

Directorate General Internal Market and Services
(Unit G3 – Securities Markets)
European Commission
2 rue de Spa
B-1000 Brussels
Belgium

(by e-mail to Markt-g3@ec.europa.eu)

10 March 2008

Dear Sirs,

Consultation on the review of the Prospectus Directive

The International Capital Market Association, Register of Interest Representatives identification number 0223480577-59, (“**ICMA**”) is pleased to respond to the European Commission’s consultation (the “**Consultation**”) on the review of Directive 2003/71/EC (the “**PD**”).

ICMA is the self-regulatory organisation representing the financial institutions active in the international capital market worldwide. ICMA’s members are located in 46 countries across the globe, including all the world’s main financial centres. ICMA’s market conventions and standards have been the pillars of the international debt market for over 40 years, providing the self regulatory framework of rules governing market practice which have facilitated the orderly functioning and growth of the market. ICMA actively promotes the efficiency and cost effectiveness of the capital markets by bringing together market participants including regulatory authorities and governments. See: www.icmagroup.org.

We set out our response in the Annex to this letter and would be pleased to discuss it with you at your convenience.

Yours faithfully,



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CC: Committee of European Securities Regulators
European Securities Markets Expert Group

Annex

The European Commission's review of the operation of the PD is a welcome step towards the further development of a European single market in financial services. The Consultation is a useful opportunity for industry to contribute to the Commission's efforts and ICMA looks forward to further such opportunities in due course.

ICMA is generally supportive of the Commission's approach as expressed in the Consultation's legislative proposal and related background document.

We address the Consultation's specific points – general assessment, legislative proposal and other issues – in, respectively, Sections 1, 2 and 3 below. In Sections 4 and 7 we raise some further issues not addressed in the Consultation (including, for the Commission's general information, certain noted differences in the national application of the PD regime). Finally, Sections 5 and 6 set out elements of detail that may help to illustrate certain aspects of our response. ICMA understands that the Commission is intending, as a subsequent step, to mandate the Committee of European Securities Regulators (“**CESR**”) to review the operation of Regulation EC/809/2004 (the “**PD Regulation**”), and so some of the aspects of this response have been raised with this in mind.

Section 1 – General assessment of the Prospectus Directive

The PD has contributed to the development of the single market. It has streamlined the cross-border offering of securities in the wholesale market; and it has improved cross-border offerings of retail securities (although we note that there are still significant differences between the legal regimes of Member States – for example in the areas of contract, liability and consumer protection – that continue to make pan-EEA offerings difficult).

The introduction of the PD resulted in many significant changes being made to market practices and documentation – such as changing denominations for wholesale issues, to bring them within the new PD regime. This was both time-consuming and costly. Institutions involved in the primary debt markets have invested substantially in adjusting to the regime and are now generally comfortable with it, from the wholesale (and a limited retail) angle, and so are not looking for significant changes to the regime at this time.

However, suggestions for specific and discrete amendments to the regime have been made previously¹ and are now addressed again here. These are limited to isolated, self-contained issues (such as addressing limited retail cascades rather than full public offers) where useful changes can be made which will not result in major shifts in documentation or practice.

Section 2 – Legislative changes proposed

2.1 Definition of qualified investors (*legislative proposal Article 1.1(a)*)

We welcome the opportunity to align the definition of qualified investors in the PD with the professional client and eligible counterparty categorisations applied to investors in the Markets in Financial Instruments Directive (“**MiFID**”). We agree that the proposed change to Article 2.1(e) achieves this purpose, save that it does not address the differences between the "large undertakings" concept set out in Annex II, Section I(2) of MiFID and the language in Article 2.1(e)(iii) of the PD, which cross refers to the definition of "small and medium-sized enterprises" in Article 2.1(f). In order to better align the definitions and eliminate unnecessary complexity we would suggest the deletion of Article 2.1(e)(iii) of the PD.

2.2 Exempt offers ('retail cascade') (*legislative proposal Article 1.2*)

We broadly agree with the Commission's general description of the 'retail cascade', though we have some reservations about the legislative proposal to delete the last sentence of Article 3.2 of the PD.

¹ See article on page 9 of the January 2009 edition of the ICMA Regulatory Policy Newsletter: <http://www.icma-group.org/ICMAGroup/files/f5/f575c25a-a958-46e4-ac8d-35abf80908d3.pdf>.

The retail cascade involves the issuer selling the securities to investment banks underwriting the issue and organising the retail cascade (the “**Initial Offer**”) who, in turn, sell them to financial intermediaries appointed as retail distributors. Over a period of time ranging from several days to several months, which may extend beyond the closing date (when the securities come into being and the issuer receives the related funds) of the Initial Offer, the retail distributors then sell the securities to their retail investor clients (the “**Cascade Offers**”) at prices that may vary from sale to sale, reflecting market conditions at the time of sale.

We agree that where financial intermediaries are ‘acting in association’ with the issuer in a retail cascade, they are not, in relation to any non-exempt Cascade Offers they make, required to draw up a new prospectus and they can rely on the prospectus published by the issuer. However, this will, in practice, be limited to jurisdictions and to a period of time formally specified by the issuer. The issuer will indeed be responsible for the publication of any supplement during this specified period. Some example wording illustrating this is set out in Section 5 of this response. The wording restricts (non-exempt) Cascade Offers to specified ‘in association’ intermediaries in specified jurisdictions for a specified period.

However, we believe that it makes no sense, where the issue is admitted to an EEA regulated market, to require any offeror, other than the issuer or persons acting in association with the issuer, to prepare a prospectus. Such a requirement could be damaging to the market because the offeror, having no knowledge of the issuer other than that which is in the public domain, will only be able to produce a compilation of that public information. This information will comprise in part information produced by the issuer, pursuant to its obligations under the Market Abuse Directive (Directive 2003/6/EC) and the Transparency Directive (Directive 2004/109/EC); but the offeror will have no means of checking whether it is still up to date (and, if it is not, its inclusion in a prospectus will only mislead investors). The other element of the public information will be information produced by persons other than the issuer (such as journalists and analysts), which is likely to include not only fact but also opinion, speculation and rumour. Again the offeror will not be able to check this information with the issuer and there will consequently be a danger that misleading or incorrect information will be included in the prospectus. Accordingly, the requirement for an unconnected offeror to produce a prospectus for its offer will not achieve the objective set out in Article 5 of the PD, to enable investors to make “an informed assessment” of the issuer.

We think that a more logical approach to secondary offers by persons who are not acting in association with the issuer of securities admitted to regulated or equivalent markets would be to take into account the information flow provided for by the PD together with the Market Abuse and Transparency Directives or equivalent regimes. At the time of the Initial Offer and admission of the securities, a prospectus will have been prepared under the PD giving investors the information they need to make their investment decision and (by necessary implication) enabling them to price the issue. Under Article 6 of the Market Abuse Directive, the issuer has an obligation to inform the public as soon as possible of inside information (that is, information that is not public but would significantly affect the price of its securities if it was). And under Articles 4, 5 and (for issuers whose shares are admitted) 6 of the Transparency Directive, the market has the benefit of regular reports and financial statements. Given this flow of information, it is difficult to see what additional information an investor in a secondary offer could require - or indeed, why they should require any information that is additional to that which a purchaser on the regulated market would receive - particularly when that information is prepared by someone with no connection with (and therefore limited knowledge of) the issuer.

We would therefore suggest that a further exemption should be inserted (as PD Article 3.2(f)) in respect of:

“an offer, of securities of an issuer whose securities are already admitted to trading on a regulated market or equivalent market or any other market specified by the home Member State, by a person other than the issuer of the securities or another person with whom the issuer has made arrangements for the issue or sale of the securities.”

It would be helpful if the Commission, or perhaps CESR, could make clear at Level 3 that, where a prospectus is required because someone is making a non-exempt offer in association with the issuer, a single prospectus will be sufficient for all the offers concerned.

The Commission’s Background Document notes that the last sentence of Article 3.2 of the PD was originally included to clarify the anti-avoidance provision stipulating that certain exemptions cannot be cumulated. This ensures that an issuer does not, for example, distribute otherwise non-exempt securities to each of two separate institutions that, in turn and within the same EEA Member State, each offer to 99 persons (i.e. a total of 198 persons) on the basis of the Article 3.2(b) “fewer than 100 person” exemption. We consider that

the anti-avoidance effect will (rightly) continue to exist following the proposed deletion – certainly an English court would be likely to construe the above cascade circumstance to constitute a single offer by the issuer. In this context, the last sentence of Article 3.2 acts as a helpful reminder of the enduring anti-avoidance provision and so should be retained.

The Commission's proposed deletion is reproduced for information:

<< However, any subsequent resale of securities which were previously the subject of one or more of the types of offer mentioned in this paragraph shall be regarded as a separate offer and the definition set out in Article 2(1)(d) shall apply for the purpose of deciding whether that resale is an offer of securities to the public. ~~The placement of securities through financial intermediaries shall be subject to publication of a prospectus if none of the conditions (a) to (e) are met for the final placement.~~ >>

There is a separate problem relating to retail cascades that needs to be resolved, even if the 3.2(f) amendment suggested above is made (because offers will be made before admission is granted and therefore before the exemption applies). Annexes V and XII of the PD Regulation contain various provisions requiring the inclusion in the prospectus of information on the terms of “the offer”. Many of these provisions are problematic, because they could be considered to be applicable not just to the Initial Offer, but to subsequent Cascade Offers. For example, each Cascade Offer will have conditions to which it is subject (paragraph 5.1.1), an amount (paragraph 5.1.2), a period during which it is open (paragraph 5.1.3), a time for payment and delivery of the securities (paragraph 5.1.6) and an offer price (paragraph 5.3.1). Yet often few if any of these elements will be known at the time the issuer's prospectus is approved. This leaves two possibilities. Either the issuer will have to produce a supplement, or the relevant offeror will have to produce a new prospectus, each time a Cascade Offer is made. As Cascade Offers will potentially be made several times a day over a prolonged period, neither option is practicable.

In addition to impracticality, it is difficult to see what essential purpose would be served by requiring the production of a prospectus or supplement including this additional information. Each Cascade Offer will be made by the offering bank to its customer. The bank will (as a commercial matter and under the requirements of MiFID) make the offeree aware of the information that is specified in Annex V/XII paragraph 5. There seems to be no purpose in making that information available to anyone else through the publication of an approved prospectus.

However, where information specified in Annex V/XII paragraph 5 relating to distributors acting ‘in association’ with the issuer is known (or should have been known) to the issuer at the time of the issuer's publication of the prospectus, then such information should be included in the prospectus, unless it would be unreasonable to do so. This would be the case, for example in the case of sub-paragraph 5.1.1, where the “conditions to which the offer is subject” would in practice be the lengthy standard terms of business of each of, say, a dozen individual ‘original’ such distributors. Given that any one investor would only be concerned with one (if any) of the ‘original’ distributors, the resulting addition of dozens of pages to the prospectus could not be reasonably said to result in the prospectus being in “an easily analysable and comprehensible form” as required by the PD.

Set out at Sections 5 and 6 is wording illustrative of a practical approach frequently used regarding Annex V paragraph 5 disclosure in retail cascade transactions under debt issuance programmes – similar or equivalent wording is used in the context of Annex XII disclosure and of stand-alone bond issues. This approach effectively completes Annex V/XII disclosure with information relating to the Initial Offer and then refers to any applicable arrangements in place between the relevant offeror and offeree of the individual Cascade Offers.

It is therefore suggested that the PD Regulation be amended by making it clear that “offer” when used in Annex V or XII paragraph 5 refers to the Initial Offer, and not to any subsequent offer by anyone else – except where the relevant information is known to issuer and can be reasonably included in the prospectus.

2.3 Employee share schemes *(legislative proposal Article 1.3)*

We have seen a draft response to the Consultation by the Securities Industry and Financial Markets Association and agree with its view that the Commission's proposal would helpfully eliminate anomalies between categories of issuer.

2.4 Information (PD Article 10 annual update) (legislative proposal Article 1.4)

We agree with the analysis and the removal of PD Article 10. We would recommend that the proviso in PD Article 9.4 also consequently be deleted but, however, that the numbering of the remaining Articles of the PD not be changed as market participants are familiar with the existing numbering. We also suggest that PD Article 11 should be updated to reflect the fact that Titles IV and V of the 2001 Directive (Directive 2001/34/EC) have been largely repealed. We believe that references to this Directive should be replaced by a reference to the Market Abuse and Transparency Directives. We address the consequential impact in relation to the Article 10 reference within the Transparency Directive under 2.6 below.

2.5 Supplement to prospectus (2 day withdrawal right) (legislative proposal Article 1.5)

We agree with the analysis that further harmonisation of the time limit would be positive. Currently, for example, Sweden requires a minimum of 5 working days and Hungary 15 working days. This situation is undesirable in the context of a maximum harmonisation measure such as the Directive. We believe that PD Article 16.2 should be amended to make the withdrawal right exercisable within a fixed time of two working days after the publication of the supplement.

However, the proposed amendment to the PD, as currently drafted, does not seem to achieve the stated aim of the Commission, as inclusion of the words “at least” allows scope for much longer periods. We therefore suggest that the words “at least” in the Commission’s legislative proposal be replaced by the words “not more and not less than”.

We also have an entirely separate point relating to PD Article 16.1, which requires a supplement to the prospectus be published only in the context of a significant new factor, material mistake or inaccuracy capable of affecting the assessment of the securities. Issuers frequently publish supplements where this is not the case, often for reasons of consistency – for example in relation to the publication of quarterly financial statements that are entirely in line with expectations or to alter, in a non-material way, the terms of the securities set out in the prospectus. Such supplements do not materially alter the basis on which investors have contracted to buy the issue and we do not think that the PD regime should grant investors a gratuitous withdrawal right in such circumstances. We note in this context that the PD was adopted prior to the detailed development of the ad hoc disclosure regime under the Market Abuse Directive, which requires prompt disclosure of information that would have a significant effect on the price of securities admitted to regulated markets. We therefore suggest that the withdrawal right under Article 16.2 of the PD should be amended so that investors are only able to withdraw their acceptances where the supplement discloses adverse information that would be disclosable under Article 6 of the Market Abuse Directive (i.e. information likely to have a significant negative effect on the price of the securities concerned).

We would therefore suggest that PD Article 16.2 be further amended to ultimately read (changes marked):

“Investors, who have already agreed to purchase or subscribe for the securities before publication of a the supplement that discloses information that would be disclosable pursuant to Article 6 of Directive 2003/6/EC, is published shall have the right, exercisable within a time limit which shall not be shorter not more and not less than two working days after the publication of the supplement, to withdraw their acceptances.”

2.6 Modification of thresholds (€1,000 and under) (legislative proposal Article 1.1(b))

PD Article 13.5 permits the competent authority of the home state to transfer approval of a prospectus to the competent authority of another state. A number of issuers of debt securities use a single issuance programme for several issuers in their group. Where these issuers are in different countries and the programme permits the issue of denominations below €1,000, there are sometimes conflicts between competent authorities as to who should approve the base prospectus. This creates problems for the issuers that can only be solved by splitting the programme into several different programmes, one for each issuer, thus adding to cost and administrative inconvenience.

The Commission’s legislative proposal to remove the distinct treatment currently applicable to securities below the ‘above €1,000’ threshold would address this problem and is welcome.

However, the legislative proposal’s Article 2 amendment may not fully address the issue from the perspective of the Transparency Directive. The result of the proposed drafting of Article 2 would be to refer to

the PD Article 2.1(m)(iii) mechanism and leave third country issuers of low denomination debt locked-in to the first place of offering or admission to trading. This would be disproportionate to the treatment (under Article 2.1(i)(ii) of the Transparency Directive) of issuers of higher denomination debt who can change their home Member State every three years. More importantly, this would be inconsistent with the Commission's proposed disapplication of the equivalent lock-in provision under the PD as a burdensome restriction.

We would therefore propose that the legislative proposal's Article 2 be amended to read:

<< *The whole of Article 2.1.i(i) is replaced by:*

"(i) in the case of an issuer of shares:

- where the issuer is incorporated in the Community, the Member State in which it has its registered office;*
- where the issuer is incorporated in a third country, the Member State referred to in Article 2.1(m)(iii) of Directive 2003/71/EC." >>*

Section 3 – Other issues identified

3.1 Disclosure obligations: the prospectus and its summary

We note the concerns that have been raised with the Commission concerning prospectus length and complexity. However, we believe that, as issuers and others are subject to a stringent liability regime in respect of misleading statements in, or omissions from, the prospectus, it is inevitable that they will wish to say more, rather than less – always bearing in mind the PD requirement for prospectuses to be presented in an easily analysable and comprehensible form. Investors wishing to invest in such products and/or issuers should commit the necessary time to analysing the information that is made available in the prospectus. Some may argue that certain retail investors are not able to do this; but they should recall that MiFID contains appropriate provisions to protect these investors, by (amongst other things) interposing a financial intermediary who is able to read and understand the whole prospectus (and not just the summary) and to help the retail investor understand what it contains.

There is, however, one possible area of improvement in relation to base prospectuses that provide for the issuance of several different products. In such cases, the issuer should be able, if it wishes, to prepare a separate summary for each product. This would allow investors to read (by way of an introduction to their reading of the full prospectus) just the one – shorter – summary concerning the product they are being offered.

It would be helpful if the Commission inserted the following before the last sentence of the opening paragraph of PD Article 5.2 (which begins "The summary shall also contain..."): "Where a base prospectus is prepared in relation to more than one type of security, it may contain, at the option of the issuer, a separate summary for each type of security. References in this Directive to the summary shall be, where the context refers to the offer of a security, to the summary relevant to securities of that type."

3.2 Disclosure obligations for retail investment products

We note the forthcoming publication of a Commission white paper.

3.3 Disclosure obligations for small quoted companies

We have seen a draft response to the Consultation by the Securities Industry and Financial Markets Association and agree with its view that small quoted companies may be seen by investors as no less risky than larger companies. We therefore believe the existing PD provisions should be maintained.

3.4 Disclosure requirements and government guarantee schemes

We express no comment on this evolving aspect.

3.5 Rights issues

We express no comment on this aspect.

3.6 Article 2(1)(d) — Definition of offer of securities to the public

We generally agree with the Commission's view that this issue is delicate and may best be addressed, to the extent necessary, at Levels 3 and 4 of the Lamfalussy process. That said, some clarification would be welcome as to what constitutes "sufficient information" for the purposes of PD Article 2.1(d) – as it is at times difficult to draw the line, under the PD, between a public offer that requires prior publication of a prospectus and pre-marketing that does not.

3.7 Liability

We generally agree with the Commission's view that this issue is such an ambitious objective (cutting across national liability and consumer laws) as to be outside the scope of the Commission's current review.

3.8 Equal treatment of shareholders

We express no comment on this aspect.

Section 4 – Issues not raised in the Consultation

4.1 Withholding tax

Annex V paragraph 4.14 and Annex XII paragraph 4.1.14 of the PD Regulation require disclosure in the prospectus of information on taxes on the income from the securities withheld at source. This is limited, by the paragraph introductions, to those taxes in the country of the registered office of the issuer and the country where the offer is being made or admission is being sought.

CESR has helpfully stated that this "refers to information on any amount withheld at source, that is, by the issuer or by any agent appointed by it for the purpose of making payment on the securities". Thus, where the ultimate investor holds securities through a custodian or a clearing system, the issuer does not have to describe in the prospectus any withholding that may be made by that custodian or clearing system when passing on any payment on the securities (because they are not agents of the issuer). It would clearly be impossible for the issuer to identify everyone in the payment chain between itself and the ultimate investor, so as to describe correctly the payment amount that that investor will ultimately receive.

It would therefore be helpful if PD Regulation Annex V paragraph 4.14 and Annex XII paragraph 4.1.14 were reworded to make this clear, as follows (amendment in underlined type):

"In respect of the country of the registered office of the issuer and the country(ies) where the offer being made or admission to trading is being sought:

- information on taxes on the income from the securities withheld at source by the issuer or its agents; . . . "

4.2 Passporting – additional national requirements

Though we acknowledge this to be somewhat more of a Level 3 or 4 topic, we set out here for the Commission's information various host Member State additional requirements that we have been recently made aware are continuing:

- **Austria:** Although Austria has removed the requirement to publish a notice in a newspaper, it seems that it still requires details of the offer to be reported in advance to OeKB (*Oesterreichische Kontrollbank AG*) on a special form (prepared by Austrian lawyers), by 2 p.m. on the day before the start of the offer in Austria – see <http://www.oekb.at/en/capital-market/notifications/new-issue-calendar/pages/default.aspx>;
- **Belgium:** Any marketing material which is intended to be used in the Belgian market needs to be filed with the CBFA at least five business days prior to the start of the public offer in Belgium; Such marketing material will be reviewed and approved by the CBFA and needs to be drafted in French and/or Dutch; The constitutional documents also need to be translated (though must not refer to being a translation) and apostilled;
- **France:** Issuer constitutional documents are currently required to be translated into French and filed with registry of the Commercial Court, though this requirement may be terminated as part of legislative changes to the public offer (*appel public à l'épargne*) regime expected at the beginning of April;
- **Greece:** Any marketing material which is intended to be used in the Greek market needs to be filed with the CMC at least two days prior to its publication date; Such marketing material needs to be drafted in Greek;
- **Hungary:** Pursuant to applicable Hungarian law, any marketing material which is intended to be used in the Hungarian market needs to be drafted in Hungarian and to be filed with the HFSA at least five business days prior to the start of the public offer in Hungary (though, confusingly, the HFSA reportedly recently took the view that such filings are not necessary);
- **Italy:** A detailed description is set out in Section 7.
- **Portugal:** Recently, on a German issuer's programme, the CMVM took the view that the binding language version of the terms and conditions and the final terms must be either English or Portuguese (rather than just the disclosure language being English or Portuguese); This did not work in the context of the German law programme which, not surprisingly, contains binding German law terms and conditions;
- **Spain:** Any marketing materials must be sent to the CNMV together with the signed Final Terms for their records.

The various listed points can unduly delay the making of retail offers and, where such offers are made simultaneously in several states, can result in the entire offer proceeding at the pace of the state with the longest procedures. Again, this is not consistent with a maximum harmonisation measure and it frustrates the fundamental objective of the Directive - the promotion of a pan-EEA retail securities market.

The above is complicated by the fact that passport information is not always easy for investors to find from an 'official' source in good time. Publication on a centralised website (perhaps managed by CESR) of the passport documentation (in particular certificates of approval and translated summaries) would be helpful in this respect.

It would be helpful if the Commission could encourage action to remove these barriers and foster the establishment of a central website for passport information.

4.3 Information relating to an underlying index

Annex XII paragraph 4.2.2 of the PD Regulation requires the inclusion in the prospectus of a description of an underlying index, if it is composed by the issuer. If it is composed by someone else, the issuer only has to indicate where information about the index can be found. This creates an unequal disclosure regime, with the sponsor of the index having to make more disclosure than others who may use the index. We understand this can lead to significant additional disclosure having to be included in the prospectus (running even to dozens of extra pages).

It would be helpful if the Commission could remove this anomaly by allowing both the index owner and others to indicate where information on the index may be found.

4.4 Cash flow statements by banks

Annex XI paragraph 11.1(c) of the PD Regulation requires a bank issuer to include a cash flow statement in the prospectus. Some bank issuers are not required by International Financial Reporting Standards to produce cash flow statements (typically because at least 90% of their shares are owned by a parent company that does produce such a statement). It is inappropriate for the PD Regulation to require a cash flow statement where EU approved accounting rules do not. Furthermore, such cash flow statements, due to the very nature of banking business, are subject to substantial variation from day to day.

It would be helpful if the Commission could remove this anomaly by amending paragraph 11.1(c) of Annex XI to the PD Regulation.

4.5 Information provision where no prospectus is required

Article 15.5 of the PD requires, where no prospectus is required in relation to public offers and admission to trading on a regulated market, that material information provided to qualified investors or special categories of investors be provided to all such investors. However, in the context of such private transactions, investors decide themselves what information they require from the issuer and this requirement is unnecessarily burdensome.

It would be helpful if the Commission could remove this anomaly by limiting the scope of Article 15.5 to cases where a prospectus is required.

4.6 Profit forecasts and estimates

Under paragraph 9.2 of Annex IV of the PD Regulation, it is required that profit forecasts or profit estimates included in a prospectus be accompanied by an accountants' report stating that, in their opinion, the forecast or estimate has been properly compiled on the basis stated and that the basis of accounting used for the profit forecast or estimate is consistent with the accounting policies of the issuer.

In the current turbulent market conditions, it is becoming increasingly apparent that market announcements are taking on increasing importance and so may need to be disclosed in the prospectus. Such announcements may well include estimates or forecasts and so are subject to the above report requirement. However, accountancy firms have advised that they may not deliver such reports because the market announcements are issued in advance of the related financial results being finalised.

The net result of this is that issuers are not able to issue retail debt securities until the final results are published. This can cause serious problems for very frequent issuers, such as banks, that issue off their debt programmes on an almost daily basis.

The burden of such a requirement may be justified in an equity context where investors' ultimate economic exposure is much more substantial. This burden is, however, excessive in the context of debt securities.

It would therefore be helpful if the Commission could delete the paragraph 9.2 requirement to bring Annex IV in line with the provisions of Annex IX of the PD Regulation.

4.7 Issues guaranteed by OECD regional and local authorities subject to similar disclosure

Extending the scope of Annex XVII of the PD Regulation (currently applicable to issuers guaranteed by OECD member states) to cover issues guaranteed by the regional and local authorities of OECD member states would be helpful. As the credit risk accepted by investors relates to the regional or local authority guarantor that is already subject to PD Regulation Annex XVI disclosure, requiring a public sector guaranteed issuer to comply with the corporate disclosure Annexes seems unnecessary. This would, in particular, enable issuers guaranteed by an OECD regional or local authority to avoid the IFRS or equivalent financial statement requirements. Such requirements can be problematic for those public sector issuers using public sector accounting standards in order to facilitate consolidation of their results into their regional or local authority guarantor's financial statements (which also use public sector accounting standards). Incidentally, a similar suggestion might be made in the context of any future consultation on the Transparency Directive in relation to its Article 8.1(a).

Section 5 – ICMA's IPMA pro forma final terms

The below is extracted from the IPMA pro forma final terms for use in connection with issues of securities with a denomination of less than €50,000 to be admitted to trading on an EEA regulated market and/or offered to the public on a non-exempt basis in the EEA.

<< The Prospectus referred to below (as completed by these Final Terms) has been prepared on the basis that, except as provided in sub-paragraph (ii) below, any offer of Notes in any Member State of the European Economic Area which has implemented the Prospectus Directive (2003/71/EC) (each, a Relevant Member State) will be made pursuant to an exemption under the Prospectus Directive, as implemented in that Relevant Member State, from the requirement to publish a prospectus for offers of the Notes. Accordingly any person making or intending to make an offer of the Notes may only do so in:

- (i) in circumstances in which no obligation arises for the Issuer or any Dealer to publish a prospectus pursuant to Article 3 of the Prospectus Directive or supplement a prospectus pursuant to Article 16 of the Prospectus Directive, in each case, in relation to such offer; or*
- (ii) in those Public Offer Jurisdictions mentioned in Paragraph 37 of Part A below, provided such person is one of the persons mentioned in Paragraph 37 of Part A below and that such offer is made during the Offer Period specified for such purpose therein. Neither the Issuer nor any Dealer has authorised, nor do they authorise, the making of any offer of Notes in any other circumstances. >>*

An issuer might perhaps then complete Paragraph 37 with wording essentially to the effect that:

<< An offer of the Notes may be made by the Managers and other parties authorised by the Managers (the "Placers") other than pursuant to Article 3(2) of the Prospectus Directive in [country A, country B and country C] during the Offer Period. >>

“Offer Period” might simply be defined by reference to two specific dates. The “Managers” would be specific institutions named in the final terms.

Section 6 – Example PD Regulation Annex V wording

Below is selected example Annex V wording illustrating the reference to the relationship between the relevant offeror and offeree of the individual Cascade Offers.

Annex V reference	Example wording concerning Cascade Offers
Offer Price:	<i>“Managers and Placers will offer and sell the Notes to their customers in accordance with arrangements in place between each such Manager and its customers (including Placers) or each such Placer and its customers by reference to the Issue Price and market conditions prevailing at the time.”</i>
Conditions to which the offer is subject:	<i>“As between Managers and their customers (including Placers) or between Placers and their customers, offers of the Notes are further subject to such conditions as may be agreed between them and/or as is specified in the arrangements in place between them.”</i>
Description of the application process:	<i>“A prospective Noteholder will purchase the Notes in accordance with the arrangements in place between the relevant Manager and its customers or the relevant Placer and its customers, relating to the purchase of securities generally.”</i>
Process for notification to applicants of the amount allotted and indication whether dealing may begin before notification is made:	<i>“Prospective Noteholders will be notified by the relevant Manager or Placer in accordance with the arrangements in place between such Managers or Placers and its customers.”</i>

Section 7 – Italy

Listing on the Italian Stock Exchange (ISE)

There are no specific requirements provided by applicable laws and regulations in case of passporting of a prospectus, other than the translation of the Summary Note if the prospectus is drafted in a language commonly used in finance. In case of listing in Italy, the ISE can review the compliance of the features of the securities described in the Prospectus with the ISE regulation. Therefore, it is advisable to submit the draft Prospectus to the ISE in advance of an application for admission to listing.

In addition to the above, please note that when Italy is the host member state:

- (a) although not a requirement, increasingly issuers are translating the Final Terms into Italian when making retail offers into Italy. There is no requirement to file the Final Terms with CONSOB (only a few Italian distributors still ask issuers/offers to file them with CONSOB);
- (b) marketing materials (advertisements) do not need to be filed with CONSOB. An Italian translation must be produced in order to be delivered/made available to Italian investors, since marketing material should be clearly recognisable as such by the Italian investors.

Prospectus liability

Pursuant to article 94 of the Legislative Decree 24 February 1998, no. 58 (**Italian Financial Services Act**), implementing article 6 of the Prospectus Directive, specific liability is provided for the authors of the prospectus (paragraph 8) and for the entity acting as lead manager (Responsabile del collocamento, the **Lead Manager**) in connection with the public offer (paragraph 9).

Retail cascade

As per the retail cascade issue, any subsequent offer or resale of securities subscribed upon issue by intermediaries within an exempt offer could be considered as a new offer and subject, because of CONSOB's interpretation of the Italian regime governing public offers to the obligation to publish a prospectus, unless an exemption applies. In connection with this, normally in the context of public offers, Italian distributors do not purchase the securities, but they just carry out a pure placement activity vis-à-vis the investors.

The "Scheda Prodotto": additional information provided by intermediaries and consistency with the prospectus

On March 2, 2009 CONSOB released its Communication no. 9019104 on the rules on fairness and transparency in the distribution of illiquid financial products. Such communication contains a requirement for the inclusion of additional information on the financial products normally not contained in passported prospectuses/final terms prepared in accordance with Regulation 809/2004.

Taking into consideration also Recital 52 of the Directive 2006/73/CE, as well as Article 15 of the Prospectus Directive, such additional information does not seem to be coordinated with the set of information to be provided in case of offers on the primary market as well as with the role played by the prospectus document in such offers (as it should be the only document upon which the investor should base his investment decision, as set out at article 15 of the Prospectus Directive).

Subscription form

There are some additional requirements concerning the offer, which lie outside the scope of the Prospectus Directive, such as the fact that retail investors subscribe the offer by means of a subscription form with prescribed minimum content set out in CONSOB Regulation n. 11971/1999 (such as, a reference to the risk factor section).