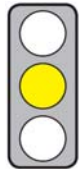


MAIN ISSUES

Objective of the Directive: The Proposal aims to increase the legal certainty when issuing securities and, at the same time, to reduce costs. Simplifying the provisions should boost EU competitiveness.

Parties affected: All issuers of securities, investors.



Pros: Several of the proposed changes do actually increase legal certainty and lower the costs for issuing securities.

Cons: (1) It is not possible to include all "relevant" aspects of highly complex financial products in one prospectus summary.

(2) Issuers should not be held liable for decisions taken by investors on the basis of prospectus' summaries only.

(3) Simplifications for companies with a low stock exchange value distort competition.

CONTENT

Title

Proposal [COM \(2009\) 491](#) of 23 September 2009 for a **Directive** of the European Parliament and of the Council **amending Directives 2003/71/EC on the prospectus** to be published when securities are offered to the public or admitted to trading, and **the Directive 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.

Brief Summary

The articles quoted refer to the Prospectus Directive to be amended (2003/71/EC) unless otherwise stated herein.

► Context

The Prospectus Directive stipulates the framework conditions for the offer to the public and the listing of securities (stocks, bonds, etc.) in the EU. Amongst other things it provides for comprehensive disclosure and information requirements for issuers which have to publish a "prospectus".

► Scope of the Directive

– The Directive clarifies that wherever its rules refer to any "total consideration of offers" these are based on "Community-wide" considerations and not on a "country-by-country basis". This is particularly important for the following securities offers which are excluded from the Directive:

– securities whose "total consideration of offers" is less than € 2.5 million and

– certain non-stock securities, issued by banks ("non-equity securities") with a "total consideration of offers" of less than € 50 million (amended Art. 1 (2) lit. h and lit. j)

– In order to take account of "technical developments" the Commission may adopt implementing measures to adjust these limits (new Art. 1 (4)).

► New exemptions from the requirement to publish a prospectus

– For securities which are placed or sold to private investors by intermediaries and not directly by the issuer ("retail cascades"), the intermediary does not have to publish a prospectus if a valid prospectus by the issuer exists and if the issuer accepts its use by the intermediary. (amended Art. 3 (2))

– Employees shares schemes are not subject to any prospectus requirements (amended Art. 4 (1) lit. e).

► New provisions regarding the prospectus

– The Commission must increasingly adapt its detailed rules on the minimum requirements of the prospectus to the "size and track record" of the issuer. This applies, in particular, to:

– companies with a low stock exchange value (below € 500 million), small and medium-sized enterprises (which comply with at least two of the following three criteria: less than 250 employees, balance sheet total below € 43 million; annual net turnover below € 50 million) and credit institutions issuing non-equity-securities (amended Art. 7 (2) lit. e),

– capital increases of listed stock companies (rights issues) whose disclosure obligations should be "proportionate" (new Art. 7 (2) lit. g).

– If securities are guaranteed by a Member State, detailed information on the guarantor is not required (new Art. 8 (3a)).

– The prospectus, base prospectus (in which offer conditions are not yet fully known) and registration document (containing information on the issuer) are valid for 24 months, provided they are kept up-to-date (amended Art. 9 (1), (2) and (4)).

–The issuer’s obligation to keep the prospectus up-to-date by properly “supplementing” it, ceases upon the final closing of the offer to the public or at the point when trading begins, depending on which happens first (amended Art. 16 (1)).

–If a supplement to the prospectus is published, investors may withdraw their previous acceptances within two days of publication. The offeror may extend this term on a voluntary basis (Art. 16 (2)).

► **New provisions for summaries of prospectus: content and liability**

–The mandatory summary of the prospectus must contain all “key information”. They are to enable investors to take “informed investment decisions” and to compare the security with other investment products (amended Art. 5 (2)).

–If a summary does not contain all key information, the issuer, offeror, guarantor or the person applying for the trading admission is held liable (amended Art. 6 (2), (2)).

► **Miscellaneous**

–The existing obligation for issuers, whose securities are admitted to trading on a regulated market, to annually submit a document containing all information published in the previous year is no longer applicable (deleted Art. 10).

–When offering cross-border securities, the competent authority of the home Member State must notify the competent authorities of the host Member State of the existence of an approved prospectus. Notice of such confirmation must, at the same time, be given to the issuer concerned. (amended Art. 18 (1))

–In future, a “qualified investor” (for whom according to the directive a prospectus need not be drawn up) is someone who is a “professional client” or “eligible counter party” according to the MiFID Directive ((2004/39/EC) (amended Art. 2 (1) lit. e).

–The issuers of non-equity securities are free to choose in which Member State the debt is to be admitted to trading on a regulated market (“home Member State”) (amended Art. 2 (1) lit. m, nr. ii).

–Member States must apply the amendments to the Prospectus Directive at the latest one year after coming into effect (Art. 3).

Changes Compared to the Status Quo

► To date, it is not clear whether the “total consideration of offers” of a security is computed on a national or community-wide basis. In future, the community-wide total will apply. This is particularly relevant for the exemptions from the Directive.

► To date, the Commission cannot change the scope of the directive. In future, it will be able to do so by means of implementing measures.

► To date, there are no clear rules with regard to whether or not prospectus must be drawn up for “retail cascades”. In future, intermediaries may use existing prospectuses if their publishers allow so.

► To date, prospectus have had to be drawn up for employees shares schemes if the company concerned was not listed in the EU. In future, this prospectus obligation will cease.

► To date, issuers whose securities were admitted for trading on a regulated market have had to submit at least once yearly a document which – pursuant to the Prospectus Directive (2003/71/EC) and to the Transparency Directive (2004/109/EC) – had to contain or refer to all information that had been published within the preceding 12 months. This duplication will be dispensed with in future, whereby the obligation to prepare “annual financial reports” following from the Transparency Directive remains in effect.

► To date, it has been unclear whether an issuer must revise a prospectus after the offering period had already expired but the trading had not yet started. This will no longer be necessary in future.

► To date, following supplements to the prospectus, investors have been able to withdraw their offers for a period of at least two working days, depending on the Member State. In future, a harmonised EU right of withdrawal of two working days will come into force, unless issuers extend this term voluntarily.

► To date, the prospectus, base prospectus and registration documents have been valid for a period of 12 months; this will be extended to 24 months in future.

► To date, summaries of prospectus did not have to be based on “key information” enabling “informed investment decisions”; this will change in future. To date, liability applied only to mistakes in summaries and not – as will be the case in the future – for the missing of “key information”.

► To date, cross-border trading issuers were not informed if the competent authority of their home Member States confirmed that an admitted prospectus existed towards the competent authorities of a host Member State. This will change in future.

► To date, a difference has been made between “qualified investors” (Prospectus Directive) and “professional clients” (MiFID Directive). In future only the concept of the “professional client” will be used.

► To date, when issuing non-equity securities with a denomination of less than € 1,000 the seat of the issuer must be the “home Member State”. In future, the issuers of such securities will be free to choose in which Member States the securities are admitted and traded, irrespective of their denomination.

Statement on Subsidiarity

The Commission argues that only a consistent approach at EU level can help prevent regulatory arbitrage between Member States and distortion of competition on different markets.

Policy Context

The Commission's Proposal is part of a simplification programme by the Commission to cut administrative burdens. This goes back to a decision taken by the European Council regarding a 25% reduction of administrative costs for EU companies by 2012. Pursuant to Article 31 of the Prospectus Directive 2003/71/EC, the Commission is obliged to examine the Directive five years after its coming into force and to propose amendments if necessary. Also, the Commission refers to its Communication on packaged retail investment products (PRIPs) [COM(2009) 204; cp. [CEP Policy Brief](#)]. There, too, it wishes to introduce a harmonised "basic investor information", as has already been introduced for UCITS investment funds [Directive 2009/65/EC; cp. [CEP Policy Brief](#)].

Status of Legislation

23 September 2009	Adoption by Commission
11 January 2010	Draft Report by the EP Committee Economic and Monetary Affairs
Open	Adoption by the European Parliament and Council, publication in the official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Internal Market and Services
Committees of the European Parliament:	Economic and monetary affairs (in charge), rapporteur: Wolf Klinz (ALDE, D); legal affairs
Committees of the German Bundestag:	Financial committee (in charge); legal affairs; economics & technology
Decision mode in the Council:	Qualified majority (adoption with a majority of the Member States and 255 of 345 votes; Germany: 29 votes)

Formalities

Legislative competence:	Art. 114 TFEU (Internal Market; ex-Art. 95 TEC) and Art. 50 TFEU (Freedom of establishment; ex-Art. 44 TEC)
Form of legislative competence:	shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure; ex-Art. 251 TEC)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Several of the amendments are clarifications which increase legal certainty. Therefore, they are to be welcomed without limitation. This is true particularly for the community-wide computing of the total consideration of offers of securities, the harmonisation of notice periods in case of prospectus supplements and the duration of the obligation to revise prospectuses.

On the other hand, however, one key amendment of the Directive, namely the upgrading of prospectus summaries and the related liability rules, reduces legal certainty and therefore is to be rejected.

Although the Commission's diagnosis of the key problem of the existing Prospectus directive – that investors often do not read the highly complex prospectuses and, instead rely on their rather informal summaries – is correct, the Commission draws the wrong conclusions: it formalises the summaries and intends to enable liability for incorrect or incomplete summaries. This is not consistent with the principle whereby investors should base their decisions on the entire prospectus.

Moreover, **it is not possible to explain to investors all "relevant" aspects of highly complex financial products within a summary of only a few pages.**

Instead, the Commission should apply the "horizontal approach" it already presented in its Communication on packaged retail investment products [COM (2009) 204; cp. [CEP Policy Brief](#)], also to the issuing of securities. Instead of upgrading the summaries of prospectus in an unclear manner and introducing liability rules which cause great uncertainty, prospectuses should be accompanied by harmonised key investor information. The availability of such comparable information on securities, insurances etc. adds not only to the comparability of investment products but also to competition.

The planned simplifications of prospectus obligations for companies with a stock exchange value of less than € 500 million, for SME and for banks which issue non-equity securities are problematic. On the one hand, this results in prospectuses showing different levels of detail, which could confuse investors. On the other hand, such exceptions need convincing explanations, since they lower costs of raising capital for smaller enterprises only and thus **distort the competition** with larger companies.

The Commission's Proposal to relax **the prospectus obligation for rights issue** does not go far enough, as these concerns existing stockholders. As these are already familiar with the company, the prospectus obligation **should be abolished altogether** in this case.

The fact that employees share schemes will be exempted from the obligation to draw up prospectus, is to be welcomed. The costs for such prospectus make the participation of employees difficult and are needless, since employees are more familiar with the company concerned than the general public is.

Another improvement is the cancellation of the obligation to provide information on the Member States guaranteeing securities. This simplifies the EU-wide trading of such securities without weakening investor protection: information on the solvency of states is available to the public anyway, even without this disclosure obligation.

Impact on Efficiency and Individual Freedom of Choice

As a result of the proposed simplifications, the Commission hopes to gain an annual reduction in costs of € 302 million (Impact Assessment SEC(2009) 1223, p. 71).

The Commission sees the greatest potential for cost reduction in the simplification of the prospectus obligation for issue rights (€ 80 million) and for companies with a stock exchange value of less than € 500 million (€173 million). However, just what exactly the simplification measures will look like that justify these numbers has not yet been revealed by the Commission.

Using existing and admitted prospectuses when reselling securities (retail cascade) saves costs. The precise extent of these savings will depend on whether and to which amount the original issuers require compensation from the reselling intermediaries for the use of the prospectus.

The extended validity of the prospectuses also facilitates cost savings, in fact without any loss in quality, as the prospectuses must also be kept updated in the future.

Impact on Growth and Employment

The Directive increases the efficiency of issuing securities and thus the potential for growth, as it reduces the capital costs of investments. Whether legal uncertainty caused by the liability for incomplete summaries of prospectus, will compensate this positive effect, can currently not be estimated.

Impact on Europe as Business Location

An efficient mobilisation of capital through capital markets – instead of through bank credits – **can significantly enhance the quality of Europe as a business location.** This is especially true as many banks have to reduce their credit volumes due to regulatory requirements. However, given the threatening legal uncertainty resulting from the planned liability, the net effects for the quality of a business location can not be estimated here either.

Legal Assessment

Legal Competence

The Proposal is – rightly – based on Art. 50 TFEU (right of establishment; ex-44 TEC) and Art. 114 TFEU (internal market; ex-Art. 95 TEC).

Subsidiarity

Unproblematic.

Proportionality

Extending the obligatory information in prospectus summaries to include all “key information” which should enable investors to take informed investment decisions and to compare them with other investment products is an unproportional – since unnecessary – burden to the issuer. The related extension of liability means that a huge amount of additional information has to be included in order to reduce the liability risk.

Compatibility with EU Law

Unproblematic.

Compatibility with German Law

Unproblematic though entailing amendments of various laws.

Alternative Procedure

Instead of focusing on the prospectus summary, the Commission should introduce harmonised “key investor information” as already intended for small investors [COM(2009) 204; cp. [CEP Policy Brief](#)] also for securities.

Possible Future EU Action

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Conclusion

Extending the mandatory information in summaries of prospectuses to include “all key information”, and the intended liability of the issuer for the consequences of decisions which investors make on the basis of prospectus summaries only, creates not only great legal uncertainty. It is impossible to summarise all “relevant aspects” of highly complex financial products on a few pages only. Simplifications for companies with a low stock exchange value, small and medium-sized enterprises and non-equity securities of banks can distort competition. The remaining proposals made by the Commission lower legal uncertainty and reduce the costs for issuing securities.