securities through financial intermediaries or in any subsequent resale of securities, provides sufficient information for investors to make informed investment decisions. Therefore, financial intermediaries placing or subsequently reselling the securities should be entitled to rely upon the initial prospectus published by the issuer or the person responsible for drawing up the prospectus as long as this is valid and duly supplemented and the issuer or the person responsible for drawing up the prospectus consents to its use.

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105 The envisaged delegated measures identify and select the disclosure requirements, as currently specified under the Prospectus Regulation 809/2004, which are necessary to these types of offers.

106 Most stakeholders having replied to ESMA's consultation paper expressed their support for the proposed measures. The Federation of European Securities Exchanges (FESE) thus stated the "omissions for a proportionate disclosure regime for rights issues and credit institution appear satisfactory". London Stock Exchange Group (LSEG): "ESMA's approach provides investor clarity, reduces complexity and risk of investor confusion". International Bar Association (IBA) welcomes "ESMA's advocacy of a broad interpretation of the term rights issue". Deutsche Borse, NYSE Euronext also generally support ESMA's approach.

The Amended Directive also states that the issuer or the person responsible for drawing up the prospectus may attach conditions to his or her consent. The consent, including any conditions attached thereto, should be given in a written agreement between the parties involved enabling assessment by relevant parties of whether the resale or final placement of securities complies with the agreement. Once the issuer or person responsible for drawing up the initial prospectus has consented, he is liable for the information stated therein and in case of a base prospectus, for providing and filing final terms and no other prospectus should be required. However, in case the issuer or the person responsible for drawing up such initial prospectus does not consent to its use, the financial intermediary should be required to publish a new prospectus. In that case, the financial intermediary should be liable for the information in the prospectus, including all information incorporated by reference and, in case of a base prospectus, final terms.

It is evident from the content of these duties that an appropriate level of disclosure in relation to the consent must be established. For this reason, clarifications are required in order to ensure the necessary flow of information between the issuer, the financial intermediary and final investors. The Delegated Regulation will clarify the format and modalities according to which the consent, including the conditions attached thereto, to use the initial prospectus by financial intermediaries placing or subsequently reselling the securities should be disclosed to the relevant parties.

Justification: Envisaged delegated measures are indispensable to the implementation and the proper functioning of the Amended Prospectus Directive exemption to publish a prospectus in case of retail cascade. No other alternative was possible. Moreover, the impact assessment for the Amended Directive already took notice of the necessity to provide further clarification in relation to the way the disclosure requirements apply to the multiple sales by intermediaries and the way the requirement to produce and update a prospectus (and the attached liability) applies in retail cascade cases.

Again, the same line of argumentation is relevant here as well as in the previous cases. The envisaged delegated acts practically mean a power to investigate what would be the appropriate degree of detail for the content of the disclosures that were already required by the Amended Directive provisions. The impact of the possible specific elaborations on the modalities to disclose the consent/agreement appears to be marginal as the major impact of the fact that such consent and agreement shall be in place is due to the Amended Directive.

7.2.4. Problem 5. REVIEW / TECHNICAL ADJUSTMENT OF SOME PROVISIONS OF THE PROSPECTUS REGULATION

These measures are not included within the body of the impact assessment as they are purely technical adjustments and clarifications to a number of requirements of the Prospectus Regulation. Clarification is being brought in relation to the information on taxes on income from securities withheld at source (Items 4.11 of Annex III, 4.14 of Annex V, 27.11 and 28.11 of Annex X, and 4.1.14 of Annex XII), to the information relating to an underlying index (Item 4.2.2 of Annex XII), to audit reports accompanying profits forecasts or estimates and to audited historical financial information (Items 20.1 of Annexes I and XI). These adjustments would provide conditions for enhanced legal clarity and so reduce opportunities for regulatory arbitrage between Member States.

Justification: The foreseen adjustments are necessary in order to take into consideration the technical developments on the financial markets in the Union, the amendments to the

Prospectus Directive and the objectives of increasing legal clarity and efficiency in the prospectus regime.

7.3. Proportionate disclosure regime for SMEs and Small Caps

Article 7.2(e) of the Amended Directive introduces the principle that, without prejudice to investor protection, a proportionate disclosure regime should apply to SMEs and Small Caps. The co-legislators empowered the Commission to possibly adopt a Delegated Regulation in order to adapt the disclosure requirements to the size and nature of these issuers and to the amount of information already disclosed to the markets but without any prejudice to investor protection[107].

In its Advice, ESMA and the majority of competent authorities were not in favour of a full proportionate disclosure regime for SMEs and Small Caps raising their concern about the negative impact such a regime could have on the regulatory framework of regulated markets and investor protection.[108] Therefore the challenge was to strike the right balance between the objectives of reduction of administrative burdens for those issuers and investor protection.

Additionally, it has to be kept in mind that the Amended Directive already contains provisions aimed at facilitating access to financial markets for SMEs and Small Caps:

- the threshold of 2.5 MEUR was raised and thus, offers of securities of a total denomination of 5 MEUR, calculated over a period of 12 months, are no longer within the scope of the Directive (and therefore do not require a prospectus);
- offers of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors are now exempted of the obligation to publish a prospectus;
- the incorporation of documents by reference is allowed when these documents have been previously filed, in accordance with the Transparency Directive, or approved by the Competent Authority. This can significantly alleviate the size of the prospectuses as regards particularly historical financial information.

Moreover, Small Caps and SMEs listed on a regulated market or an MTF, with equivalent disclosure requirements and market abuse rules, will benefit from the proportionate regime for rights issues.

Finally, it should also be reminded that the current review of the MiFID aims to facilitate better access to capital markets for SMEs and contains a proposal to introduce the creation of a specific label for SME markets. This will provide a quality label for platforms that aim to meet SMEs' needs. The proposed proportionate regime would promote the creation of a network of markets specialised in SMEs.

7.4. External studies

Centre for Strategy and Evaluation Services - Study on the Impact of the Prospectus Regime on EU Financial Markets[109]

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107 See Recital (18) of the Amended Directive. The objective is to "adequately take account of the size of the issuers, without prejudice to investor protection".

108 See the Advice, p. 106.

109 http://ec.europa.eu/internal_market/securities/docs/prospectus/cses_report_en.pdf

The study suggests that the passporting system constitutes a significant improvement over the previous system which relied on mutual recognition. Within the CSES Study on the Impact of the Prospectus Regime on EU Financial Markets, the survey respondents estimated the average cost of an equity prospectus to be in excess of €900,000 (with the bulk of this expended on legal and accounting-related costs). The average costs of the other prospectus types were substantially less. This cost is typically borne by the issuer.

Although the majority of respondents who expressed an opinion believed that the cost of issuing a prospectus had increased, it was also found that the cost increase in prospectus preparation was due to the general evolution of the market and the de facto adoption of US market standards before the Prospectus Directive came into force.

The study was suggesting 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.

Evaluation of the economic impact of the FSAP and Study on the costs compliance with the selected FSAP measures[110]

In the framework of the economic evaluation of the Financial Services Action Plan (FSAP) the European Commission published in 2009 two studies: a study on the general economic impact of the FSAP and –complementing the general assessment – a study on the cost of compliance with the FSAP measures. The study on the cost impact of compliance with financial services regulation focused upon six directives, among which the Prospectus Directive. According to the Study, the Prospectus Directive was not identified as a significant source of costs beyond sufficient familiarisation with the Directive in order to assess the extent (or not) of its applicability.

This Study is broadly in line with CSES results, namely that the Prospectus Directive has not in itself typically generated significant incremental costs in order to achieve compliance.

110 http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_cost_of_compliance_en.pdf