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COVER NOTE

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to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
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Subject: COMMISSION STAFF WORKING DOCUMENT EXECUTIVE
SUMMARY OF THE 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

Delegations will find attached Commission document SWD(2012) 76 final.

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COMMISSION STAFF WORKING DOCUMENT

EXECUTIVE SUMMARY OF THE 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. PROBLEM DEFINITION

The Prospectus 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 Prospectus Directive was recently amended by Directive 2010/73 in order to further enhance investor protection, increase legal clarity and efficiency in the prospectus regime, and reduce administrative burdens for companies when raising capital in the European securities markets. The Amended Directive introduced legislative solutions for these problems and envisaged the implementation of the new framework through the adoption by the Commission of a Delegated Regulation amending the Commission Regulation (EC) No 809/2004.

The proposal for a Delegated Regulation addresses the following problems:

- The current system of the base prospectus and the final terms affects investor protection and lacks legal clarity. When the final terms of a single issue are not included in the base prospectus, they are filed as a separate document without any approval and must only be made available to investors. The absence of such approval and of any precise mandatory disclosure requirement in the Regulation has generated inconsistency and permitted abuses in the various market practices.
- The summary of the prospectus does not ensure a high level of investor protection. 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, undermining investors' protection and impeding any comparability among similar securities.
- The disclosure requirements of the Regulation can be disproportionately burdensome, by driving up the cost of capital or by having deterrent effects for some issuers and offers of securities. These negative effects are all the more remarkable when considering the costs related to the offerings or admission to trading by SMEs and issuers with reduced market capitalisation (the "Small Caps")¹, to specific offers of non-equity securities issued by credit institutions or in the case of pre-emptive issues of equity securities (rights issues).
- Investor protection and legal clarity are hindered due to the lack of regulation of modalities by which issuers disclose their consent, including the conditions attached thereto, to the use by financial intermediaries of their prospectus in case of retail cascade.

¹ See Article 2.1(f) and (t) of the Amended Directive. Small and medium enterprises ("SMEs") are 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 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.

- Technical adjustments and clarification of some requirements of the existing Prospectus Regulation are needed as six years have passed since the entry into force of the Regulation.

2. ANALYSIS OF SUBSIDIARITY

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. Also, the obligation for action has been decided by the co-legislators, when amending the Prospectus Directive, who empowered the European Commission to adopt the Delegated Regulation.

3. PROCEDURAL ISSUES

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 following the formal request from the Commission. The advice is available at the following address: http://www.esma.europa.eu/system/files/2011_323.pdf

ESMA consulted widely with all major stakeholders, including securities regulators, market participants (issuers, intermediaries and investors), and consumers. Responses are available at the following address: <http://www.esma.europa.eu/consultation/Consultation-ESMA-technical-advice-possible-delegated-acts-concerning-Prospectus-Direc#responses>

4. OBJECTIVES

In light of the analysis of the problems above and of the objectives identified for the review of the Prospectus Directive, the objectives of the proposal for a Delegated Regulation are (i) to strengthen investor protection, (ii) to increase legal clarity and certainty and (iii) to reduce the administrative burdens for specific issuers.

5. POLICY OPTIONS

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 Small Caps.

Other 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. Some follow the amendments to the Directive and have been already the object of a full and proper impact assessment with marginal additional impact or even nil. Others are purely technical adjustments to a number of requirements of the Regulation with negligible impact on stakeholders but in line with the general objectives of increased investor protection and legal clarity.

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

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 – 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. 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 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. In order to ensure the comparability of the summaries, this option also proposes that a summary of each individual issue is drawn up, and fully completed and annexed to the relevant final terms.

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. 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.

5.2. Proportionate disclosure regime for SMEs and Small Caps

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 for IPOs on a regulated market and admissions to trading (first admissions to a regulated market). 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.

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).

6. ASSESSMENT OF IMPACTS OF THE PREFERRED OPTIONS

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.

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

The impact of the proposed measures concerning the final terms will increase. This evaluation must be nevertheless mitigated because most of the costs are one-off costs and once the issuers will adapt their practices to the new requirements the costs will decrease. Furthermore, the policy choice in relation to final terms are not likely to have a direct or major impact on SMEs.

Overall, the harmonised format for the final terms to the base prospectus is expected to contribute to improve **investor protection**.

6.2. Proportionate disclosure regime

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 and they will benefit from the other proportionate measures envisaged in case of rights issues.

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.

A proportionate disclosure regime except in the case of IPOs and initial admissions on regulated markets 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 but would not provide any incentives for SMEs to proceed with an IPO on a regulated market as well as on MTFs.

On the other hand, introducing a general proportionate regime for SMEs and Small Caps will really reduce administrative burdens for SMEs without harming the adequate level of investor protection. Indeed, 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 a prospectus.

6.3. Other measures

In addition to cost impacts originating from requirements of the Prospectus Directive, the format and the content of the summary will ensure greater clarity and comparability, and 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.

More generally, 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 proportionate prospectus. Small credit institutions can be expected to have better access to finance.

Investors (greater clarity and comparability), **supervisors** (facilitating their tasks of supervision and enforcement) and **issuers** (reduction of compliance costs particularly for those operating on a cross-border basis) will benefit from the clarification of certain key concepts.

6.4. 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.

6.5. Social impact

The package of measures as a whole may indirectly contribute to have more efficient capital markets 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.

6.6. Impacts on EU budget

There is expected to be no impact on EU budget.

7. COMPARISON OF OPTIONS

The different policy options were tested against the objectives defined above. The comparison of policy options lead to the following conclusions:

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

	Investor protection	Legal Clarity	Administrative Burdens
Option 1 - Baseline (No Action)	0	0	0
Option 2 – Categorization Approach	++	++	--
Option 3 – Principle Based Approach	=	+	-

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

7.2. Proportionate disclosure regime for SMEs and Small Caps

	Investor protection	Legal Clarity	Administrative Burdens
Option 1 - Baseline (No action)	0	0	0
Option 2 – Proportionate Disclosure Regime except for IPOs and 1 st 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 considerably harming investor protection.

8. 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 would now be extended as a result of additional requirements in the Delegated Regulation. The evaluation could take place five years after the entry into force of the Prospectus Directive, in the context of a report to the Council and the Parliament. Also, the Delegated Regulation requests ESMA and competent authorities to publish on their websites the list of certificates of approval of prospectuses and any supplements thereto.