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REVIEW OF THE PROSPECTUS DIRECTIVE AND REGULATION: TOPICS FOR CONSIDERATION

Dear Mr Wright

The International Capital Market Association (**ICMA**) would like to take the opportunity to suggest topics for consideration in the course of the proposed review of the Prospectus Directive and Regulation.

ICMA is the self-regulatory organisation and trade association representing constituents and practitioners in the international capital markets worldwide. ICMA's members are located in 49 countries across the globe, including all the world's main financial centres, and currently number some 400 firms in total.

We attach our suggestions as an **Annex** to this letter and would be pleased to discuss them with you at your convenience.

Yours sincerely,



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ANNEX

1. Background and general approach

ICMA and IPMA, its predecessor association, participated in the various consultations leading up to the adoption of the Prospectus Directive and Regulation as well as in the work done at EU and national level on their proper implementation and application. We are looking forward to the upcoming review as an opportunity to further improve the pan-European regulatory framework for public offer and admission disclosure.

A number of suggestions for improving the Prospectus Directive and Regulation have been made in the past two years and we appreciate the difficulties you may have reconciling and prioritising them. To assist you in the process, we would like to build on our extensive work to date and summarise our key suggestions.

We approach the topic from the perspective of cross-border offerings or (less frequently) admissions to trading of “international” debt securities (“Eurobonds”), issued by corporate or financial issuers, usually under offering programmes but also as “stand alone” issues. The inherently international nature of this market makes the Prospectus Directive and Regulation particularly important and any practical difficulties in their application immediately apparent.

We do not repeat here the assessment of the impact which the Prospectus Directive and Regulation have had in practice and refer to our letter to CESR of January 2007¹, as well as the subsequent CESR and ESME reports, for such analysis.

We also do not discuss here the crucial topic of consistent implementation and application of the Prospectus Directive and Regulation across the EEA as it falls primarily within the remit of CESR, which has been doing a lot of helpful work in the field recently. If implemented, however, our suggestions should remove the most important inconsistencies and hopefully reduce the likelihood of others arising in the future, so helping CESR in their work.

Finally, we do not focus on technical detail or propose drafting changes at this stage. Instead, we identify, in generic terms, the most important changes which we will ask for in the upcoming consultations and explain them in the context of specific policies on which the review should be based.

Our approach is pragmatic. We do not seek changes to the fundamental concepts of the Prospectus Directive and Regulation but only targeted changes which could resolve problems so far identified or frictions caused by unnecessary complexities or overlaps with other legislation. We do not advocate unnecessary, experimental or academic changes but practical simplification and streamlining of the regulatory framework which does not compromise investor protection. By way of an example, the combination of several of the changes we suggest should to a large degree address the “retail cascades” issue which has arisen in several Member States.

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http://www.icmagroup.org/market_practice/Advocacy/eu_prospectus_directive/eu_prospectus_directive.Par.0033.ParDownLoadFile.tmp/ICMA%20Response%20to%20CESR%20Call%20for%20Evidence%20on%20the%20Functioning%20of%20the%20Prospectus%20Directive.pdf

Our suggestions are based on over two years` experience of our members and their legal advisors arranging international issues as well as the resulting extensive discussions within our committees and working groups. Not all of them can, however, be supported with readily available statistics at this point. We are looking forward to assisting you in any such analysis conducted by you and the consultancy which we understand you have engaged for this purpose.

2. Topics for consideration

2.1 Policy objectives of review

We believe that the review of the Prospectus Directive and Regulation should be driven by the following three policy objectives:

- strengthening the key principles of the Prospectus Directive and Regulation;
- aligning the Prospectus Directive and Regulation with other relevant legislation; and
- making offering programmes work.

Achieving these objectives is necessary to reduce legal risk and costs and enhance legal certainty associated with pan-European securities offerings which, in turn, will promote the original wider policy objectives of the Prospectus Directive and the FSAP generally. These involved namely facilitating access by issuers to capital across the EEA on the one hand and access by investors, in particular retail investors, to investment opportunities across the EEA on the other.

These objectives should be used to assess each provision of the Prospectus Directive and Regulation, whether existing or proposed.

2.2. Strengthening the key principles of the Prospectus Directive and Regulation

The three principles intended to achieve the objectives of the Prospectus Directive and Regulation are:

- Maximum harmonisation (no additional rules or requirements may be imposed by the Member States).
- Home Member State control (the law of the home Member State governs the contents of the prospectus and other substantive questions within the scope of the Prospectus Directive and Regulation, home Member State competent authority approves the prospectus and supervises compliance with the substantive rules).
- Passport (public offer may be made or admission to trading sought in a host Member State on the basis of a simple notification procedure between the competent authorities involved).

Most of the problems caused in practice have been caused by non-observance of these principles, whether such deviations were allowed by the Prospectus Directive and Regulation or not.

The maximum harmonisation principle now seems universally accepted and confirmed by CESR but it should be strengthened:

- A number of “additional requirements” are imposed by individual Member States not by the rules implementing the Prospectus Directive but by separate securities, company, consumer protection and other laws. To address this, the scope of the Prospectus Directive could be redefined in broader terms (with a focus on information provided by an issuer to the public or authorities generally in connection with a public offer or admission to trading) to ensure that requirements imposed by such laws are within its scope and therefore illegal if inconsistent. Alternatively, the Prospectus Directive could, in a more targeted way, prohibit imposition of such additional requirements, especially by a host Member State.
- All options to impose additional or different requirements granted by the Prospectus Directive and Regulation to the Member States should be reconsidered and, if found to inhibit cross-border offerings, abolished.
- To further reduce frictions caused by any remaining additional requirements and use of options, Member States could be required to notify them to the Commission and have only limited grounds available to justify them – an approach similar to the one taken in MiFID.

Similarly, home Member State control is accepted as a principle but fraught with deviations and difficulties in practice.

- The principle should be expressly and in general terms stated as applying to all matters within the scope of the Prospectus Directive, both in its positive (applicability of the home Member State rules and competence of its authority) and negative (dis-application of host Member State rules and no competence of its authority) aspects, with any exceptions clearly defined.
- In particular, it should be made clear that (i) no disclosures or filings are required in the host Member State and (ii) no disclosures specific to a host Member State are required to be made in a prospectus or other document.
- “Additional requirements” and options should be scrutinised particularly carefully if invoked by host Member States.

Effective passport regime is closely linked to maximum harmonisation and home Member State control. The review should consider if it could be further strengthened. Provision of all the required documentation to the home Member State competent authority should be sufficient for the public offer to commence or admission to trading to be applied for in the host Member State. This would protect the issuer from any delays in communication between the two competent authorities involved.

2.3. Aligning the Prospectus Directive and Regulation with other relevant legislation

The Prospectus Directive and Regulation do not exist in isolation but are a part of a wider regulatory framework involving namely:

- The disclosure duties subsequent to admission to trading (both periodic and on-going), set out mainly in the Transparency and Market Abuse Directives.
- The client-facing duties of an investment firm through which the issuer will normally communicate with potential investors, set out mainly in the conduct of business rules of MiFID.
- The rules imposing liability for incorrect disclosure by the issuer, set out to a small degree in the Prospectus and Transparency Directives, but primarily in the domestic laws of the Member States determined using their domestic conflict of laws rules, to be harmonised by the Rome I Regulation (where the liability is contractual) and Rome II Regulation (where it is non-contractual).

While perfect consistency of these pieces of legislation is an unrealistic ideal, the most glaring inconsistencies and overlaps need to be addressed so as to reduce unnecessary regulatory burden without jeopardising investor protection.

Where an issuer is subject to the Transparency and Market Abuse Directives, parallel prospectus disclosure of the same information does not appear meaningful (as it does not where a prospectus has already been published although technically speaking not for the particular offer). More importantly, it can also give rise to anomalies such as different content or publication requirements or different liability regime affecting different persons - for essentially the same disclosure.

To this end, the prospectus regime should cease to apply to a particular offer upon admission of the securities to trading. This would mean, among other things, that:

- If a public offer continues beyond admission to trading, the prospectus need not be supplemented after that date.
- The annual information update under Prospectus Directive Article 10 should be abolished.

The triggers for pre- and post-admission disclosure should in principle be consistent. Where an issuer benefits from an exemption or a lighter regime under the Prospectus Directive, it should in principle benefit from a similar treatment under the Transparency Directive. The discrepancy most acutely felt involves the scope and definition of the various "50,000 Euro exemptions" used in each of the Prospectus and Transparency Directives:

- The Prospectus Directive "total consideration" exemption should be supplemented with the more objective "minimum transferable amount" concept already informally used in the markets to provide more certainty to the issuer. Admission to trading prospectuses for securities with such a minimum transferable amount should benefit from the same "lighter-touch" regime as those for securities with a minimum denomination of over 50,000 Euro.
- The scope of the Transparency Directive "50,000 Euro exemptions" should be aligned with the scope of those in the Prospectus Directive. Such a review could go wider and consider whether the considerable differences between classification of securities in the Prospectus and Transparency Directives are not the root cause of the difficulties which arise in practice and should therefore be reconsidered.

Reflecting market developments, the Transparency Directive has introduced a pan-European system of electronic dissemination of information to investors and their filing with “officially appointed mechanisms”, all subject to the home Member State principle, to be interconnected into a pan-European network. As CESR has confirmed, the information disclosed under the Prospectus Directive is within the scope of this system.

Although much remains to be done in practice, the principle of such a system has our full support. To reflect this:

- Issuers should not be required to publish notices or other information in newspapers or other hard copy media, in particular (i) not as a pre-condition to a public offer or admission to trading in the Member State concerned and (ii) not in the host Member State.
- Once set up, the system should include information on approvals of the prospectuses and passports to increase transparency about permitted geographical uses of a prospectus.

Following the implementation of MiFID, it can be assumed that an EEA-based investment firm will owe its client, a potential investor, strict conduct of business duties, namely to check suitability/appropriateness, provide important information (including on the terms & conditions of the transaction and their relationship generally) and deliver best execution. This is the primary investor protection mechanism. It should not be supplemented by additional prospectus disclosure by the issuer focusing on this relationship as the issuer will usually not know the investors and their individual circumstances. To this end:

- An issuer should not be required to describe in the prospectus the terms & conditions or other details of the offers by distributors to their clients or provide other information specific to the distributor/client relationship which is more suitable to be provided, tailored to the specific circumstances, directly by the distributor to its client under MiFID conduct of business rules.
- The regulation of advertisements in the Prospectus Directive and Regulation should defer to the corresponding provisions of MiFID on marketing communications. In principle, the current double and partially overlapping regulation should be removed. If the provisions on advertisements are retained, the requirements should be the same as under MiFID and any *ex ante* review or approval of the advertisements by a competent authority should be expressly prohibited.

Under the current fragmented liability regime, the issuer and other parties involved in a securities offering are exposed to a multitude of widely different (and sometimes considerably burdensome) liability regimes, although the two Rome Regulations may in time go some way to harmonising at least the rules determining the applicable liability regime. We believe that serious consideration should be given to harmonisation of the liability for issuer disclosure under the securities directives regimes across the EEA, although we recognise that such a project would be more long-term and have a wider scope than the review of the Prospectus Directive and Regulation.

The links with other relevant legislation need to be kept in mind also when considering any changes to the Prospectus Directive and Regulation. For example, abolition of the annual information update under Prospectus Directive Article 10 would require changes to the definition of the home Member State under the Transparency Directive, which currently cross-refers to that

Article. When an issue addressed in course of the review requires a change to another piece of EU legislation, such a change should be considered – even if the relevant legislation itself is not currently being formally reviewed.

We would encourage communication and co-ordination between the Commission and CESR teams responsible for the Prospectus, Transparency and Market Abuse Directives and MiFID. In particular, the formal review of the Prospectus Directive should be co-ordinated with the concurrent review of the Market Abuse Directive.

2.4. Making offering programmes work

Frequent issuers, both corporate and financial, increasingly opt to issue under offering programmes given the flexibility and efficiency they provide. Our research conducted in 2007 showed that, in 2006, 93% of Eurobond issues made in the EU by non-EU issuers (corresponding to 72% of the volume issued) were made under offering programmes and the figures for EU issuers are likely to be substantially similar. To support this trend, deficiencies of the Prospectus Directive and Regulation in this area should be remedied as a matter of priority.

Most importantly, the legislation should in a clear and systematic way set out which provisions apply to offering programmes and which do not. Interpreting, for example, which provisions apply to base prospectuses (as opposed to prospectuses for stand-alone issues) and how is currently sometimes difficult and leads to inconsistent results.

The criteria used by the Prospectus Directive and Regulation to determine the permitted scope of final terms (in other words, the line between final terms and a supplementary prospectus) are unclear and inconsistent. This has led to inconsistent approaches across the Member States and extensive debates about the correct approach. The legal certainty issue is particularly acute in this case as a wrong answer may result in liability, in some Member States criminal, for a public offer or admission to trading without an approved prospectus. These criteria should be clarified and simplified, building on CESR's and ESME's work on the topic.

The frequency of issues when using an offering programme means that difficulties of the existing approach to investors' right of withdrawal are particularly acute in this context.

- The option for Member States to set a longer withdrawal period should be abolished. If it is retained, the period set by the home Member State rules should apply (as opposed to the periods set by the rules of the law applicable under general conflict of laws rules of all the various Member States concerned as is currently the case).
- The unlimited nature of the trigger for the withdrawal right should be reconsidered. At the very least, it would seem that only supplements (i) containing negative information (possibly using the price-sensitivity test of the Market Abuse Directive), (ii) relating to the securities the acceptance relates to (iii) which the investor could not have been aware of from other sources at the time of purchase should trigger the withdrawal right.
- The technicalities of the withdrawal right (namely its exact start and end dates) should be harmonised.