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Response to Review of Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC ("Prospectus Directive")

The City of London Law Society (CLLS) represents over 13,000 City lawyers, through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response to the Commission's review of the Prospectus Directive has been prepared by the CLLS Company Law and Regulatory Committees. These Committees are made up of solicitors who are expert in their field.

Summary of our response

We welcome the Commission's initiative in bringing forward their proposals set out in the review. We agree with a number of the proposals suggested in your review (see below for detail).

We respond to your specific questions as follows:

1. **CHANGES PROPOSED**

1.1 *Article 2(1)(e) - Definition of qualified investors*

We agree that the various directives governing financial services should be consistent where at all possible. We have some drafting comments.

(a) The draft amendment cross refers to paragraphs (1)- (4) of section 1 of Annex II of MiFID. MiFID allows persons within those categories to request non-professional treatment. It should be made clear that the proposed amendment covers the persons in paragraphs (1) to (4) of section 1 of Annex II of MiFID "even if they have requested non-professional treatment". This is to preserve the existing position where persons within these categories are treated as qualified investors for prospectus directive purposes, regardless of any MIFID elections they have made.

We note that the proposed amendment retains the existing PD definition of large enterprises (PD Article 1 (e) (iii) and (f)) in addition to introducing the definition of "large undertakings" in paragraph (2) of Section 1 of Annex II of MiFID and we agree with this approach. The PD and MiFID definitions are different but each represents a category of investor that should be within the scope of "qualified investor".

(b) In the draft amendment paragraph 1 (a) (ii) we would suggest the following amendment:

"(ii) in relation to a placement of securities by an intermediary that is an investment firm **(whether as principal or agent, for the issuer or seller)** ……".

1.2 *Article 3 – Exempt Offers*

The proposed amendment to Article 3(2), leaves the position of intermediaries acting in association with the issuer unclear because the wording in the draft amendment "subsequent resale… shall be regarded as a separate offer" means that this will be the case even where intermediaries are acting in association with the issuer. If the intention is that current CESR guidance continues to apply (we think it should) the amendment should make that clear.

We are aware that the International Capital Markets Association (ICMA) has also addressed the question of offers made after the admission of securities to trading and we suggest an exemption for *"an offer of securities that 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 anyone acting in association with the issuer in respect of such an offer"*. We think that such a change would also be helpful.

1.3 *Article 4 – Exemptions for Employee Share Schemes*

We agree with the proposed extension of the exemption so that issuers who are not listed on a regulated market can offer shares to employees without needing to prepare a prospectus. We note, however, that the drafting provided refers to a document being made available to employees which contains information on the number and nature of the securities and the reasons for and details of the offer. Paragraph 3.3 (last sentence) suggests that the current CESR work on a short-form disclosure regime might be a suitable reference point, however, our view is that this information would be too onerous. The information documents which are prepared to comply with the exemptions set out in Articles 4(1)(e) are drafted in compliance with the CESR Guidance (CESR's Recommendations for the consistent implementation of the European Commission Regulation on Prospectuses no. 809/2004 CESR/05-0546). We understand that this works well and do not see the need for further information to be included and for the document to become similar to a prospectus.

In some Member States, employee share schemes are in favour of existing or former directors or employees, **their families or employee share trusts**. We suggest that these words should be added here and (also in Article 3.2).

1.4 *Article 10 – Information*

We agree that Article 10 should be deleted but we note that there is a cross-reference in Article 9(4). We suggest that the relevant sentence should stop after the word "updated" and that the words "in accordance with Article 10(1)" should be deleted.

1.5 *Article 16 – Supplement to the prospectus*

We agree that the technical issues referred to in the first question should be left to Level 3. We also agree that the time period during which the right of withdrawal is relevant should be harmonised across Member States, however, we do not think that the proposed formalisation of "at least two working days" achieves this. We therefore suggest that the time period should be set at "two working days" i.e. delete "at least" in the draft amendment.

An alternative approach that would allow certainty would be to provide for the period to be determined by the Home Member State.

1.6 *Modification of thresholds*

We do not have any views on this.

2. OTHER ISSUES IDENTIFIED

2.1 *Disclosure obligations: the prospectus and its summary*

In our experience, the 2,500 word summary achieves its aim of requiring issuers to produce a concise extract of key issues from the prospectus. Whilst there were initial problems after 1 July 2005 as market participants adjusted to the new approach, we believe that the concept of the summary is now well established and that the problems posed by the word limit have now disappeared. We would therefore suggest that the summary and the 2,500 word limit be retained.

2.2 *Disclosure obligations for retail products*

We do not have any views on this.

2.3 *Disclosure obligations for small quoted companies*

While we understand the concern that production of a prospectus complying with the PD may be unduly burdensome for small companies we are concerned that small companies are likely to be more risky investments than larger companies. We would therefore support an increase in the threshold (which takes the offer outside the scope of the Directive and makes it subject to Member State regulation). We do not see any justification for the second proposed solution, which would leave the investor in the smaller (and potentially more risky) quoted company without the protection of full prospectus disclosure.

2.4 *Disclosure requirements and Government Guarantee schemes*

We do not have any views on this.

2.5 *Rights issues*

We generally support the views of the Rights Issue Review Group report published in the United Kingdom in November 2008. This report proposed a shortened prospectus for a rights issue, and set out at Appendix E suggestions as to content requirement. We believe this change would be of significant benefit to issuers in reducing the amount of time required to prepare and obtain approval for the prospectus. We believe this change is consistent with the investor protection objectives of the Prospectus Directive:

- the exemption should apply to offers to existing shareholders of the issuer; such shareholders have made a decision to invest in the issuer based on such information as was available publicly at the time and the information now required is that which would justify a further investment, taking into account information supplied to them as a shareholder;

- the exemption should apply to the admission to trading of issuers already listed; the continuous disclosure regime mandated by the Market Abuse Directive means that sufficient information would be publicly available for secondary trading (and the decision to participate in the rights issue or open offer is not materially different from the decision to purchase shares in the market.

In any event, we consider it desirable that the PD be amended to clarify whether a non-tradable rights offer is an offer to the public, even when (if the offer is accepted) the shares allotted are listed on a regulated market, as we understand interpretation of this differs across member states.

2.6 *Article 2(1)(d) – Definition of offer of securities to the public*

We agree that a legislative amendment to the Directive to amend the definition of "offer to the public" is not required.

2.7 *Liability*

We agree with the analysis set out in this paragraph. There are divergent liability regimes across Member States, however, in practice our members have not experienced prospectuses not being passported into particular jurisdictions because of fears of potential liability – this supports the analysis set out in your second paragraph. We therefore suggest that this issue is not addressed at the present time.

2.8 *Equal treatment of shareholders*

We agree that the issue of equal treatment of shareholders should not be addressed by this review of the Prospectus Directive.

3. **OTHER ISSUES**

Our members have raised a number of issues not covered by the review which we believe merit attention from the Commission.

3.1 *Article 14 – Publication of the prospectus*

We note that the aim of this review is "to simplify and reduce administrative burden". In our experience, the requirements of Article 14(2)(b) and (c) add administrative burden to transactions by the inclusion of the word "and" in the fourth line of (b) and the first line of (c). We believe that "and" should be replaced by "or" so that in the case of (b) publication is achieved either by being made available at the offices of the market on which the securities are being admitted to trading or at the registered office of the issuer or at the offices of the financial intermediaries. In the case of (c) publication would be achieved by publication electronically on the issuer's website or on the website of the financial intermediary.

3.2 *Dividend Re-investment Plans (DRIPs)*

Article 4(1)(d) provides an exemption from the requirement to publish a prospectus for scrip dividends. We think it would be helpful for it to be made clearer that the exemption extends to other similar schemes for the payment of dividends through shares, for example dividend re-investment plans where either (i) cash amounts in respect of dividends are applied in the acquisition of existing shares; or (ii) cash amounts in respect of dividends are applied in subscribing new shares.

We support the Securities Industry and Financial Market Association's (SIFMA) request that the PD be clarified that exemptions in Article 4.1 and 3.2 and the Euro 2.5m exemption can each be used cumulatively with others in 4.1 or 3.2 (or Euro 2.5m) (and similarly amongst the exemptions in 4.2 and the Euro 2.5m exemption.

3.3 When determining the Home Member State and looking at the definition set out in Article 2.1(m)(iii), it is currently not clear whether an offer to the public covered by an exemption (for example, because made to employees or qualified persons) falls within the words "intended to be offered to the public for the first time". We suggest adding the words "(excluding situations not requiring the publication of a prospectus)" after the words "offered to the public" to make it clear that such an offer would not determine the Home Member State.

3.4 We support representations by ICMA and SIFMA relating to the need to simplify the passporting mechanism.

Please contact Nicholas Holmes (+44 (0)20 7859 2058 or Nicholas.holmes@ashurst.com) if you wish to discuss any of the points raised in more detail.

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