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| From: | The President of the European Economic and Social Committee, Mr Georges Dassis |
| To: | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union |
| Subject: | Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading |

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European Economic and Social Committee

ECO/388
Prospectus Directive

Brussels, 16 March 2016

OPINION

of the
European Economic and Social Committee
on the

**Proposal for a Regulation of the European Parliament and of the Council on the prospectus to
be published when securities are offered to the public or admitted to trading**

COM(2015) 583 final

Rapporteur: **Ms Angelova**

On 15 January 2016 and 18 January 2016 the Council and the European Parliament respectively, decided to consult the European Economic and Social Committee, under Article 114 of the Treaty on the Functioning of the European Union, on the

Proposal for a Regulation of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading
COM(2015) 583 final.

The Section for Economic and Monetary Union and Economic and Social Cohesion, which was responsible for preparing the Committee's work on the subject, adopted its opinion on 3 March 2016.

At its 515th plenary session, held on 16 and 17 March 2016 (meeting of 16 March 2016), the European Economic and Social Committee adopted the following opinion by 158 votes to 1 with 2 abstentions.

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1. **Conclusions and recommendations**

- 1.1 The EESC firmly supports the current proposal for a Regulation as well as its underlying approach – to simplify and streamline the requirements for the prospectus published when securities are offered on the regulated markets making them more cost-effective and more useful for investors in terms of the information they contain. It appreciates the greater legal clarity that the form of a regulation rather than a directive brings in this case to the issuers, to the investors and to all stakeholders, as this will both increase the investors' trust and confidence and will promote the achievement of a CMU.
- 1.2 The EESC welcomes the special focus on re-gaining investors' trust, approves the particular actions taken in this regard and supports the principle that making the prospectus more reader-friendly and targeted to the specific situation of the issuer has the double advantage of reducing costs and increasing the relevance of the prospectus for potential investors. The EESC also sees the possibility for all prospectuses in the EU to be accessible in a common user-friendly and accessible database as a source of a considerable boost to the development of capital markets in Europe, greater investor confidence and the creation of more diversified financial products.
- 1.3 The proposal for a Regulation is clearly aimed at reducing the administrative burden of drawing up prospectus for all issuers, in particular for SMEs, frequent issuers of securities and secondary issuances, and therefore merits the EESC's support. The efforts to make the prospectus a more relevant disclosure tool for potential investors and to achieve more convergence between the EU prospectus and other EU disclosure rules also are praiseworthy.
- 1.4 In order to guarantee that the proposal for a Regulation will achieve its stated objectives it is necessary for all the stakeholders to be closely involved in the process of producing the level 2 legislation and an in-depth, qualitative impact assessment to be performed two years after the Regulation enters into application. The EESC is particularly interested in participating actively in these consultations.

1.5 The EESC urges the Commission to clarify some unclear issues that may influence the impact of the proposed Regulation and to avoid any situation where the margin of discretion left to the Member States may contribute to producing an unnecessary and disproportionate burden for the issuers or may prejudice the clarity of the relevant information for the investors. It is strongly recommended therefore that the ESMA, in exercising its powers to bring supervisory practices in the Member States into closer convergence, take on board the views not only of local regulatory authorities, but also of local stakeholders, including market participants.

2. **The European Commission's proposal**

2.1 The reform of legislation relating to the publication of prospectuses when securities are offered to the public is part of the third pillar of the Investment Plan for Europe¹, which seeks to improve the business environment and is a key element of the Capital Markets Union².

2.2 The proposal for a Regulation comes as the result of the European Commission's long-term efforts to improve the legal framework for the disclosure of information when securities are issued. Therefore, the components of the proposal should be evaluated retrospectively, taking into account the progress that has already been achieved at the various stages of this endeavour.

2.2.1 Directive 2003/71/EC³ replaced two earlier directives on listing particulars (1980)⁴ and prospectuses (1989)⁵ – that had faced strong criticism from stakeholders because they allowed widely varying practices across the Union and were based on a system of mutual recognition with significant discretion left to the host Member State authorities. It also introduced for the first time the "single passport" principle.

2.2.2 The 2010 review of Directive 2003/71/EC showed that, although some progress had been achieved, this Directive still lacked the necessary legal clarity, was not effective and efficient enough and did not strike the balance needed between market efficiency and investor protection. It was therefore replaced by Directive 2010/73/EU⁶.

1 COM(2014) 903 final.

2 COM(2015) 468 final. The Capital Markets Union Action Plan presents a comprehensive and ambitious programme of measures to strengthen the role of market-based finance in the European economy.

3 Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC ([OJ L 345, 31.12.2003, p. 64](#)).

4 Council Directive 80/390/EEC of 17 March 1980 coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing ([OJ L 100, 17.4.1980, p. 1](#)).

5 Council Directive 89/298/EEC of 17 April 1989 coordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public ([OJ L 124, 5.5.1989, p. 27](#)).

6 Directive 2010/73/EU of the European Parliament and 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](#)).

- 2.2.3 The impact of Directive 2010/73/EU was evaluated three years after its entry into application. The assessment clearly demonstrated that it had failed to produce the expected results (the prospectus summary, for example), that it had not been ambitious enough (the proportionate disclosure regimes) or simply did not contain measures to satisfy all the expectations of stakeholders.
- 2.2.4 The proposal for a Regulation contains many new features and measures and can be seen as a major step forward towards improved and more effective regulation of issues for the public and towards effectively enabling issuers and investors to perform actions within the EU.
- 2.3 The main goal of the proposal is to make it easier and cheaper for companies to raise capital throughout the Union on the basis of a single approval from a regulatory authority in only one Member State (usually the home country), while at the same time ensuring adequate, accurate information for investors.

3. **General comments**

- 3.1 The EESC fully supports the European Commission's initiative to simplify the drafting and procedures involved in publishing prospectuses when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State, thus making them more cost-effective and more useful for investors in terms of the information they contain. The EESC had already expressed its support for these same principles in its opinion on Directive 2003/71/EC⁷.
- 3.2 The EESC underlines the importance of re-gaining investors' trust and in this regard welcomes the special focus on investors in the draft Regulation. It approves the particular actions taken in this regard and supports the principle that making the prospectus more reader-friendly and targeted to the specific situation of the issuer has the double advantage of reducing costs and increasing the relevance of the prospectus for potential investors. It also appreciates the improvement in structuring the risk factors in the prospectus.
- 3.3 The EESC also fully supports and endorses the Commission's view that action must be taken to improve the situation for issuers by reducing the administrative burden when securities are offered to the public, since SMEs are currently impeded in this regard by the vast amount of documentation required and the high costs this entails. The Committee believes the estimated time and cost savings to issuers referred to in the impact assessment of the proposal for a Regulation' (about EUR 175 million per year) will further contribute to increasing the EU business competitiveness.
- 3.4 The EESC believes that the possibility for all prospectuses in the EU to be accessible in a common database should deliver a considerable boost to the development of capital markets in Europe, greater investor confidence and the creation of more diversified financial products. In order for such a database to be really efficient it should be designed in a user friendly way with formats allowing for the information to be easily accessible and usable.

⁷ EESC opinion on Directive 2010/73/EU of the European Parliament and 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](#)).

- 3.5 The EESC welcomes the requirement to disclose less – but standardised – information which will also streamline the work of the administrations concerned and so bring down their running costs.
- 3.6 The EESC welcomes the choice of legislative instrument and the decision to regulate this area using a regulation and not a directive. A regulation, being a single set of provisions to be directly implemented by all Member States, eliminates the discretion that has so far existed in the transposition of the Directive⁸ into the national laws of the Member States. The adoption of a regulation ensures the unity and integrity of the internal market, reduces disparities and fragmentation among legislative provisions in force within the EU and is conducive to the Capital Markets Union. Such an approach will also make life much easier for investors, who will not have to familiarise themselves with various national legislations when deciding on investing abroad.
- 3.7 Given how EU law on prospectuses has evolved and the demonstrated need for its ongoing improvement, the EESC welcomes the fact that the Commission has – even at the proposal stage – expressed its intention to assess the Regulation's impact after its entry into force and, more specifically, that has set out the parameters for this. However, the Committee feels that five years is too long to wait for such an important evaluation and urges that this period be appreciably reduced – to two years after the Regulation enters into application. This will allow for a swifter overview of the effects produced by the proposed Regulation and for undertaking corrective actions if necessary. The EESC recommends that a qualitative, in-depth evaluation should be carried out in order to complement the stated quantitative assessment parameters, including a qualitative, in-depth assessment focused also on analyses of how – and to what extent – the capital raised by simplifying prospectus has improved the competitiveness of firms and how far it has helped progress to be made on promoting capital markets in the Member States – and how this has affected the overall business climate in them. It is crucial also to evaluate also whether the Member States have gold-plated the implementation of the Regulation when applying its provisions in areas where they have discretion in adapting them.

4. **Specific comments**

- 4.1 Increasing the threshold for issues requiring a prospectus to EUR 500 000⁹ is a step in the right direction in simplifying bureaucracy with the view to improving SMEs' access to finance. On the other hand, the Member States' right to require special forms for the disclosure of information for these issues¹⁰ must not generate additional administrative barriers and "gold-plating"¹¹ and is something that should be included in the impact assessment to be carried out after the Regulation has entered into application. The EESC sees some potential risks in this regard and invites the Commission to take a closer look at that during the impact assessment.

8 Directive 2010/73/EU.

9 Article 1(3)(d) of the proposal for a Regulation.

10 Article 3(2) of the proposal for a Regulation.

11 In its communication "Better regulation for better results - An EU agenda" (COM(2015) 215 final, p. 7), the Commission defines "gold-plating" as follows: "Member States also often go beyond what is strictly required by EU legislation when they implement it at national level ("gold-plating"). The Commission adds in the same paragraph that "This may enhance the benefits but can also add unnecessary costs for businesses and public authorities which are mistakenly associated with EU legislation."

- 4.2 The EESC fully supports the special attention devoted by the Commission to providing a precise definition of an "SME" and shares the view that further adjustments of this definition may be needed¹². The Committee has already flagged up the need to provide a unified, updated and more precise definition in a number of its recent opinions¹³.
- 4.2.1 The EESC supports the definition used in the draft Regulation (Article 2(1)(f)) introducing the requirement that at least two of the three criteria set out in European Commission Recommendation 2003/361¹⁴ should be met at the same time. This approach should be adopted more broadly and be mainstreamed across all of the Commission's legislative proposals, as well as in the laws and administrative practices of the Member States.
- 4.2.2 The Committee is also very much in favour of raising the threshold from EUR 100 to 200 million for the definition of a "company with reduced market capitalisation"¹⁵, which reaffirms the definition contained in Directive 2014/65/EU¹⁶ and closes the gap between this and the definition in Directive 2003/71/EC¹⁷.
- 4.3 The possibility of publishing "voluntary prospectuses"¹⁸ provides additional flexibility for issuers and facilitates access to EU capital markets.
- 4.4 The provisions facilitating subsequent, "cascade" trading of securities¹⁹ are a very positive new element.
- 4.5 The proposed extremely detailed description of the prospectus summary²⁰ significantly relieves the burden on issuers, surmounting the shortcoming identified in Directive 2010/73/EU as a result of the assessment. The obligation to include only essential and material information simplifies matters for both issuers and investors, making it easier for the latter to navigate the data provided and to compare the prospectuses of various issuers. The Committee invites the Commission to make sure that civil liability is charged for all the cases.

¹² Article 2(1)(f) of the proposal for a Regulation.

¹³ EESC opinion on the Green Paper on Building a Capital Markets Union and EESC information report on Access to finance for SMEs and EESC opinion on Family Business in Europe as a source of renewed growth and jobs. In these opinions the Commission was urged to refine the definition of SMEs so as to better reflect the diversity of companies in Europe and to address the need to standardise the different definitions currently laid down in Commission Recommendation 2003/361 (which broadly reproduces Commission Recommendation 96/280 of 1996, is hugely outdated and does not take into account EU enlargement), in Directive 2014/65/EU of 15 May 2014 on markets in financial instruments, and in Directive 2013/34/EU of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings (discrepancies in the definition offered by the two Directives are addressed in the present proposal for a Regulation).

¹⁴ Article 2(1)(f) of the proposal for a Regulation. In practice, the original definition of SMEs as set out in Recommendation 96/280/1996 requires two of the three criteria to be fulfilled at the same time. But Recommendation 2003/361/EC then gives margin for discretion for the competent authorities "in the interest of administrative simplification ... to use only one criterion – the staff headcount – for implementation of some of their policies" (Recital (7)), which leads to exclusion of a large portion of companies from the scope of the definition, which would have been qualified if two of the three criteria had been used simultaneously as per the initial definition.

¹⁵ Article 2(1)(f), second indent, of the proposal for a Regulation.

¹⁶ Article 4(1)(13) of Directive 2014/65/EU.

¹⁷ Article 2(1)(t) of Directive 2003/71/EC.

¹⁸ Article 4 of the proposal for a Regulation.

¹⁹ Article 5 of the proposal for a Regulation.

²⁰ Article 7 of the proposal for a Regulation.

- 4.6 The envisaged possibility of drawing up a base prospectus when issuing non-equity securities provides flexibility for an additional category of issuers.
- 4.7 The universal registration document is an option²¹ to be capitalised on because it significantly reduces many of the administrative barriers for frequent issuers and so facilitates their access to the capital market.
- 4.8 The specific disclosure regimes²², which again make it easier for companies to publish and for investors to process information, also merit appreciation and support.
- 4.9 The EESC warmly welcomes the fact that that the European Securities and Markets Authority (ESMA) will be tasked to frame certain regulatory and implementing technical standards. These include guidelines for clearer treatment of risk factors and their assignment to appropriate categories with an emphasis on specific rather than general risks, as well as lists for expanding the disclosed information that may be incorporated by reference in the prospectus. This will advance integration in the field of capital markets.
- 4.10 The EESC suggests to also include proposals aimed at greater standardisation of procedures for examination and review of a prospectus in case of suspension or cancellation of publication. In many cases there are multiple backward and forward procedures before the final decision by the regulatory institution. This leads to unnecessary delay which may be rather costly for the issuer compared to a situation where all recommendations by the regulator are presented in one step. Therefore it would be helpful in making progress on the Capital Markets Union, in the Committee's view, for the ESMA to work out uniform rules for Member States on time limits and on the formats for specific instructions to potential issuers on how to address any shortcomings in a draft prospectus. This would make it easier for issuers – especially SMEs – to draw up their prospectus and would also create a more homogeneous environment, reducing grounds for regulatory discretion.
- 4.11 The Committee also supports the practice of allowing for a voluntary part in the prospectus where companies would be able to communicate to investors' additional factually correct non-financial information regarding matters as environmental protection, production practices, participation in social programmes, etc. Such information is particularly important for large public companies which are the flagships of Corporate Social Responsibility in line with the request for the prospectus to be correct, clear and complete.
- 4.12 The EESC would make the following recommendations for improving the annexes to the proposal for a Regulation:
- 4.12.1 The sections dealing with risks should be more specific: the registration document should distinguish between risks for the company and those for its business (Annex II, II.C., p. 5).

²¹ Article 9, in conjunction with Articles 10(2), 11(3), 13(2) and 19(5) of the proposal for a Regulation.

²² Articles 14 and 15 of the proposal for a Regulation.

- 4.12.2 To avoid duplication of information, the securities note should only cover risks associated with securities (Annex III, III.C., p. 8).
- 4.12.3 The identification of directors, members of senior management, consultants, auditors and certain other information (Annex III, p. 8, I) should be removed from the securities note, since this information is contained in the registration document, unless there are shareholders issuing securities.
- 4.12.4 The statute of the issuer may be made available as a separate document to which the prospectus can refer.
- 4.12.5 The EESC recommends reducing the timeframe for the approval of prospectuses of irregular issuers and shortening the time allowed for a reply from the regulator when amendments are made, which should be shorter than the initially proposed times. It should also be possible to submit only corrected parts of the prospectus in response to comments and to reduce the number of paper copies by introducing an electronic variant of the prospectus and its annexes.
- 4.12.6 The EESC invites the Commission to provide a reasonable period that will enable smooth progression of the implementation of the new provisions and will allow the markets and the issuers to adapt accordingly to the changes involved.

5. **Outstanding issues**

- 5.1 Some issues that may influence the impact of the proposed Regulation are insufficiently clarified and the EESC recommends that they be better addressed.
- 5.1.1 A threshold of EUR 500 000 is introduced for offers of securities, with no prospectus required if the value of the issue is less than this²³. In the latter instance, national regulators can at their own discretion provide for issuers to make "appropriate forms of disclosure". The EESC recommends that the content of these "appropriate forms" should be established in advance to forestall any possible unequal treatment of these issuers in different EU Member States and that they are simpler than the prospectus.

²³ Article 1(3)(d) of the proposal for a Regulation.

- 5.1.2 In addition, there is provision for national regulators to exempt all issues between EUR 500 000 and EUR 10 000 000 from the Regulation's provisions on the harmonised prospectus, provided the exemption only relates to the proposal within the Member State concerned and does not require the prospectus to be "passport". In this regard, we think that the greater the discretionary scope of the national regulator, the greater the likelihood of unequal treatment of the same categories of issuers by the national legislations of different Member States. This also helps to avoid potential undesirable effects of lower levels of consumer protection. This being the case, we believe that scope for national discretion should be curtailed in some measure. To develop the idea even one step further, the EESC invites the Commission to analyse whether the aforementioned exemption of all issues between EUR 500 000 and EUR 10 000 000 could possibly be detrimental especially for SMEs in the perspective of the CMU. The Committee invites the Commission to rethink, in the light of the conclusions of such an analysis, whether this exemption should be kept or is better dropped.
- 5.1.3 Delegated acts within the meaning of Article 42 of the proposed Regulation should be discussed at length with all stakeholders before their final adoption. The EESC is particularly interested in playing an active part in the Level 2 legislation development consultations.
- 5.1.4 Similarly, the ESMA, in exercising its powers to ensure convergence of supervisory practices in the Member States, should take on board the views not only of local regulatory authorities, but also of local stakeholders, including market participants.
- 5.1.5 Since no prospectus is needed for issues of less than EUR 500 000, and they fall beyond the scope of the Regulation, EESC recommends that the EC or ESMA provide recommendations to the Member States on how to clarify the status of "SME issuers", who are not allowed to trade on regulated markets but trade on Multilateral Trading Facilities or through crowdfunding platforms. These recommendations should also cover the question of whether such companies are to be referred to as public or private companies and what supervisory arrangements there will be for them.
- 5.1.6 The EESC draws attention to the text of Article 25(2), referring to "a language customary in a sphere of international finance" and specifies that this should be an EU official language, and accepted by the host country.
- 5.1.7 It would be a good idea for Article 7, on the prospectus summary containing information for investors, to include specific warnings on the risks associated with investment.

Brussels, 16 March 2016.

The President
of the
European Economic and Social Committee

Georges Dassis